

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN**

CASE NO: D 202/06

In the matter between:

EDCON LIMITED

APPLICANT

and

COMMISSIONER HILDA GROBLER

1ST RESPONDENT

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

2ND RESPONDENT

JANET PAGE

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant seeks an order reviewing and setting aside an arbitration award issued by the first respondent (the commissioner) under case number KNDB 13948-05, dated 8 February 2006. In terms of the arbitration award, the commissioner ordered the reinstatement and compensation of the third respondent (the employee).

Background Facts

- [2] The employee who was employed as a branch manager at the applicant's Jet Stores in Field Street, Durban, was charged and dismissed for abusive language. The charge proffered against her was formulated as follows:

“Failure in your duty to be obedient and show respect in that on the 26th July you used abusive, insulting and derogatory language when you referred to Deshan, an employee of Coin Security, as a ‘monkey’ when speaking to his manager Yvonne Wagemaker thereby bringing the Company’s name into disrepute.”

- [3] The incident that lead to the dismissal occurred on the 25th July 2005 when the employee telephoned Mrs Yvonne Wagemaker of Coin Security and enquired as to who “the monkey” was who had installed the panic buttons at the store. At that stage Coin Security was a service provider responsible for the installation of panic buttons at the applicant's workplace.
- [4] According to the applicant, Ms Wagemaker took offence at the reference to one of her technicians being called a “monkey” by the employee. She reported the incident to her senior, Mr George Kypreos, either on the same day or the following day.

- [5] The employee did not dispute the use of the word “monkey” with reference to the person who installed the panic button. She however, stated that at the time she used the word she was stressed and concerned about the safety of the applicant’s employees. It is also undisputed that Ms Wagemaker reported the incident to her manager via email nine days after the incident.
- [6] The commissioner in her award disagreed with the chairperson of the disciplinary hearing and found that it was not possible to determine how she (the chairperson) arrived at the conclusion that the word “monkey” in that context amounted to abusive, insulting and derogatory language. The commissioner also found that there was no basis to conclude that the use of the word amounted to a total lack of respect of the service provider’s employee.
- [7] It is common cause that at the time, the employee used the word; she did not know the identity of the person who installed the panic button in question. It is apparent from the reading of the arbitration award that this influenced the decision of the commissioner in weighing whether the use of the word could be said to amount to abuse, and lack of respect to the unidentified employee.

- [8] The commissioner concluded that there was no evidence that the employee was guilty of having used the word in the manner that it can be described as abusive, insulting and derogatory. In this regard she found that the word was used without malice or intention to insult.

Grounds for Review

- [9] The applicant based its challenge of the arbitration award on two grounds. The first ground is that there is no rational connection between the evidence presented at the hearing and the commissioner's finding that the employee was not guilty of the use of abusive language. The second ground is that the commissioner committed a gross irregularity by approaching the arbitration proceedings as one akin to a review of the disciplinary hearing, and accordingly misapplied the legal principles applicable to the arbitration hearing.

- [10] The law is now settled as to which test to use when considering whether or not to review an arbitration award. The test was formulated in a question form in *Carephone (Pty) Ltd v Marcus N.O. and Others* (1998) 19 ILJ 1425 at 1435 paragraph 37, wherein the Court posed the question as follows:

“Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she arrives at?”

[11] The rationality test was recently reaffirmed by the Supreme Court of Appeal in the case of *Rustenburg Platinum Mines Ltd v CCMA & Others* (2006) 11 BLLR 1021 (SCA). The test for rationality is satisfied if there is reasonable logical connection between the evidential material properly placed before the commissioner and his or her decision.

[12] The question in this matter is therefore whether there is a rational connection between the evidence relating to the misconduct for which the employee was charged with and the conclusion of the commissioner that the dismissal was unfair. The question in this regard is not whether the decision of the commissioner is correct, but whether it is rational and justifiable.

[13] The commissioner in her analysis of the evidence of Ms Wagemaker, on whose evidence the case of the applicant was mainly based on, took into account her reaction and the context in which the

alleged abusive word was used. In this regard in summarising the evidence of Ms Wagemaker, she states:

“Wagemaker testified that she was ‘offended’ by the usage of the word, and that she would have been offended regardless of what word (‘idiot’/‘fool’ etc) was used to refer to her technician. She conceded that she did not know who the technician concerned was. It appears from the evidence that neither did the applicant know who the technician was. Wagemaker’s e-mail makes it clear that she also did not know why the applicant had referred to the unknown technician as a ‘monkey’. It is common cause that no one thought or had understood that there was a racial connotation to the usage of the word.”

- [14] The commissioner in arriving at the conclusion as she did assessed the alleged misconduct in context within which the statement was made. She in this regard relied on John Grogan, *Dismissal (Juta & Co Lt, Lansdowne, 2002)*, wherein the learned author has the following to say:

“While it is expected that the workplace is not a finishing school, there are limits to the language which employees are permitted to use to express their views. Swearing and invective are generally considered to amount to misconduct, which may in certain cases justify dismissal even on the first occasion; This is so especially

so when employees use abusive words or phrases that impair the dignity and sensibilities of those against whom they are directed.”

- [15] After observing that whether language is abusive will depend, to a certain extent on the circumstances and practice in a particular work place, the learned author quotes with approval the decision of the arbitrator in the *Spinning Mills and ACTWUSA (1998) ARB 8.13.2* where in dealing with the issue of abusive language the arbitrator said:

“It is often difficult to distinguish between language used on the shop-floor which undermines the authority of the employer and that which is merely jocular or rude. The degree of tolerance for what is sometimes called ‘industrial language’ varies from one plant to another and whether use of the same words constitutes insubordination may differ from plant to plant and circumstances to circumstances.”

- [15] Whether language is abusive will depend on the circumstances of a given case. The circumstances within which the language was used has to be evaluated in particular against whether the language used was directed at a particular employee or employees. The level of malice, the extent of the abuse and its degree are factors that may

aggravate the offence. See PAK le Roux & Andre van Niekerk, *The South African Law of Dismissal* at 124-5.

[17] In my view, the commissioner cannot be faulted. She correctly applied the legal principles relating to the evaluation and assessment of evidence. She properly assessed and considered whether in the context and the circumstances within which the word was used it could be considered abusive, and arrives at the conclusion that it was not.

[18] As indicated earlier, the second ground upon which the commissioner's award was challenged, was that she approached the proceedings as one akin to a review.

[19] I do not agree with the applicant that the commissioner in a sense arrived at her conclusion through reviewing the record of the disciplinary hearing. The record of the disciplinary hearing was placed before the commissioner as part of the documentation and accordingly constituting material properly before her.

[20] In her analysis the commissioner contrasted and compared the evidence which was presented in the arbitration and that which was presented at the disciplinary hearing. She does this with the main focus of evaluating and assessing whether or not it could be said that

the relationship between the employee and the applicant has irretrievably broken down.

[21] The above analysis is informed by the fact that this is a review and not an appeal. It should also be pointed out that the misapplication of relevant legal principles is not in itself sufficient to justify an interference with the commissioner's decision. See *Federated Timbers (Pty) Ltd v Lallie N.O. & Others* (1999) 20 ILJ 348 (LC) and *Standard Bank of SA Ltd v CCMA & Others* (1998) 19 ILJ 903 (LC).

[22] If it was to be found that the approach adopted by the commissioner was incorrect, then I would submit that the misapplication of the legal principles, if at all, is not serious enough to justify interference with the arbitration award.

[23] The third ground of review concerns the finding by the commissioner that the dismissal was not an appropriate sanction. The applicant contended that the commissioner committed a reviewable conduct in not taking into account the Code of Good Practice: Dismissal in determining "whether the dismissal was the appropriate sanction." To this extent the applicant's case was that the

employee was already on a final written warning and therefore the commissioner should have confirmed the dismissal.

[24] There is authority that the discretion to determine a sanction in a disciplinary hearing lies with the employer and not the arbitrators. The discretion of an arbitrator is limited to determining the fairness of the sanction. The criterion is not whether an arbitrator would have imposed a different sanction or he/she did not like the sanction imposed by the employer. The question is whether or not the sanction is correct, or the commissioner agrees with it. The question is whether or the sanction is fair. See *Rustenburg Platinum Mines LTD (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021(SCA).

[25] Having determined the function of a CCMA commissioner, the SCA in the *Rustenburg Platinum Mines LTD case* followed the decision in *County Fair Foods v CCMA* (1999) 20 ILJ 1701(LAC) also reported at (1999) 11 BLLR 1117 (LAC), where it was held that, *commissioners* should not substitute their decisions for the decision fairly exercised by the employers.

[26] The principles discussed in both *Rustenburg Platinum Mines* and *County Fair* (*supra*) arose in the context where the respective

commissioners found the respective employee's guilty of misconduct and after assessing and evaluating the mitigating circumstances of the employee, the arbitrator deemed it necessary to interfere with the sanction imposed by the employers. The sanctions were interfered with because they were in both instances found to be unfair by the commissioners. The decisions of the arbitrators were set aside on both appeals.

[27] The issue of whether the sanction was appropriate does not, in my view, arise where a commissioner or an arbitrator finds that the reasons for the dismissal was substantive unfairness. The finding that the dismissal was substantively unfair concludes the inquiry and the commissioner or the arbitrator may either reinstate, or re-employ or award of compensation in terms of s193 of the LRA.

[28] In the present case the commissioner found on the bases of the evidence before her that the employee was not guilty of misconduct of using abusive, insulting and derogatory language. In essence this finding amounts to nothing but a finding that the dismissal was substantively unfair. It was for this reason that she ordered the reinstatement and compensation of the employee.

[29] The commissioner also dealt with the appropriateness of the sanction which in my view was not necessary. However, I do not believe that this approach by the commissioner would justify interference with the arbitration award. This approach does not have a material bearing on the logical connection between the reasoning and the outcome of the arbitration award. In fact even if this portion of the award was to be excised, the award would still be above reproach. In other words with or without this portion of the arbitration award dealing with the issue of the sanction, the arbitration award would still retain its rationality and justifiability.

[30] I see no reason why the costs should not follow the result. It follows from the above that the applicant has not made out a case for the relief sought and in the premises the application is dismissed with costs.

MOLAHLEHI J

DATE OF HEARING : 18 MAY 2007

DATE OF JUDGMENT : 10 AUGUST 2007

APPEARANCES

For the Applicant : M Alexander of Deneys Reitz Inc

For the Respondent: B Purdon of Brett Purdon Attorneys