

IN THE LABOUR COURT OF SOUTH AFRICA**HELD AT DURBAN****CASE NO: D30/03**

In the matter between:

5 **EARLY BIRD SERVICES****APPLICANT**

and

THE COMMISSION FOR CONCILIATION,**MEDIATION AND ARBITRATION****FIRST RESPONDENT****COMMISSIONER L.M. EPSTEIN****SECOND RESPONDENT**10 **MANIVASEN PILLAY****THIRD RESPONDENT**

JUDGMENT

15 Pillay D, J In this review the employee, the 3rd respondent, was found guilty of the following charges and dismissed: “(1) taking unauthorised leave from 22 October 2001 to 21 November 2001; (2) taking a half day’s leave on 21 November 2001 without authorisation; (3) insubordination, disrespect and defiance of authority arising out of the above two charges.”

20 The arbitrator found the employee guilty on the second charge. From his findings that the employee’s dismissal was substantively unfair, that the employee’s version was credible and that he would not have endangered his employment of 12 years, the Court infers that the arbitrator found the employee not guilty on the first charge.

25 The credibility of witnesses for both parties were at issue. In a

review the Labour Court is usually slow to interfere with an arbitrator's finding of credibility. However, having read the record, the Court does not understand the employee to say that he received written authorisation to be on leave.

5 His evidence was that the written authorisation was "somewhere" (page 155, line 15 of the transcript, volume 2), that he was sure it was at head office (page 156, line 2 of transcript, volume 2) and that he was actually waiting for his copy (page 155, line 8 of transcript, volume 2).

 The Court deduces from his evidence that the employee assumed
10 that the leave authorisation had been issued but had not yet been given to him. The arbitrator's finding that the employee received it is not supported by the evidence. The arbitrator's credibility finding against the employee on this issue is therefore not well founded.

 The gist of the employer's evidence was that it had not issued any
15 authorisation, written or verbal. Mr *Schumann* for the employer submitted that Mr Wright was not authorised to grant the employee leave. As the employee claimed that Mr Wright had authorised his leave, his leave was not properly authorised.

 Mr *Schumann* submitted from the bar that the rationale for the
20 formality of granting leave was firstly, to ensure that the employee was entitled to leave and, secondly, that it was operationally feasible. If there were operational reasons for refusing leave, they do not emerge from the evidence.

 Mr *Schumann* laboured the point that Mr Wright was not authorised
25 to grant the employee leave. As the employee claimed that Mr Wright had

authorised his leave, his leave was improperly authorised. So submitted Mr *Schumann* for the employer.

Mr Wright's authorisation was indispensable to the granting of leave. That was the evidence from the employer's documents at B22 and B24. If
5 Mr Wright granted the leave, then the Human Resources Department had to complete the formality of ensuring that the employee was entitled to leave.

The Court is unable to say from the papers whether Mr Wright granted or refused leave. The Court has to defer to the arbitrator's findings in this regard. The Court must therefore accept the arbitrator's credibility
10 finding against Mr Wright that he told the employee that he refused to authorise his leave.

The employee's version was that he was repeatedly told that the Bargaining Council had to pay for his leave before he can take it. The employee ensured that he received the leave payment before he renewed
15 his application for leave to Mr Wright. The employer's reason for denying him leave had therefore fallen away. If there was any other reason for refusing him leave, that was not disclosed during the arbitration.

The Court finds that the employee was not issued with written authorisation to go on leave, but that Mr Wright may have told him that he
20 could go on leave. Mr Ehlers' visit to the employee at his home suggested that the employer did not want the employee to go on leave and revoked any permission that Mr Wright might have granted.

The employer's refusal to authorise the employee's leave must be considered in the context that the employer wanted to get rid of the
25 employee. The arbitrator correctly assessed the employer's conduct against

its purported notice to retrench the employee and its invitation to him to consider being medically boarded. His finding that the employer was intent on terminating the employee's services is well supported by the evidence.

5 This intention also impaired the credibility of the employer's witnesses. By issuing the handwritten notice of retrenchment document B27 about the same time as the notice to attend the disciplinary inquiry, by following that retrenchment letter with a formal letter in terms of section 189 (3) of the Labour Relations Act, by serving that notice on 4 December 2001, a day before the employee's disciplinary hearing, by inviting the employee to
10 consult about this retrenchment on 6 December 2001, and finally, by selecting the employee as the only person affected by the retrenchment, accumulatively suggested that the employer not only constructed a paper trail to back up its decision to get rid of the employee but also invoked retrenchment as another basis to get rid of him.

15 The arbitrator's suspicions about the employer's notice were also fortified by the employer advertising for posts that could have been filled by the employee, if necessary with training, and at the same time purporting to retrench the employee.

In the circumstances, the employer's refusal to grant the employee
20 leave and its decision to dismiss the employee were tainted by an improper motive to get rid of the employee on any basis. Even if the employee took unauthorised leave, he should not have been dismissed. The employer's own conduct in refusing to grant him leave and in dismissing him were not justified.

25 In the circumstances THE APPLICATION FOR A REVIEW IS

DISMISSED WITH COSTS.

Pillay D, J

5 Date:

APPEARANCES

For the Applicant: MR SCHUMANN

For the Respondent: MS J MOODLEY

**IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION**

HELD AT DURBAN

CASE NO : D30/03

DATE : 6.02.08

EARLY BIRD SERVICES : APPLICANT

And

CCMA RESPONDENT

BEFORE THE HONOURABLE MADAM JUSTICE PILLAY

ON BEHALF OF APPLICANT : MR SCHUMANN

ON BEHALF OF RESPONDENT : MS J MOODLEY

REPORT ON RECORDING

Clear recording.

TRANSCRIBER'S CERTIFICATE

This is, to the best abilities of the transcriber and proofreader, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

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CASE NO : D30/03X

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