IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Reportable
Case Number: C335/2020

In the matter between:

NEHAWU OBO NDIKHO BUQA	Applicant
And	
DEPARTMENT OF HEALTH (WESTERN CAPE)	First Respondent
THUTHUZELA NDZOMBANE N.O	Second Respondent
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL	Third Respondent

Date Heard: 8 July 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 27 July 2022

Summary: Review application – Award challenged on basis that inconsistency principle not applied.
Held - historical inconsistency cannot be invoked by an employee when the underlying misconduct involves serious criminal conduct. It does not matter whether or not the employer informed its employees that the criminal conduct will no longer be tolerated and may lead to dismissal.

JUDGMENT

CONRADIE, AJ

Introduction

1 This is a review application in terms of section 145 of the Labour Relations Act 66 of 1995 in terms of which the Applicant (Mr Buqa) seeks to review and set aside an arbitration award handed down by the Second Respondent (the arbitrator) on 20 July 2020.

Background

2 Mr Buqa commenced employment with the First Respondent (the Department of Health) on 9 May 2011 at the New Somerset West Hospital.

3 On 17 October 2019 Mr Buqa was charged with the following act of misconduct:

> *"You allegedly made yourself guilty of an act of misconduct as contained in the disciplinary code and procedures for the public service, resolution 1 of 2003, annexure A in that you while on duty, conducted yourself in an improper, disgraceful and unacceptable manner when you on or about 21 August 2019 removed the private property (Adidas black backpack) of a patient admitted to New Somerset Hospital without permission from the kit room at emergency care, with the intention to permanently deprive the rightful owner of her property."*

4 Mr Buqa pleaded guilty at the disciplinary hearing and was dismissed on 31 January 2020. He referred the matter to arbitration where he also pleaded guilty. His version of events can be summarised as follows:

> 4.1 After removing the clothing that was inside of it, he stole the patient's bag from the kit room at emergency care while the patient attended the hospital for surgery.

4.2 He stole the bag because his son needed a bag for school. He had previously given his parents money for a bag, but they used it to take his father to a doctor.

4.3 He ended his shift and was on his way home when the patient's husband arrived to collect the bag.

4.4 When he returned to work the following morning, he found out that everyone was looking for the bag.

5 Having admitted guilt, the crux of Mr Buqa's case before the arbitrator was that in dismissing him the Department of Health acted in an inconsistent manner in relation to other employees who were found guilty of similar misconduct. The arbitrator did not agree and found that the dismissal was fair.

Grounds of review

6 According to Mr Buqa's grounds of review, the arbitrator:

6.1 Disregarded relevant evidence in that he was aware that the Department of Health had previously condoned various incidents of theft.

6.2 Considered irrelevant considerations when comparing previous incidents with Mr Buqa's situation, including that the previous incidents occurred approximately six years ago.

6.3 Misconstrued the evidence that the Department of Health had previously condoned dishonesty by employees and permitted a continued working relationship with these employees.

6.4 Failed to appreciate that Mr Buqa was remorseful and that his circumstances were the same as the employees that committed the other incidents of theft. In this regard the arbitrator failed to identify any substantive

factors to distinguish Mr Buqa's case from the others, except the passage of time, which was an irrational consideration rendering the result reviewable.

6.5 Failed to appreciate the leniency that the Department of Health has afforded employees who steal in the workplace.

6.6 Failed to attach appropriate weight to the relevant evidence in that the stolen bag had been returned to the patient, who was not aggrieved with Mr Buqa and had forgiven him.

6.7 Made irrelevant factual and legal findings that rendered his award reviewable.

7 Ultimately, Mr Buqa submits that the arbitrator committed misconduct and arrived at a decision that no reasonable decision maker could have arrived at.

Evaluation

8 At both the arbitration and in this court, Mr Buqa did not shy away from the fact that he stole a patient's property. On the contrary, he was brazen about his misconduct which is criminal in nature. For example, in his founding affidavit in support of this review application he states that while he was on duty on 21 August 2019, he *"stole the bag of a patient."* Further, when he realised that the "*stolen*" bag was being searched for, he went home to collect the bag and returned it.

9 I point this out because it appears that Mr Buqa is comfortable being frank about his criminality as he genuinely believes, or has been advised, that because his colleagues were not dismissed for similar misconduct a precedent has been created from which he too must benefit. This is apparent from his grounds of review which all lead to an inconsistency argument.

10 At the commencement of her argument, Ms Myburgh who appeared on behalf of Mr Buqa, indicated that the matter turns on whether the arbitrator misdirected himself when he considered dismissal to be an appropriate sanction. According to her, when

inconsistency is raised, the employer must show that there was no bias and justify why the employee should be treated differently. In support of this submission, she indicated that there is a body of law on how to deal with inconsistency and that the CCMA Guidelines on Misconduct Arbitrations[1] also directs arbitrators on how to deal with inconsistency. In this regard, a lot of emphasis was placed on the arbitrator's alleged failure to properly compare similar cases where employees were not dismissed with Mr Buqa's case and that if the Department of Health had changed its approach it needed to communicate this to employees.

11 Ms Myburgh referred to the decision in *Cape Town City Council v Masitho & Others*[2] in support of her argument in which the Labour Appeal Court stated the following:

> *"[14] In SACCAWU & others v Irvin & Johnson [1999] 8 BLLR 741 (LAC) at 751B, this court reiterated that consistency is an element of disciplinary fairness, and that it 'is really the perception of bias inherent in selective discipline which makes it unfair,' but went on to observe that the flexibility which is inherent in the exercise of discretion will inevitably create the potential for some inconsistency. I am not at all sure that disciplinary decisions involve the exercise of a discretion, but even if that is so, fairness would seem to me to generally require any such discretion to be exercised consistently. While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency, in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary.*

[1] GNR 224 in Government Gazette 38573 dated 17 March 2015.
[2] (2000) 21 ILJ 1957 (LAC).

Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias.

[18] …I hasten to add that the fact that consistency is called for from the appellant does not mean that, having adopted one course in the past, it is forever bound to adhere to it. The value of consistency is that employees are entitled to expect that like cases will be dealt with alike, but they can have no complaint if they are told clearly in advance that a former practice will no longer be adhered to. I agree with the learned judge in the court a quo that the conduct of the respondents in the present case was most irresponsible, but if it is to warrant instant dismissal, employees ought to be made clearly aware of that fact."[3]

12 I pointed out to Ms Myburgh that the underlying facts in *Irvin & Johnson* did not relate to theft and asked her if she was aware of any cases in which the inconsistency principle was applied to serious misconduct such as theft. She was unable to refer me to any such case law.

13 In the case of *Capitec Bank v CCMA & others*[4] the Labour Appeal Court repeated the established principles relating to inconsistency as follows:

"[20] Historical consistency requires that an employer applies a penalty consistently with the manner in which it has been applied to other similarly situated employees in the past. Contemporaneous consistency requires that a penalty be applied consistently as between two or more similarly situated employees who commit the same misconduct. Where an employer shows a legitimate basis on which to differentiate between employees, whether due to their seniority, personal circumstances, the severity of the misconduct or due to other material factors, no inconsistency will have been proved." [my emphasis]

14 In my view, a material factor or consideration would include cases where the underlying misconduct amounts to a serious criminal offence, such as theft. It cannot be

[3] Ibid para 14 and 18.
[4] (DA5/2019) [2020] (LAC) (30 September 2020); *Southern Sun Hotel Interests (Pty) Ltd v CCMA & Others* (2010) 31 ILJ 452 (LC) para 10.

that employees can engage in blatant criminal conduct and then argue that they should not be dismissed because others who have committed similar crimes in the workplace were not dismissed. To make matters worse, in this case the employer is a state hospital which is required to provide critical services to the most vulnerable in our society. The patient visited the hospital to access these services, not to have her belongings stolen by one of its employees.

15 In *Mphigalale v Safety & Security Sectoral Bargaining Council and others*[5], a police inspector was dismissed for accepting R500 from an illegal immigrant. The Labour Court found that the fact that the employer had not warned the employees that corruption would lead to dismissal in future was regarded as irrelevant, as this would suggest that employees need to be reminded of the core values of honesty and integrity.[6] The court went on to state that *"Objectively, there exists little need to remind those officials employed in positions of trust and responsibility in society that fundamentally dishonest practices may result in dismissal."*[7] In this case, the hospital was not prepared to tolerate the theft by Mr Buqa and it should not be obliged to do so because of the lenient approach which it and other hospitals falling under the Department of Health had previously adopted.

16 In summary, I am of the view that historical inconsistency cannot be invoked by an employee when the underlying misconduct involves serious criminal conduct. On this approach it does not matter whether or not the employer informed its employees that the conduct will no longer be tolerated and may lead to dismissal.

17 Given my view on inconsistency in the context of criminal conduct and the fact that the review grounds are intrinsically linked to how the arbitrator applied the inconsistency principle, there can also be no merit in any complaint that the arbitrator disregarded or misconstrued the evidence relating to when the previous incidents took place or failed to properly compare the previous incidents to Mr Buqa's case.

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[5] (2012) 33 ILJ 1464 (LC)
[6] At para 25.

18 Emphasis was also placed on factual issues such as whether Mr Buqa participated in the search for the bag he had stolen, and that the patient had forgiven him for the theft. Even if the arbitrator got it wrong and Mr Buqa did not participate in the search this would not render the award reviewable. As far as the patient supposedly forgiving Mr Buqa is concerned, even if it is accepted that this is the case, this does not assist him as it remained for the employer to decide if the employment relationship had broken down.

19 In the circumstances the review application must fail.

20 I make the following Order:

Order:

1. The application is dismissed.
2. There is no order as to costs.

BN Conradie
Acting Judge of the Labour Court

Appearances:
For the Applicant: Advocate L Myburgh, instructed by Bagraims Attorneys
For the Respondent: Advocate MA McChesney, instructed by the State Attorney