

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 1609/06

In the matter between:

CASH PAYMASTER SERVICES

NORTHWEST (PTY) LTD

APPLICANT

AND

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1ST RESPONDENT

BUYELWA VIVIENNE TLHAPI N.O.

2ND RESPONDENT

COENRAAD JOHANNES LAMPRECHT

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the award of the second respondent (the commissioner) under case number NW3703/05 and dated 13 June 2006. In terms of the arbitration award the commissioner found that the dismissal of the third respondent (the respondent) for misconduct was too harsh.

Background facts

[2] The respondent who was employed by the applicant on a fixed term contract as a support supervisor at the Vryburg branch was charged and disciplined with a number of offences. The respondent pleaded guilty to charges 3 (three) and 4

(four) and was found guilty by the chairperson of the disciplinary hearing for charges 1 (one) and 2 (two).

[3] The first charge related to failure to obey instructions in that the respondent was alleged to have failed to submit a compact disc with assignments in it. The second charge which is related to the charge 1 (one) concerns the allegation that the respondent submitted a compact disc with the full knowledge that it did not contain any of the assignments.

[4] Mr Van der Merwe, technical manager for the Northwest branch of the applicant, testified that the respondent was one of the trainees who attended a management course which was conducted by Miss Sukhdeo, the training manager. According to her the trainee employees were required at the completion of the course to submit assignments which had to be copied into a compact disc.

[5] After submitting his disc which purportedly contained the assignment, the respondent was informed that it was blank. The respondent then indicated that the problem may have arisen from the applicant's computers and then undertook to copy the information on to the disc through his home computer. He also promised to email the assignment to the training manager. The respondent failed to carry out these undertakings.

[6] After being requested to intervene and assist by the training manager, Mr Van der Merwe enquired from the respondent whether he has in deed done the assignments. The respondent insisted that he had completed the assignment.

- [7] Immediately after this conversation with Mr Van der Merwe where he insisted that he had done the assignment, the respondent contacted another employee, Mr Bonzaaier and requested a copy of his assignment. When Bonzaaier refused to avail his assignment to him the respondent approached another employee Mr Boshoff with the same request.
- [8] During the arbitration hearing Mr Van der Merwe testified that he could no longer trust the respondent because of the incident involving submission of his assignment.

Review and award

- [9] The grounds for review upon which the applicant relies on are set out in the founding affidavit as follows:

“9.1 Failed to apply her mind to the evidence led at the arbitration proceedings;

9.2 Exceeded her powers confined by the Act;

9.3 Committed a gross irregularity in the conduct of the proceedings;

9.4 Reached unjustified and irrational conclusion.”

- [10] In her award the commissioner found the respondent guilty of charges 2 (two), 3 (three) and 4 (four). She found him not guilty of charge 1 (one). In finding the respondent not guilty of charge 1 (one) the commissioner reasoned that there was no evidence both at the disciplinary hearing and during the arbitration

proceedings that failure by the respondent to execute a legitimate and fair instruction was deliberate or intentional.

[11] In finding that that the sanction of dismissal was inappropriate in the circumstances of this case the commissioner reasoned as follows:

“In as much as I have found that the Applicant’s conduct was dishonest I do not find that it is of such a serious nature that it is deemed to have affected the trust relationship between him and the Respondent beyond repair. Whilst I may not prescribe to the Respondent the type of sanctions to give to employees I believe that the procedures should act as a guideline as correctly submitted by Mr Grudlingh, in this instance the Applicant was untruthful in handing in an assignment, which related to a training programme organised by the Respondent. He should have been put on terms and advised of the consequences of him not fulfilling the training modules designed for his advancement. It is unfortunate that this was clouded with him not opening the [deport] timeously. An appropriate sanction would be a written warning.”

[12] In essence the commissioner’s finding is that the offence for which the respondent was found guilty of was not serious enough to warrant a dismissal. There are several authorities to support this view, namely that it is not every act of dishonesty that will lead to automatic dismissal. In *Toyota SA Motors (Pty) Ltd v Radebe & Others (2000) 21 ILJ 340 (LAC)*, the Court found that it is not

an invariable rule that offences involving dishonesty necessarily attract the sanction of dismissal. The Court went further in that case and held that:

“I am saying that there can be no sufficient mitigating factors in cases of dishonesty ...”

[13] The Court then qualified the above statement by indicating that it was not saying that dismissal would always be appropriate in cases of dishonesty. However, where the dishonesty is found to be gross it is almost given that the dismissal should follow. See also *De Beers Consolidated Mines Ltd v Commission Conciliation, Mediation and Arbitration & (2000) 21 ILJ 1051 (LAC)*, *Toyota SA Manufacturing (Pty) Ltd v Radebe & Others (1998) 19 ILJ 1610 (LC)*, *Standard Bank of SA Ltd v Commission for Conciliation, Mediation and Arbitration (1998) 19 ILJ 903 (LC)*, and *Orange Toyota (Kimberly) v Van der Walt & Others (2000) 21 ILJ 2294 (LC)*.

[14] In relation to the above approach the central question in the present instance does not relate to the substance of the offence, the commissioner having found the respondent guilty of the offence, but whether the commissioner performed her duties properly in the assessment of the fairness of the dismissal.

[15] The approach to be adopted by commissioners in performing their duties of assessing whether or not the sanction of dismissal in the circumstances of a given case is fair, was stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC)* as follows:

“[75] ...Ultimately, the commissioner’s sense of fairness is what must prevail and not the employer’s view.”

[16] The Labour Appeal Court in the case of *Fidelity Cash Management Service v CCMA & Others* (2008) 3 BLLR 197 (LAC), in confirming the above approach adopted in *Sidumo* held that:

“...When a commissioner of the CCMA is called upon to decide whether dismissal as a sanction is fair in a particular case he or she must not apply the reasonable employer test, must not in any way differ to the employer and must decide at issue on the basis of his or her sense of fairness.”

[17] On the facts of the present case I see no reason why this Court should interfere with the conclusion reached by commissioner in as far as the finding that the sanction was too harsh, regard being had to the fact that in arriving at this conclusion the commissioner applied her mind and based her decision on her sense of fairness. It is apparent from the reading of the award that the commissioner in arriving at her decision took into account the seriousness of the failure by respondent to submit his assignment. This in her view did not affect the core of the trust relationship between the parties. The same seem to apply to the other charges where the commissioner directed that warnings be issued against the respondent rather than a dismissal.

[18] I know proceed to deal with the nature of the contract of employment.

[19] It is common cause that the respondent was employed on a fixed term contract which was about to expire at the time of the arbitration hearing. It is not disputed that the commissioner had sight of the contract of employment during the arbitration hearing. However, despite having seen the contract of employment which at the time of the award was one month away from expiry the commissioner ordered the reinstatement of the respondent.

[20] In my view argument of Mr Balanco for the respondent that the decision of the commissioner was reasonable because there was legitimate expectation that the contract would be extended is unsustainable.

[21] The issue concerning legitimate expectation is dealt with in terms of section 186(1)(b) of the Labour Relations Act 66 of 1995 (the Act) which read as follows:

“(1) “dismissal” means that -

(a) ...

(b) employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it:”

[22] There was no claim in the applicant’s referral of the dispute to the CCMA for conciliation or his evidence at the arbitration proceedings that he had a

legitimate expectation for the renewal of the contract of employment which as stated earlier was about to expire at that time.

[23] In the light of this the commissioner had a duty to establish the nature of the contract and its terms in considering the appropriate remedy. It is clear that the commissioner failed to apply her mind in this regard and accordingly committed a gross irregularity by ordering reinstatement of the respondent and thereby extended the contract of employment beyond the terms agreed to by the parties. The commissioner in extending the contract through ordering the reinstatement of the respondent exercised powers she did not have and accordingly committed a gross irregularity.

Conclusion

[24] In my view there is no basis upon which this Court can fault the commissioner in arriving at the conclusion that the sanction of dismissal was unfair. However, the powers and authority of the commissioner in the circumstances of the present case was limited to the terms of the contract of employment agreed to by the parties. By extending the contract of employment beyond the fixed term agreed to by the parties, the commissioner exceeded her powers.

[25] In the circumstances the commissioner's award stands to be reviewed to the extent that she exceeded her powers by extending the terms of the fixed term contract beyond the period described in the employment contract. It would not in the circumstances of this case be fair to allow the costs to follow the results.

[26] In the premises I make the following order.

- (i) Arbitration award of the commissioner issued under case number NW3703/05 is reviewed and corrected as follows:

“The respondent is ordered to compensate the applicant Mr Coenraad Johannes Lamprecht, in the amount equivalent to the unexpired portion of the fixed term contract.”

- (ii) There is no order as to costs.

Molahlehi J

Date of Hearing : 17th June 2008

Date of Judgment : 28th November 2008

Appearances

For the Applicant : Adv W J Hutchinson

Instructed by : Fluxmans Incorporated

For the Respondent: Adv Balanco

Instructed by : Thompson Attorneys