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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR 375/00

2002-11-20

In the matter between

SHOPRITE CHECKERS

Applicant

and

CCMA

Respondent

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J U D G M E N T

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LANDMAN J: Shoprite Checkers (Pty) Limited has applied to review and set aside the award of a commissioner of the CCMA handed down during February 2002.

Ms Shioma, the employee, attended court yesterday and I noted that she is present in court this morning. She said that she came to

court because her trade union representative, Ms Josephine Ledwaba, was unable to attend court.

The application had been served on her union, the Rule 7(a)(8) notice had also been served by registered post sent on 17 May. No opposition has been filed and Ms Shioma says that she has not signed any documents regarding this case. The last document that she signed related to the CCMA proceedings, she is not sure whether or not they were affidavits.

In the absence of an explanation as to why there was no opposition it was necessary to proceed and hear the application on an unopposed basis.

Ms Shioma was employed as a receiving clerk in Shoprite Checkers' Louis Trichardt store. A receiving clerk is an important position within the store and is a position of trust which also requires the person to be reliable.

The receiving clerk is responsible for ensuring that the goods received by the store are properly recorded and checked. In addition to this the receiving clerk must ensure that when he or she signed invoices reflecting what the company has received, that they have in fact received those goods. He or she is also responsible for ensuring that all goods that leave the store through the receiving

department, are properly accounted for.

On 10 July 2000 the store manager, Mr Van der Walt, was doing a spot check and he noticed approximately seven apple boxes in the receiving department. These boxes had been placed in front of Ms Shioma's desk at the receiving department earlier for her to perform her duties.

He noticed that the employee of the company that was collecting the boxes had only two claim forms in hand and this appeared to be wrong. As a consequence he investigated the situation and found out that the large number of products in the boxes were not recorded on any documentation. Had the products left the store, Checkers would have suffered a loss of approximately R684.

As a result of this discovery Ms Shioma was issued with a notice to attend a disciplinary inquiry, the complaint against her was "serious misconduct in that she did not follow company return procedures on 10 July, resulting in a potential loss to the company of R684."

Ms Shioma attended the disciplinary inquiry on 13 July where she pleaded guilty and admitted her mistake. She was found guilty and dismissed. An appeal was unsuccessful.

She referred a dispute to the CCMA and the only issue which was relevant at the ensuing arbitration was whether her negligent

misconduct was sufficient to warrant dismissal.

The commissioner made the following finding in his award:

"In this case I find the following strong mitigating factors favourable to the employee.

The employer suffered no financial loss as a result of the employee's negligent conduct. The employee by pleading guilty to the charge demonstrated a remorse for the wrongdoing.

I am also in total agreement with the employee that by the time she committed this misconduct she was working under pressure after the dismissal of her co-worker, Ms Khunwana. She was virtually doing the work of two employees single-handedly.

My considered opinion is that the employee's circumstances at the commission of the misconduct falls squarely into the provision of the code of good practice of the Labour Relations Act i.e. Schedule 8(3)(5), which provide that when deciding whether or not to impose a penalty of dismissal the employer should in addition to the gravity of the misconduct, consider factors such as employee's circumstances (including length of service, previous disciplinary record and personal circumstances) the nature of the job in the circumstances has been infringement

itself.

This provision in my further opinion, implies that the company should not behave like an armchair critic advisor after the event.

The company should place itself in the position of the employee who was doing the work of two employees.

The *visa versa* is not the case, no evidence was led at the hearing as to what prevented the company to acquire the services of someone to replace Ms Khunwana. I agree with Mr ... (inaudible) only called for a corrective progressive action short of dismissal. An outright dismissal in this case is completely disproportionate and similar to an act of crushing a fly with a sledgehammer.

I am also at complete variance with the company's contention that the employee's conduct resulted in breaching the trust relationship between her and the company beyond repair, especially for reasons already mentioned above in the form of mitigating factors, particularly lack of financial loss to the company and the fact that the employee was doing the work of two employees.

I find that the dismissal of Hilda Naletshani Shioma on 24 July 2001 by the employer party was substantively unfair.

I order the employer party to reinstate the employee with full back pay and all her service benefits. the award comes into operation as soon as the employee receives it."

The general rule relating to interference by an arbitrator or a court with the sanction imposed by an employer is well known. An arbitrator may only intervene if the sanction is unfair. An arbitrator may therefore only intervene if the sanction is so disproportional in the circumstances as to induce a sense of shock.

It is also a fundamental rule that a court or tribunal is not permitted to award an applicant more relief than the applicant sees.

If one does this, one commits a gross irregularity.

In this matter the union representing Ms Shioma sought reinstatement without back pay. Notwithstanding this, the commissioner awarded her reinstatement with back pay and with all her benefits.

This constitutes a reviewable defect. The award must be reviewed and set aside on this basis.

The question is as to whether I should make the order which the commissioner should have made or whether I should refer it back to the commissioner or to another commissioner.

There is no reason for this matter to be sent back, the record is

complete and I might add that despite my finding that the award is defective the commissioner conducted the proceedings in an even handed manner.

The following considerations need to be considered in judging whether the employer's sanction of dismissal for gross misconduct, that is gross negligence, is so inappropriate that it calls for intervention.

1. Ms Shioma was employed as a receiving clerk, a position of trust and was entirely responsible for all stock which was dispatched and received through the receiving area.
2. Her gross negligence was only discovered by means of a spot check. Had the spot check not taken place it is unlikely that it would have been discovered.
3. Had it not been for the store manager's alertness Checkers would have suffered financial loss.
4. A counselling session with both receiving clerks, which includes Ms Shioma, had been held and it was emphasised during the counselling session that no mistakes in the receiving area would be tolerated.
5. Checkers has a serious problem regarding shrinkage which causes it to suffer heavy losses. Having regard to the limited profit which is made one can understand that an employer such

as Checkers has an interest in combatting shrinkage.

6. Ms Shioma's conduct although not pointing on these facts to dishonesty, could have contributed to further shrinkage.

Ms Shioma had been employed for approximately 11 years.

7. At the time of her dismissal she was employed as a receiving clerk.

8. She did not dispute that she had not properly checked the boxes at her table and she admitted her guilt. This is also indicative of remorse.

9. Ms Shioma was under pressure due to the fact that one of her colleagues had left the employment of Checkers and had not been replaced and that she was effectively doing the work of two persons. It is true that in the record at one stage when heavily pressed, she said that she was not under pressure in doing her job but all the facts which were put to her before and after show that there was pressure on her.

10. Ms Shioma's conduct had breached the trust relationship insofar as this refers to her reliability in looking after the goods of her employer.

11. The evidence presented to the arbitrator was to the effect that no other position would be suitable for her given the lack of trust



and reliability.

This is not a case of dishonesty or theft but one of serious negligence with the potential for serious losses which would be untraceable and irrecoverable.

This sort of gross negligence can of itself lead to dishonesty as Mr Van der Walt pointed out at page 120 of the bundle.

Taking all the factors into account I am unable to say that the employer's sanction warrants interference. It is proper, I think, to apply the test which this court uses to examine an award of a commissioner, namely to determine whether it is justifiable in relation to the material facts which were placed before the commissioner.

This test, I think, is applicable to the employer's decision regarding sanction. The question is was the employer's sanction justifiable. It need not be justified.

I doubt whether I would have come to the same conclusion, particularly as the employer had worked for 11 years and I would thought that it would have been possible to transfer her to another position within the store.

However, I must come to the conclusion upon all the facts which I have set out above, that the employer's sanction was justifiable and that it was not proper for the commissioner to have intervened, even had he

not committed the gross irregularity to which I have referred. It also means that this court cannot interfere with the employer's sanction.

In the premises the award of the second respondent, the commissioner, dated 15 January 2002 under case number MP1921/01, is reviewed and set aside and replaced with an award that the dismissal was fair.

The third respondent, that is the union, is to pay the cost of this application.

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