

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT DURBAN)

Case No: D875/06

In the matter between:

RENNIES DISTRIBUTION SERVICES (PTY) LTD

APPLICANT

AND

DIETER BIERMAN N.O.

1ST RESPONDENT

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

2ND RESPONDENT

SEWANARTHAN GOVENDER

3RD RESPONDENT

JUDGMENT

AC BASSON, J

[1] This is an application for the review of an arbitration award issued by the First Respondent (hereinafter referred to as “the Commissioner”)

in terms of which the dismissal of the Third Respondent (hereinafter referred to as “Govender”) was found to be substantively unfair but procedurally fair. Govender was awarded compensation in the amount of R 76 717.12 which is equal to 8 months’ salary. The Applicant filed an application to review and set aside the award by the Commissioner and for an order substituting the Commissioner’s award with an order that the dismissal of Govender was substantively and procedurally fair.

Brief Background

- [2] The Applicant - Rennies Distribution Services (Pty) Ltd (hereinafter referred to as “*the Applicant*” or “*the Employer*”) carries on the business of a warehouser and distributor of goods.
- [3] The business of the Applicant operates on a 24 hour basis and employees are required to work on a shift basis as determined by their employer. Govender was employed as a superintendent at the Applicant’s warehouse in Gauteng. This position is a responsible position and is at junior management level.
- [4] It is common cause that Govender had stayed away from work on 21 and 22 August 2006 and that he was also again absent on 6 September 2006. On 21 August 2002 Govender was served with a written memorandum urging him to use his sick leave sparingly and

only when it was really necessary. In this memorandum Govender was also cautioned that he had already taken up 29 of his sick leave allocation. The memorandum also points out that an employee must notify the company of any anticipated absence before 12H00 on the day an absence occurs. In addition hereto Govender was also formally counseled in respect of the sick leave policy. Govender acknowledged that he understood the procedure and stated that he will not stay away unnecessarily and only when he was really sick. During the period March 2006 to 18 August 2006 Govender took thirteen days sick leave.

Disciplinary charge

[5] On 7 September 2006 Ms Tracey Mcleod (of the Applicant) instituted the following disciplinary charges against Govender. Govender was instructed to appear before a disciplinary hearing on 11 September 2006:

- (i) Unauthorized absence from work for three days: Monday 21 August 2006, Tuesday 22 August 2006 and Wednesday 6 September 2006.
- (ii) Gross insolence in that he had changed the current compressed shift system to a purely day and night shift operation without

authorization from management. It was the evidence on behalf of the Applicant that a major company was then unable to deliver goods to the Applicant's warehouse as a result of this change.

[6] The chairperson found Govender guilty and imposed the penalty of a *final written warning* valid for 12 months.

[7] It is important to point out what the Applicant's disciplinary code provides. It reads as follows:

"1.10 Unauthorised and/or uncommunicated absenteeism where such absence is longer than three (3) successive working days, unless the employee offers a reasonable and legitimate excuse for his absence, the onus in this case being on the employee to justify his unauthorized and/or uncommunicated absence"

The proposed action in respect of a first offence is indicated as "*dismissal*". It should be pointed out that it was common cause that Govender was not absent for three successive working days.

Appeal

[8] It is common cause that Govender then appealed against the decision made by the chairperson. After the appeal hearing the chairperson (of the appeal hearing) changed the penalty of a final written warning in respect of the first charge and substituted it with a penalty of a *dismissal*. In respect of the second charge the chairperson confirmed the penalty of a final written warning. In the founding affidavit it is stated that the appeal hearing amounted to a re-hearing. A reading of the transcript of the appeal hearing does not, however, indicate that Govender was warned that the chairperson may impose a harsher penalty nor is it the Applicant's contention in the papers that the disciplinary code allowed for the imposition of a harsher sanction on appeal. It was also not the case for the Applicant that Govender was or should have been aware that should he appeal against the findings of the disciplinary hearing that there is a possibility that the chairperson of the appeal hearing may impose a harsher sanction. I have also perused the transcript of the appeal hearing and it does not appear from the transcript that the chairperson had warned Govender that the appeal hearing was a re-hearing of the charges and that he may impose a harsher sanction. I will return to this aspect herein below.

The Award

[9] It is not necessary to give a recount of the evidence that was led before the Commissioner. Suffice to point out that the Commissioner evaluated in some detail the evidence that was led by the witnesses. Because Govender was dismissed (by the chairperson of the appel hearing) in respect of charge 1 only, the Commissioner found it not necessary to deal with the second charge in respect of the changing of the shift system. In respect of the first charge, the Commissioner noted the Respondent's submission that the Applicant had a severe history of staying away from work. The Commissioner also noted Govender's evidence to the effect that he had not exceeded his sick leave and that he was last reprimanded in 2002. The Commissioner, however, rejected Govender's evidence that he had tried to contact the terminal manager to inform her that he was ill on 21 August 2006 but that he was unable to do so as he experienced problems with his cell phone battery.

Evidence in respect of dishonesty

[10] It is common cause that the Applicant had led evidence during the arbitration hearing to the effect that Govender was dishonest when he had requested a receptionist (a certain Ms Narain) to lie to Govender's manager. The evidence was that Govender had requested Narain to tell the manager that his (Govender's) wife had called the switchboard on 6 September 2006 and that she had requested Govender to come

home because she felt ill. During the arbitration the receptionist Narain for the first time gave evidence that Govender's wife had never phoned the switchboard and that she was asked to lie by Govender.

[11] With regard to the evidence in respect of dishonesty, the Commissioner found that there was clear evidence of dishonesty on the part of Govender in that he, *inter alia*, tried to persuade the Applicant's receptionist to lie on his behalf by fabricating an excuse for his absence in September. The Commissioner also found that his dishonesty had caused a serious breach of the employment relationship. The Commissioner, however, emphasised that Govender was, not charged with dishonesty and that he was only charged with misconduct in respect of unauthorized leave and within changing the shift system. The Commissioner therefore disregarded the evidence in respect of the dishonesty and concluded that if the Applicant had wished to rely on his dishonest conduct relating to his absence, the Applicant should have charged him with dishonesty and should have afforded him an opportunity to state his case in respect of a charge of dishonesty.

[12] Is this an unreasonable conclusion? Put differently, is an employer allowed to introduce new evidence in respect of, for example a charge of dishonesty, in circumstances where an employee was not initially

charged with dishonesty and therefore not dismissed by his or her employer on a charge of dishonesty? In the present case the Commissioner decided not to place any reliance on the further evidence in respect of the dishonesty allegations and decided that he will only considered whether or not it was fair to have dismissed Govender for absence without permission (the original charge).

Review test

[13] Before I turn to the merits of this review application, a few preliminary remarks should be made in respect of review applications in general. The Constitutional Court in ***Sidumo & Another v Rustenburg Platinum Mines Ltd and Others*** (2007) 28 ILJ 2405 (CC) sets out the test of review in respect of review applications in terms of section 145 of the LRA as that of a “*reasonable decision maker*”. The question that must therefore be asked by the review court is whether or not a reasonable decision-maker could reach the decision that the Commissioner has arrived at. The question is therefore not whether or not this court agrees with the decision, but whether it is one that a reasonable decision could reach. It is important to emphasis that the question is not whether this court would have come to a different conclusion. In ***Fidelity Cash Management Services v CCMA & Others*** [2008] JOL 21211 (LAC); 2008 (2) BLLR 197 (LAC) the Court said the following in respect of reviews:

“[98] It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.

[99] In my view Sidumo attempts to strike a balance between, two extremes, namely, between, on the one hand, interfering too much or too easily with decisions or arbitration awards of the CCMA and, on the other refraining too much from interfering with CCMA’s awards or decisions. That is not a balance that is easy to strike. Indeed, articulating it may be difficult in itself but applying it in a

particular case may tend to even be more difficult. In support of the statement that Sidumo seeks to strike the aforesaid balance, it may be said that, while on the one hand, Sidumo does not allow that a CCMA arbitration award or decision be set aside simply because the Court would have arrived at a different decision to that of the commissioner, it also does not require that a CCMA commissioner's arbitration award or decision be grossly unreasonable before it can be interfered with on review – it only requires it to be unreasonable. This demonstrates the balance that is sought to be made. The Court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision one way or another is one that a reasonable decision-maker could not reach in all of the circumstances.

[100] The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of

the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached.

- [14] With this test in mind, the decision reached by the Commissioner will now briefly be considered. I will first consider whether it was reasonable to have disregarded the evidence in respect of Govender's dishonesty. Thereafter I will briefly consider whether the conclusion that the dismissal was substantively unfair in light of the fact that the company had acted contrary to its own disciplinary code in respect of the absenteeism charge, is one which a reasonable decision maker could not have arrived at.

Evidence in respect of dishonesty

- [15] I am of the view that the Commissioner's conclusion that it is unfair to find an employee guilty of dishonestly when he was never charged with dishonesty, is not unreasonable particularly in light of the fact that

the disciplinary code allows for a charge of dishonesty - and rightly so – to be instituted against an employee suspected of dishonesty. An employer has the right to expect a high standard of honesty and loyalty from an employee and an employee who commits an act of dishonesty may be charged and may, if found guilty, be dismissed. However, where an employer does not charge an employee with dishonesty it cannot seek to introduce a new charge or a different charge at the arbitration hearing. I have already pointed out that Govender was not charged with dishonestly despite the fact that the receptionist had sent an e-mail to Mcleod on 8 September 2006 informing management of the fact that Govender had told her to tell a lie about having phoned the switchboard. On 11 September 2006 (the very day upon which the disciplinary hearing had commenced) Mcleod had asked the receptionist to clarify her allegations. It is common cause that Narain did so on that very same day. Govender's disciplinary hearing commenced on 11 September 2006. The Applicant cannot therefore argue that it was not aware of the dishonest act. The Applicant had ample opportunity to charge Govender with dishonesty but had failed to do so. What makes matters worse for the Applicant is the fact that Mcleod was the initiator at Govender's disciplinary hearing. In fact she had given the charges to Govender on 7 September 2006. She was also the one who received the e-mail a day after the charge sheet was handed to

Govender and she was the one who asked for a clarification of the allegations about Govender's dishonesty. As already pointed out, it cannot therefore be said that the Applicant was unaware of the complaint at the time of the disciplinary hearing. This is clearly not a case where it can be said that the evidence about an act of dishonesty only came to the attention of the Employer *after* the employee was charged. What is also important to note is the fact that Mcleod was also present as the initiator at the appeal hearing of Govender which was held on 21 September 2006. If the Applicant's contention is to be accepted that the appeal hearing amounted to a re-hearing of the charges, then nothing would have prevented the Applicant to have introduced further charges against Govender even at that late stage. The Applicant, however, elected not to do so. I can therefore find no basis upon which to conclude that the Commissioner's finding or reasoning in respect of the dishonesty allegation is unreasonable. It is certainly not an unreasonable finding to the extent that a reasonable decision maker could not have arrived at this conclusion. There is also clear authority to the effect that employers cannot justify a dismissal on grounds other than those which formed part of the initial decision to dismiss an employee. See in this regard *Fidelity Cash Management Services v CCMA & Others* (supra). In that case the appellant sought to justify the third respondent's dismissal on alleged acts of misconduct which did not form part of the allegations of misconduct of

which he was found guilty in the disciplinary inquiry and for which he was dismissed. The Court held as follows:

“[32] It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where at the time of the dismissal the employer gave a particular reason as the reason for dismissal in order to hide the true reason such as union membership. In such a case the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that the employer gave for the dismissal but on the basis of the true reason for dismissal.

[63] Much oral evidence was led on behalf of the appellant in the arbitration proceedings in an attempt to show what the third respondent did, what he did not do and what his duties which, he had allegedly failed to fulfil on the day of the robbery. In so far as such evidence related to conduct which did not form part of the allegations of misconduct for which the third respondent was dismissed, such evidence cannot help the appellant's case

in the determination of the fairness or otherwise of the dismissal. The evidence had to relate to the reasons for dismissal. The oral evidence that should have been led is evidence that could show that the third respondent was guilty of the allegations of misconduct for which he was dismissed. However, I am of the opinion that oral evidence to prove that the duty under consideration was one of the third respondent's duties was inadmissible on the basis that it offended the parole evidence rule as the contract of employment between the appellant and the third respondent – which set out the parties' contractual duties – was in writing. Indeed, it specifically provided that it was the entire contract between the parties."

Absenteeism

[16] Is the conclusion reached by the Commissioner that a dismissal is substantively unfair in circumstances where an employee is charged with unauthorized absence from work for 3 consecutive days but the facts show that he was merely absent for two consecutive days, unreasonable (see also paragraph [7] *supra*)? The Commissioner concluded that the Applicant had acted contrary to its own disciplinary code and that the dismissal was therefore substantively unfair. I am of the view that this is not an unreasonable conclusion. One of the principles of a substantively fair dismissal is that the employee must

have known or could reasonably be expected to have been aware of a rule as well as of the sanction which may be imposed in the event of a breach of the rule. The rationale for this rule is evident. In fairness, an employee must know that a transgression of a certain rule may lead to his dismissal even where the rule is transgressed for the first time. This creates certainty in the workplace and also ensures the consistent and fair application of discipline in the workplace. Knowledge of a rule may be inferred from the fact that there is a written disciplinary code (which may either be imposed by the employer or be the product of collective bargaining and part of a collective agreement) or from the fact that the employer had issued written notices. The disciplinary code in the present matter does not provide for the sanction of dismissal for (unauthorized) absenteeism for less than 3 consecutive days and it would, in my view, be unfair for an employer to dismiss an employee contrary to its own disciplinary code particularly. In the context of this review application it is, in my view, not unreasonable for the Commissioner to have concluded that an employer is expected to comply with its own disciplinary code.

[17] On behalf of the Applicant it was, *inter alia*, argued that the disciplinary code only provides a guideline and that each case should be taken into consideration. More in particular, reference was made to the following clause in the disciplinary code which clearly states in

respect of the “*proposed [disciplinary] action*” that: “*The proposed action should not automatically be imposed. The nature and circumstances of each individual case should be taken into consideration, prior to making a decision. Therefore, the proposed code serves only as a guideline*”. I agree with the Applicant’s submission to the extent that the Applicant’s disciplinary code does not prescribe a rigid application or imposition of the proposed sanctions prescribed by the Code once an act of misconduct has been committed and that the code only serves as a guideline. This clause is in accordance with fair labour practices and general principles of fairness which require that due consideration should be given to all relevant considerations before a sanction of dismissal (or for that matter any other sanction) is imposed. The imposition of a fair and appropriate sanction forms an important component of the general fairness requirement of a dismissal and requires the chairperson to consider all factors, including but not limited to, the nature and circumstances of the offence that was committed, the impact of the misconduct on the workplace and any other relevant mitigating circumstances before imposing a sanction. The mere fact that the disciplinary code prescribes, for example, the sanction of dismissal, does not imply that the chairperson should not consider a lesser sanction. The Applicant’s disciplinary code does not provide for a sanction of dismissal where absenteeism is less than three

consecutive days and it would be unfair to allow an employer without prior warning; notice or consultation to dismiss an employees for such an offence where the code itself only provides for the sanction of dismissal where the absenteeism is longer than three successive days.

[18] In light of the afoaregoing I am of the view that the Commissioner's award is not unreasonable. In the event, the review application is dismissed with costs. I can find no reason in law and fairness why costs should not follow the result.

Is it fair to increase a sanction on appeal?

[19] Although I am satisfied for the reasons set out in the foregoing paragraphs that the review should be dismissed, there is one further point raised in Govender's papers and that relates to the fact that the chairperson of the appeal hearing set aside the final written warning imposed by the chairperson of the disciplinary hearing and replaced it with a harsher sanction of dismissal. The Commissioner did not rule on this point but I am of the view that this is an additional important point upon which the dismissal of Govender was substantively unfair.

Broad principles:

[20] In criminal cases a court of appeal has the right to interfere with a sanction imposed by the court *a quo* and replace it with an appropriate sanction (provided that an appeal was lodged against the sanction). The Court derives this power from the express provisions of section 322(6) of the Criminal Procedures Act 51 of 1977 which sets out the powers of the court (sitting as a court of appeal) in detail.¹ It would appear that a court on appeal has this power only because it is specifically empowered by the legislature in terms of section 322(6) of the Criminal Procedures Act.²

[21] It would, in my view, be unfair to allow a chairperson in an appeal hearing (as part of a disciplinary process) to simply increase a disciplinary sanction except in circumstances where the disciplinary code expressly allows for such a power.

[22] Moreover, notwithstanding the provisions of section 322(6) of the Criminal Procedures Act which allows for the power to increase the sanction, courts on appeal are, in any event, reluctant to increase sanctions on appeal in light of the prejudice that an accused (in a criminal case) may suffer as a result. Moreover, even where the court of appeal may be open to the argument to increase the sanction on appeal, the affected accused must be afforded an opportunity to present argument to the court of appeal to persuade the court as to

¹(6) *The powers conferred by this section upon the court of appeal in relation to the imposition of punishments, shall include the power to impose a punishment more severe than that imposed by the court below or to impose another punishment in lieu of or in addition to such punishment.*

² See: Hiemstra *Suid-Afrikaanse Strafproses* 6th edition page 899” *“Magte van appèlhof – Wat ookal histories die posisie mag gewees het, behoort daar nou eenstemmigheid te wees dat die magte van die hof van appèl beperk is tot wat in hierdie en verwante artikels van hierdie wet voorgeskryf is (Sefatsa and Others v Attorney-General, Transvaal and Another 1989 (1) SA 821 (A).)”*

why the sanction should not be increased.³ The *audi alteram partem* rule is thus fundamental even in circumstances where a court of appeal (in a criminal case) has the right to increase a sanction. A similar rule, should, in my view, apply in cases where the chairperson in an appeal hearing (as part of an employer's disciplinary procedures) is empowered to increase a sanction on appeal. An employee should be warned that the chairperson is contemplating increasing the sanction imposed by the chairperson of the disciplinary hearing and the employer should be granted the opportunity either to withdraw the appeal and accept the sanction imposed by the disciplinary hearing or present argument to the appeal hearing why the sanction should not be increased.

[23] I am, of course, mindful of the fact that a disciplinary enquiry should not be equated with a criminal trial. The Court in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* 2006 (27) ILJ 1644 (LC) correctly cautioned against such approach. However, the rationale underlying the reasons why a criminal court on appeal should caution against increasing a sanction is equally valid in respect of disciplinary enquiries. Just as the court on appeal should ensure that a sentenced individual receives a just and fair trial, so must the Labour Court ensure that an employee receives a fair hearing (albeit less formalistic than a criminal trial). There is some authority which supports the principle namely that a chairperson on appeal should not have an unfettered power to increase a sanction except in circumstances where the disciplinary code provides for such a power. See in this regard *UASA obo Melville and SA Airways Technical (Pty) Ltd* (2002) 11 AMSSA 1.11.1 at paragraph 21 where the CCMA

³ See: *S v Morgan and Others* (1993) 2 SACR 134 (A).

rejected the argument that a chairperson on appeal has the right to increase a sanction on appeal in the absence of an express provision to that effect:

“21. A collective agreement is one legal constraint on the power of an employer that obliges the employer not to act in conflict with the provisions of that agreement. Beyond those constraints, the employer may act within a particular sphere subject to any constraints imposed by statute or the common law of employment.

22. In discerning the extent of the powers of an appeal chairperson I should, so it was argued by the employer, have regard to the "common law" relating to appeal enquiries. I am inclined to agree with the respondent that one can have regard to those incidental powers a chairperson requires to perform the function of appeal hearing chairperson. But I do not believe the very ambit of that chairperson's decision making power in respect of the decision appealed against can be established in this way. Moreover, I was not referred to any specific common law authority on this issue.”

[24] In summary: Firstly, except where express provision is made for such a power, a chairperson on appeal does not have the necessary power to consider imposing a harsher sanction. Secondly, even if it has such a power the chairperson must adhere to the fundamental principles of natural justice which require that the *audi alteram partem* must be afforded to the employee who may be prejudiced by the imposition of a more severe sanction.

The order

[25] In the event the following order is made:

1. The application to review and set aside the award by the First Respondent under case number GAJB21618-06 is dismissed.
2. The Applicant is ordered to pay the costs.

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AC BASSON, J

Date of hearing: 5 March 2008

Date of judgement: 24 June 2008

For the Applicant: Adv M D Csmithers

Instructed by: Deneys Reitz Attorneys

For the Respondent: Dean Caro & Associates