

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

CASE NO:JR30/01

In the matter between:

PATRICIA MDLULI

APPLICANT

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

1ST RESPONDENT

GRANT SHEEN

2ND RESPONDENT

PICK 'n PAY [SHERWOOD]

3RD RESPONDENT

JUDGMENT

PILLAY A. J

INTRODUCTION

[1] This is a matter that was referred to arbitration under the Commission for Conciliation, Mediation and Arbitration (CCMA) for a decision regarding the dismissal of the Applicant by the third Respondent.

[2] The decision of the arbitrator confirmed the dismissal as being procedurally

and substantively fair. It is this decision that is being brought on review.

[3] It is common cause that the Applicant was employed by the third

Respondent. On the 10 July 1999, the Applicant, who was employed as a
till packer, was asked to clean the floor in the absence of the person
who
normally did so. She refused to do so. At the time other employees also
refused to clean the floor that day.

[4] This resulted in disciplinary proceedings being instituted against them and
at which they were assisted by the National Entitled Workers Union
(NEWU) of which they were members. The Applicant also had a written
warning that was still “in operation” at the time of the disciplinary hearing.

This warning was a confirmed matter as no appeal against it was
launched

and was also in respect of ‘insubordination’. It was issued on the
10/06/1999 and seems to be the distinguishing feature in the treatment of
the

Applicant as opposed to her erstwhile colleagues who were not
dismissed

but received warnings.

[5] This very matter which gave rise to the warning issued on the 10/06/1999 was raised at the arbitration hearing. It seems that it concerned an instruction to the Applicant to go and fill paraffin bottles in the store room.

She went missing for quite a time . Mrs Stavastis then went to look for her in the storeroom and discovered her having a cup of tea at a table. (See page 148 at line 13 et. of the record).

[6] She was given a final written warning. On page 178 at line 15 etc. of the record, Mrs Stavastis, who clearly instituted the complaint concedes that it was not based on insubordination. Apart from the other technical matter raised in regard hereto , it is obvious that the misconduct on that occasion was not regarded as misconduct based on insubordination, if the instruction to fill the paraffin bottles was indeed given.

[7] There also seems to be serious doubt as to whether the Applicant defied an instruction because the evidence that such an instruction was given to her is suspect.(Record p175 at line 5). However, even assuming that it was given there is also serious doubt as to what the warning was for and whether it was properly issued to her.(Record p176 lines 5-25).

[8] It is clear that the Applicant did not refuse to carry out an instruction.

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(Record p179 at lines 5-25) and that she did fill the bottles of paraffin.

[9] Furthermore, there is no clear evidence as to whether the Applicant had completed filling the bottles of paraffin by the time she was discovered having tea in the canteen or whether she continued to do so after having tea.

[10] In any event it is not clear and certain that the finding in that case of misconduct for insubordination, if that it is in fact the position, was the correct one and it is doubtful that it is in the circumstances, given the concessions referred to above and made by those who testified at the arbitration hearing on behalf of the Third Respondent.

[11] In considering this review, it does not seem fair that a questionable warning, even if it is technical, should have carried so much weight, if at all.

[12] In the circumstances where there has been an obvious error or an issue is doubtful and where it leads to an obvious injustice, its relevance must be approached very carefully.

[13] If it was obviously wrong or appears to be so, as in this matter, then it ought to be disregarded in so far as it plays a role in the considerations of a subsequent matter.

[14] Consequently, the relevance of that warning in considering a sanction which affected the Applicant in this becomes doubtful.

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[15] Because of all the uncertainty of the previous final warning and its relevance, it cannot be regarded as a matter that should be considered as a factor in assessing an appropriate sanction in this matter.

[16] The others who were also disciplined in that matter all received warning. It is not certain what kind of warning they received.

[17] Consequently, the Applicant should have been treated the same as the others. The reliance by the arbitrator on such a factor to confirm the dismissal is an irregularity and the dismissal falls to be set aside.

[18] All the Respondents indicated that they were not opposing the review save in so far as it related to costs. In any event , there was no appearance for any of them. It seems to me that the costs must follow the result. To the extent that the Third Respondent is really at the root of the issues and not the first or second Respondents, I do not make a cost order against the first or second Respondents.

In the result, I make the following order :-

- (a) The dismissal of the Applicant is set aside and the sanction is substituted with a warning as was issued to the others so dealt with as a result of this
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incident;
- (b) The Applicant is hereby reinstated to the position she held as at the 22nd July 1999;
- (c) The Third Respondent is ordered to pay an amount equal to 12 months' salary at the rate of her monthly remuneration less deductions;
- (d) The Third Respondent is ordered to place the Applicant in the same position
in respect of her remuneration that she would have been at the Third Respondent's concern, had she not been so dismissed.
- (e) The Third Respondent is ordered to pay the costs of this application.

Dated at Johannesburg on this the 26th October 2001.

PILLAY A.J

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA