Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1209/12

In the matter between:

EOH ABANTU (PTY) LTD **Applicant**

t/a HIGHVELD PFS (PTY) LTD

and

CCMA **First Respondent**

BONGANI KHUMALO N.O. **Second Respondent**

BRETT DANNEY **Third Respondent**

Heard: 20 April 2017

Delivered: 13 June 2017

Summary: Review – misconduct dismissal – incomplete record not pleaded; reconstructed record in any event sufficient; arbitration award reasonable; application dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] The third respondent, Brett Danney, was dismissed by the applicant, EOH. He referred an unfair dismissal dispute to the CCMA (the first respondent). Conciliation failed. The dispute was referred to arbitration. Commissioner Bongani Khumalo (the second respondent) found it to be unfair and ordered EOH to pay him compensation equivalent to ten months' remuneration. EOH seeks to have the arbitration award reviewed and set aside in terms of s 145 of the LRA.[1]

Background facts

[2] EOH provides payroll administration services. It employed Danney for only one year as team leader for Microsoft server administrators. It did so in order for EOH to provide payroll administration services to him whilst he was rendering services in Internet technology to Wesbank. He had previously provided services to Wesbank through other employment services.

[3] Wesbank purchased 500 "multiple activation keys" for Windows 7 Professional and 5000 multiple activation keys for Windows Office 2010 from Microsoft. These "keys" are 25 character codes, including letters and numbers, used to activate Microsoft software. They are intended for the use of Wesbank employees for official purposes.

[4] There are three types of software license product activation keys which are relevant to this dispute: a volume license key, a beta key and a KMS key. A volume license key is a single license key that can be used to activate multiple installations of a software product on different computers. A beta key is used to activate pre-released software that is still being tested and is not commercially available on the market yet. And a KMS key is a software product activation key embedded in the software product itself. The beta key is freely available to the public, the others are not.

[1] Labour Relations Act 66 of 1995.

[5] Denney sent two activation keys per email to Roberta Sabbioni, the mother of his girlfriend, Monica Sabbioni (who also rendered services to Wesbank). Monica was a database administrator and did not have access to the activation keys. Denney sent the keys to Roberta on 20 June and 10 August 2011. Monica asked him to help her with the installation of Microsoft Office on her mother's personal computer.

[6] Wesbank's forensic investigation services picked up the emails. They confronted the employee (Denney). He explained that he had mistakenly divulged Wesbank's multiple activation keys when he only intended to forward a so-called "beta key". As explained above, beta keys are used to test products and to activate Microsoft products temporarily.

[7] Denney was called to a disciplinary enquiry to answer to the following allegations of misconduct:[2]

7.1 "Contravention of section 4.2.1 of the Wesbank disciplinary code namely, theft, fraud, dishonesty or the unauthorised removal of any material from the bank, or from any personal premises where such material is kept in that you dishonestly distributed the Wesbank Microsoft Office license keys to Raymond Billson and Roberta Sabbioni on 20 June 2011 and again on 10 August 2011.

7.2 Contravention of section 4.2.9 of the Wesbank disciplinary code namely, being in breach of the bank's confidentiality agreements and/or by divulging such confidential information, in that you divulged information you obtained through your position as Team Leader Server Administration, to external and authorised personnel.

7.3 Contravention of section 4.2.19 of the Wesbank disciplinary code namely, disregarding or breaching the bank's code of ethics, in that you dishonestly distributed the Wesbank Microsoft Office license keys to Raymond Billson and Roberta Sabbioni on 20 June 2011 and again on 10 August 2011."

[8] The chairperson found that the employee had committed the misconduct, but on the first allegation he had not done so intentionally. EOH dismissed

[2] My underlining.

him. He referred an unfair dismissal dispute to the CCMA. Conciliation failed and he referred it to arbitration.

The arbitration

[9] At the arbitration, Denney explained that he sent two beta keys to Roberta Sabbioni on 20 June 2011. One of them was intended for a Windows 7 evaluation product and the other for a beta version of Microsoft Office. He was not sure which one Roberta wanted so he sent her both. They were both beta keys and were freely and publicly available.

[10] Some weeks later, Roberta emailed Monica to say that the email from Denney had gone missing and she asked for it to be re-sent. On 10 August 2011 he sent her what he believed to be the beta key in respect of the Microsoft Office product he had originally sent her on 20th June. He found it on his team's server instead of his own Microsoft Office Outlook mailbox. The software license product activation key is not readily recognisable and is difficult, if not impossible, to memorise since it is 25 characters long, comprising numbers and letters. He assumed that he had sent the same beta key as before, but when he was called in about a month later and he checked again, he found that he had in fact sent Roberta a Wesbank volume license key. According to him, he had mistakenly done so, believing it was a beta key. He had not picked this up before because volume license keys do not appear on the KMS server and he had been looking in the wrong place. He then went to the office of his superior, Willie, and explained to him that he had unintentionally sent out the wrong key.

The award

[11] The arbitrator found that the dismissal was procedurally fair. Turning to substance, he made the following findings:

11.1 EOH had acted inconsistently by imposing a lesser sanction on Monica Sabbioni, on whose insistence Danney had sent the keys to her mother. The chairperson of the hearing, Mr Grové, had recommended a written warning for her. He considered that

Wesbank had suffered no harm or prejudice. The same was true for Danney's actions.

11.2 The employee was a satisfactory witness who readily admitted that he had distributed the software keys to the two individuals; that he had done so mistakenly, being under the impression that he had sent out a beta key only; he immediately approached Mr Bruwer, the IT infrastructure manager, when he realised his mistake; he admitted his error; and he admitted that his check for the software on the server should have been more thorough.

11.3 The employee's evidence was undisputed that he never intended to steal Wesbank keys; he had means and skills to have discreetly sent out the keys in issue, should he have wanted to; it could have sent a key via cell phone; he could have centred by SMS; and it could have uses network within the IT industry to send them out undetected. His undisputed evidence was that the key that he had mistakenly sent out would only operate if the recipients had three elements which they did not have in this case, including the server at Wesbank. The arbitrator added: "In any event the [employee] was neither found guilty of theft nor of fraud."

[12] The chairperson of the disciplinary enquiry did not find any dishonesty on the employee's part but found him to have been grossly negligent. The arbitrator was persuaded that charges one and three required EOH to prove intent on the employee's part; that the test for negligence was whether a reasonable person in the position of the employee would have foreseen the harm resulting from his acts and would have taken steps to guard against that harm; and that the tests for dishonesty and negligence are mutually destructive. He found that the employee was dismissed for misconduct that he was not charged with, namely negligence.

[13] The arbitrator found that the dismissal was substantively unfair. With regard to compensation, he considered the following factors:

13.1 the employee's length of service with a clean disciplinary record;

13.2 the employee had similar mitigating factors and identical personal factors to Monica Sabbioni, who had only received a written warning;

13.3 EOH had not proven substantive fairness as there was no nexus between the finding of the chairperson and the sanction given, particularly in light of the employee having been remorseful, and admitting his mistake to superior;

13.4 the employer's evidence was "incoherent, contradictory and legally unsound"; and

13.5 it would be difficult for the employee to find alternative employment.

[14] It is in those circumstances that the arbitrator awarded compensation equivalent to 10 months' remuneration.

Evaluation of review grounds

[15] In its notice of motion, EOH asked for the award to be reviewed and set aside and substituting it with an award that the dismissal was fair; alternatively, substituting it with an award compensating him in a smaller amount; and further alternatively, referring the matter back to the CCMA for a fresh arbitration.

[16] EOH raised four grounds of review, all of them based on the premise that the arbitrator committed misconduct or a gross irregularity, and that his conclusion was unreasonable. They are extensively formulated; rather than attempting to summarise them, I shall deal with each of them in turn. But in its heads of argument, for the first time, it also argues that the dispute should be remitted for a fresh arbitration because the record is defective. That is the first issue to be determined before dealing with each of the original review grounds.

Defective record?

[17] Mr *Lennox* argued, based on the recent Constitutional Court decision in *Baloyi,*[3] that the dispute should in any event be remitted for a fresh arbitration because the record is defective.

[3] *Baloyi v MEC for Health & Social Development, Limpopo* [2016] 4 BLLR 319 (CC).

[18] He argued that the arbitration was conducted over two days; that the first day's proceedings, comprising the company's evidence, was not properly recorded; and that it thus had to be reconstructed.

[19] The parties, to their credit, did reconstruct the record. But EOH did not file a supplementary or replying affidavit. It stood by its notice of motion and its original review grounds.

[20] Despite that, Mr *Lennox* argued that it was difficult to discern what exact evidence was led for EOH; that the parties could not agree on Bruwer's evidence and whether he had made concessions under cross-examination; and that the arbitrator gave only a brief summary of his evidence.

[21] Firstly, this ground of review was not foreshadowed by the founding affidavit; nor was it raised in the rule 7A(8) notice, a supplementary founding affidavit or a replying affidavit, despite the company having had the opportunity to do so after the record had been reconstructed – a process in which it played an active role.

[22] Secondly, this situation is very different from that in *Baloyi*, where there was no record. In this case, the parties did what they should and reconstructed the record. That record is sufficient for the purposes of deciding the case, especially given that EOH stood by its notice of motion and review grounds.

[23] As Ms *Venter* pointed out, EOH has not contended – either in its founding affidavit or even the belated heads of argument – that the record is incomplete or not properly reconstructed. The parties and their legal representatives actively participated in the reconstruction. Only two paragraphs dealing with Bruwer's evidence were disputed. One instance was a dispute whether Denney's counsel had highlighted that the alleged misconduct only pertained to the key for Microsoft Office and not for Windows. The other was whether Bruwer conceded that a key was not readily identifiable because it contained some 25 characters.

[24] Ms *Venter* argued, quite correctly, that nothing turns on either of these two disputed points. The first one was an interjection by counsel and not

Bruwer's evidence; and in any event, the arbitrator accepted that the employee had sent out a Microsoft key belonging to Wesbank. He concluded, though, that it was not intentional or dishonest, whether it was for Windows or Office. And it does not matter if the key was readily identifiable in the context of the allegation of dishonesty. The employee was charged with dishonesty, not negligence. The issue before the arbitrator was whether he was fairly dismissed for that type of misconduct.

[25] This new ground of review cannot succeed, even if it were to be entertained.

First ground

[26] At paragraph 33 of the arbitration award the arbitrator found that the employee's evidence was undisputed that he "never intended to steal" Wesbank's multiple activation keys. But, says Mr *Lennox*, that is not what he was dismissed for. He was dismissed for divulging the keys "in a grossly negligent manner".

[27] The arbitrator's finding is correct: Denney's evidence that he never intended to steal the keys is undisputed. And he was not found guilty of theft in the disciplinary hearing. The dispute before the arbitrator was not whether he had committed theft – that is not what he was dismissed for. The question was whether he had dishonestly distributed Wesbank property.

[28] The arbitrator had a clear understanding of the dispute he was required to determine, as required by *Gold Fields.*[4] He found that dismissal was unfair because the employee had mistakenly (and not intentionally) sent out a Wesbank owned key that he at the time believed to be a freely available beta key. The arbitrator came to this conclusion based on the undisputed evidence that:

28.1 The employee had checked the server (after having sent the second email in August) to ensure that the key that he sent to Roberta was

[4] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* (2014) 35 *ILJ* 943 (LAC) par 31.

not Wesbank property. He did so because the keys are not easily distinguishable.

28.2 When he realised his error, he approached his superior and told him.

28.3 He was not averse to a disciplinary hearing.

28.4 He had the means and skills to send out keys discreetly, avoiding detection, if he had intended any subterfuge.

[29] Given this evidence, the arbitrator came to a conclusion that another reasonable decision-maker could come to, i.e. that Denney had not acted dishonestly. This ground of review must fail.

Second ground

[30] Denney was dismissed, Monica was not. The arbitrator found that EOH was inconsistent, as they had committed the same misconduct.

[31] EOH argued that their actions were not the same. Denney sent the emails, albeit at Monica's insistence. He had access to the keys, she did not. Therefore, EOH argued, the trust relationship differed.

[32] But apart from the fact that this was but one aspect that the arbitrator considered, inconsistency hardly played a role in the arbitrator's decision on whether the sanction of dismissal was fair. He found that Denney did not act dishonestly; *ergo*, he did not commit the misconduct he was charged for; *ergo*, he could not be dismissed (or sanctioned at all). EOH alleged dishonesty; it could not prove it.

[33] This ground of review also fails.

Third ground

[34] EOH argued that the arbitrator misconstrued the evidence on various issues.

[35] Firstly, it was argued, the arbitrator mistakenly found that Denney had "mistakenly sent out a defunct Office key". The key was not defunct, EOH says. But the arbitrator correctly found that, in order to use it, the

recipients would need three things that they did not have, viz the media; the key to unlock the media; and the Wesbank server.

[36] Secondly, the argument goes, Denney did not "approach Mr Bruwer upon detecting his mistake". But in fact, he only did so after having been confronted by the forensic investigation team. This is an example of an applicant carefully parsing through the award, looking for every tiny discrepancy. It is correct that the forensics team confronted Denney; but then he checked the server and, upon realising his mistake, he did go to Bruwer and to Willie. This finding is not unreasonable.

[37] Lastly, the argument is that the arbitrator mistakenly found that Denney had 7 ½ years' service, and not one year. But that is not what the arbitrator found; that was merely a recordal of Denney's evidence. The arbitrator made no connection between the years of service and the exercise of his discretion in awarding compensation.

[38] The third ground of review also fails.

Fourth ground

[39] Perhaps most importantly, Mr *Lennox* argued that the arbitrator placed too much emphasis on the charge of dishonesty as opposed to gross negligence. He referred in this regard to *Myers*:[5]

> "Before dealing with the issue of sanction, I need to re-emphasise that an employer is not and cannot be expected to frame a charge sheet in respect of misconduct committed by an employee as one would prepare a charge sheet in a criminal matter. The importance of a so-called charge sheet in a misconduct enquiry is to set out the allegation that constitutes the misconduct so that the employee is aware of the case he or she is required to answer. It is the allegations that constitute the misconduct which must be considered and a conclusion arrived thereon."

[40] That much is trite. But in this case, the employee was charged with dishonesty. That is the case he went to meet and that is the case that the employer could not prove. The arbitrator correctly found that the employer did not discharge the onus of proving intent, and thus could not prove the

[5] *National Commissioner, SAPS v Myers* [2012] 7 BLLR 688 (LAC) par 97.

misconduct that it had alleged. That is why the dismissal was unfair. That conclusion is not so unreasonable that no other decision-maker could come to the same conclusion.[6]

Conclusion

[41] The applicant has not passed the hurdle of showing that the award is reviewable set out in *Gold Fields* and *Sidumo.* The application cannot succeed. There is no longer any employment relationship between the parties. The employee, who has waited for a long time for the arbitration award to take effect, has had to incur significant legal costs to defend the award. I see no reason in law or fairness why costs should not follow the result.

Order

The application for review is dismissed with costs.

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Anton Steenkamp

Judge of the Labour Court

APPEARANCES

APPLICANT:	M A Lennox Instructed by Van der Merwe & Bester.
THIRD RESPONDENT:	Tanya Venter Instructed by Allardyce & partners.

[6] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) par 110.