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EMPLOYMENT

Reviewing an arbitrator's misconception of the nature of an enquiry

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ISSUE

Whether, by finding that the employer should have followed an incapacity procedure instead of misconduct procedure, the arbitrator's decision is one which a reasonable decision maker could not reach.

SUMMARY

An arbitrator must consider the nature of the enquiry before him or her, as an award based on a misconception of the nature of the enquiry may be reviewed and set aside.

COURT'S DECISION

In *Bosal Africa (Proprietary) Limited v NUMSA obo Mawelela and Others* [2018] ZALCJHB 35, the Labour Court ("LC") had to consider an application to review and set aside an arbitration award which was based on the determination that the employer should have followed an incapacity procedure instead of misconduct procedure. The applicant employed Itumeleng Mawelela ("the employee") as a bender from 2004. In June 2010, the employee was issued with a notice to attend a disciplinary enquiry for violating the company's rules related to regular sickness absence alternatively, for a pattern of unacceptable behaviour related to being frequently off work and developing unsatisfactory time keeping habits. At the end of the disciplinary enquiry, the employee was dismissed. The employee then referred an unfair dismissal dispute to the Dispute Resolution Centre ("the DRC"). The dispute was unsuccessfully conciliated, before proceeding to arbitration. The arbitrator acknowledged that the employee was dismissed for misconduct, but held that an employee could never commit misconduct by taking sick leave. Thus, the nature of the dispute before him was a dismissal based on incapacity and not misconduct. The arbitrator noted that the procedure stipulated in Item 10 of Schedule 8 of the Labour Relations Act 66 of 1995 (as amended) ("the LRA"), which deals with guidelines and procedures in cases of an employee's incapacity, ill-health and injury, should have been followed. As a result, the arbitrator found that the employee's dismissal was both procedurally and substantively unfair. The arbitrator ordered the applicant to retrospectively reinstate the employee. The applicant applied for an order reviewing and setting aside the arbitrator's award.

The applicant challenged the arbitrator's award on the grounds that the arbitrator failed to consider pertinent evidence of misconduct, which resulted in his failure to appreciate the true nature of the enquiry before him. The applicant argued that this failure led to the applicant not being afforded a fair hearing, which rendered the arbitration award unreasonable and reviewable. The applicant further contended that the arbitrator exceeded his powers by finding that the employee's dismissal was both procedurally and substantively unfair when procedural fairness was not in dispute.

The LC held that the arbitrator was aware that the employee was dismissed for misconduct, and thus having regard to the procedure related to incapacity leads to a misconception of the nature of the enquiry before the arbitrator. The LC found that

the only dispute before the arbitrator was whether the reason for the employee's dismissal was fair, as the procedural fairness was not in dispute. The LC concluded that this was not a case where the LC should substitute its decision for that of the arbitrator, instead the dispute should be remitted to the DRC to be heard by another arbitrator to determine whether the dismissal of the employee was substantively unfair.

IMPORTANCE OF THIS CASE

An employer should take care to follow the correct procedure when dealing with an employee who appears to be committing misconduct but who may be suffering from an illness or injury rendering him or her incapable of performing his or her job.



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