

IN THE LABOUR COURT OF SOUTH AFRICABRAAMFONTEINCASE NO: JR1556/04DATE: 2006-12-

5 In the matter between:

M SIDDIZ

Applicant

and

W M RALEFATANE .N.O

Respondent

10

J U D G M E N T

15

PILLAY D, J: This is an application to review and set aside the award of the first respondent, the Arbitrator. The court must at the outset dispose of a preliminary matter and that is the representation of the employee, the second respondent, by NEWU.

20

The court having read the papers was not disposed to granting the review application and would have dismissed it without having heard NEWU. A number of technical objections were raised between the parties about the authority of NEWU to represent the employee. Those objections were withdrawn and the applicant was willing to proceed with the matter with Mr Maluleke representing the employee. That being the background to the case, the court wishes to place on record that this is no precedent for hearing Mr Maluleke in future matters. The court is aware that the status of NEWU is questionable and each case in which it appears will have to be decided as and when it occurs depending on its status at that time.

25

A further consideration is that the court, having formed a *prima facie* view on the basis of the pleadings and the heads of argument filed by the applicant, deduced that the employee would suffer the greatest prejudice if the matter was not disposed of expeditiously or if it had to be delayed
5 because he was not properly represented in these proceedings. That then is the background against which the court allowed Mr Maluleke to address it in these proceedings.

On the merits of the matter, the challenge against the Arbitrator's decision is both on his findings of procedural and substantive fairness. The
10 facts were that the employee was engaged as a sales representative for a short period. One of the conditions of his employment was that he would have his own transport. When he took up his employment his car had been stolen and he commenced working as a sales representative using the employer's vehicle. In that regard there appeared to have been some
15 accommodation by the employer of the employee's circumstances.

One of the charges against the employee was that he gave a customer credit and a discount for goods sold to the customer. The background to that transaction was that the employee delivered a substantial amount of goods to a customer without collecting any payment for the
20 delivery. The employer was angry about that. The employee returned to the customer and urged him to sell the goods. As an incentive for that the employee took it upon himself to offer the customer a R2,00 discount on each box sold. In total it came to about R40.00. The granting of the discount also angered the employer as it was without his authority.

25 In all the circumstances there is no suggestion that the employee

acted dishonestly. He tendered the R40,00 out of his own pocket to the employer. The employer had not sustained any loss as a result of the granting of the discount. The incident occurred at a formative stage of the employment relationship. It was in the interest of both the employer and the employee that the goods were sold as the employee earned a commission and the employer needed to get rid of his stock. On those facts the Arbitrator came to the conclusion on the substantive fairness of the dismissal that it was unreasonable to dismiss the applicant.

Assuming that the Arbitrator had not interpreted or made the correct inferences from the facts presented at the arbitration, his conclusion is not so far fetched against the background sketched. It was also not entirely clear what the rule was, whether the applicant was aware of it and whether he was mindful of the consequences of not abiding by the rules in relation to the granting of credit and discount.

There is also no evidence on the record that the employee was put on terms to get a replacement vehicle or else he would no longer be employed before steps were taken against him on that account. In any event, it is debatable as to whether his failure to provide his own transport amounted to a ground for dismissal. On the substantive grounds, therefore, the court is satisfied that the Arbitrator's findings are not assailable.

The principle concern that the court has with the procedure is that the Arbitrator found that the employer initiated the disciplinary enquiry because he feared that the employee would take him to court or to the Department of Labour and that that motivation vitiated the procedural fairness of the disciplinary enquiry.

Ordinarily, the employer's motive may not impact on the steps taken in the disciplinary proceedings. However, in this case the court takes note that the employer appointed the Chairperson of the enquiry. There is no evidence that the Chairperson of the enquiry was necessarily independent of the employer or not influenced him. Although there is no evidence as to what might have transpired between the employer and the Chairperson of the enquiry, the fact that the penalty of dismissal was imposed for an offence that did not warrant a dismissal suggests that it was not so far fetched that the Chairperson could have been influenced by the employer's motivation in instituting the disciplinary enquiry, namely his concern that he might be reported to the Department of Labour.

Furthermore, the procedure adopted during the disciplinary enquiry also shows that the Chairperson of the enquiry did not manage the process as efficiently as an independent Chairperson would have. For instance, the employee was invited to state his case first before the employer could present the evidence to the Chairperson. The switching of the tape recording on and off also created the impression that the Chairperson did not want certain aspects of the enquiry to be recorded.

The transcript of the proceedings however, do not bear out the Arbitrator's finding that the employee was not given an opportunity to cross-examine witnesses. Based on the main finding of the Arbitrator that the motivation of the employer influenced the finding of procedural fairness, the court is satisfied that overall the finding of procedural unfairness by the Arbitrator can also not be set aside. In the circumstances, the application for review must be dismissed.

Finally, it remains for the court to point out that the award directs the employer to pay to the applicant, not his representative, the amount of R36 000,00 as 12 month's compensation. The employer should abide strictly by that without further delay. The court declines to make any order as to costs
5 given the fact that the employee is represented by a trade union. The application is dismissed with no order as to costs.

---oo0oo---

10

Pillay D, J
7 February 2007