

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NUMBER: JR707/08

NOT REPORTABLE

In the matter between:

ETERNITY HEALTH CARE (PTY) LTD
t/a ETERNITY PRIVATE HEALTH

Applicant

and

COMMISSIONER TIMOTHY BOYCE N.O.

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

LINDA ELSEY

Third Respondent

JUDGMENT

LE ROUX AJ:

- 1 This is a review application in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act"). The applicant seeks to have an award made by the first respondent reviewed and set aside. It also requests the Court to substitute the award with an order to the effect that the third respondent's dismissal was substantively fair.
- 2 The facts in this matter are largely common cause. The applicant is a medical aid scheme that provides certain benefits to its members. The third

respondent, Linda Elsey ("Elsey"), was employed by the applicant as a mental wellness manager. In this capacity she and other employees in her department were tasked with loading certain information regarding members onto the applicant's computer systems.

- 3 On 14 August 2007 an incident took place between Elsey and the applicant's financial manager, a Mr Lamb ("Lamb"). The cause of the incident was the fact that Lamb's wife, a member of the medical aid scheme, had not been provided with a service that she was entitled to from the applicant. Lamb regarded Elsey as being responsible for this failure. Lamb had then reported the matter to the General Manager and the required work was done. Despite being asked to apologise to Elsey, Lamb had refused to do so.
- 4 On 31 August 2007 a Ms Kerr ("Kerr"), Elsey's immediate line manager, entered Elsey's office and requested her to load certain information contained in a questionnaire completed by Lamb's wife onto the system. Elsey refused to do so. Her reason for refusing to do so was that she felt that she was owed an apology by Lamb for his conduct during the incident of 14 August 2007. Kerr tried to persuade Elsey to do the work but she continued to refuse to do so. Kerr requested her to do the work at least five times. A few minutes later Elsey was requested to do the work by the General Manager, Mr Nel ("Nel"). She again refused to do the work, despite being asked to do so on at least two occasions. She asked Nel to leave her office. When he left, she slammed her office door after him.
- 5 As a result of the above incidents Elsey was charged with gross insubordination, gross insolence and dereliction of duty. She was found guilty.

The chairperson of the enquiry decided that summary dismissal would be too harsh a sanction and terminated her contract by giving notice of termination.

- 6 Elsey referred an unfair dismissal dispute to the CCMA. The subsequent arbitration proceedings were conducted by the first respondent ("the commissioner"). It was common cause at the arbitration that the applicant had committed acts of misconduct. The only issue before the commissioner was whether dismissal had been the appropriate sanction to apply.
- 7 The commissioner started his consideration of this question by pointing out that the Code of Good Practice: Dismissal states that it is generally not appropriate to dismiss an employee for a first offence unless the offence is so serious as to make continued employment intolerable. Elsey had almost five years' service with the applicant and had a clear disciplinary record. The question was therefore whether her misconduct was so serious as to justify dismissal.
- 8 The commissioner found that Elsey was at the end of her tether when she "snapped" on 31 August 2007. She had been running her department single handedly and performing the jobs of three people. She had been working extremely hard for the whole of August. This intolerable situation, together with the refusal of Lamb to apologise, had caused the employee to reach breaking point. The applicant had taken no steps to address this intolerable situation. It was unfair to dismiss an employee who had "imploded" because of employer inaction.

- 9 The commissioner pointed out that the fairness of a sanction of dismissal must inevitably entail a thorough consideration of all other sanctions to be imposed. In this case the chairperson of the disciplinary hearing had not considered any lesser sanction. If she had done so she would have come to the view that a less severe sanction such as a final written warning would have been a fair sanction. Save for the slamming of her office door, Elsey's misconduct had not been witnessed by any staff other than Nel and Kerr. The commissioner came to the conclusion that, on a "total conspectus of the evidence" the sanction of dismissal had been unfair. Elsey had not sought reinstatement and the commissioner ordered the payment of 3 months remuneration as compensation for the unfair dismissal. The procedural fairness of the dismissal had not been in dispute.
- 10 In its founding affidavit the applicant sets out a lengthy list of reasons why this award should be set aside. These are supplemented in the supplementary affidavit. Its attack on the award is two-pronged. The first is encompassed in its supplementary affidavit where it is stated that the "fundamental complaint" is that the commissioner subordinated the applicant's right to determine acceptable standards of behaviour by placing unreasonable emphasis on peripheral matters such as the work pressure placed on Elsey, the fact that no staff had witnessed the misconduct (with the exception of the slamming of the office door) and the incident involving Lamb some two weeks earlier.
- 11 Despite an initial reference to section 145 of the Act, the founding affidavit makes no attempt to link the grounds for review to any specific provision of this section. The supplementary affidavit does refer to a gross irregularity. The

applicant's heads of argument simply refer to the reasonableness test formulated in **Sidumo and Another v Rustenburg Platinum Mines and Others (2007) 28 ILJ 2405 (CC)**

- 12 In my view the award does not have the effect of undermining or limiting the right of the employer to set the standards it requires of employees in the workplace. The commissioner accepts the reasonableness and legitimacy of the rule against insolent or insubordinate conduct. He accepts that Elsey is guilty of misconduct. The issue is rather whether the sanction of dismissal is justified for contravening this rule in the circumstances.
- 13 The applicant argues that undue weight was given to certain factors at the expense of other more important factors. In coming to the conclusion that dismissal was not justified the commissioner took into account Elsey's clean record (linked to her length of service) the fact that she was under pressure at work, and the fact that the applicant had not assisted her in her work situation. The unresolved incident on 14 August 2007 as well as the fact that the acts of insubordination had taken place in Elsey's office out of the view of staff (with the exception of the slamming of the door) were also taken into account. In my view these are all factors that could have been taken into account by the commissioner. Mr Crafford, who appeared for the applicant, referred to factors such as seniority and the serious and repetitive nature of Elsey's conduct in support of the view that dismissal was justified. He also argued that the reliance placed by the commissioner on the fact that most of the events took place in Elsey's office and not in the view of other employees is misplaced and ignored the fact that one of the charges was that of insolence. Whilst I would

probably have given greater weight to these factors and would perhaps not have come to the same conclusion, this is not the test on review. In line with the decision of NAVSA AJ in **Sidumo** (at paragraph 110) one must consider whether the decision is not one to which a reasonable commissioner could have come. On this basis I cannot overturn the decision of the commissioner. To paraphrase the decision (at paragraph 119), when I take into account the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. If I adopt the approach adopted by Ngcobo J (at paragraphs 265 to 268) in the same decision and enquire whether a gross irregularity has been committed, I come to the same conclusion.

14 However, this is not the end of the matter. The applicant argues that in coming to his conclusion the Commissioner disregarded, or misconstrued, certain evidence. In certain respects his reasoning was also flawed.

15 A lengthy and often repetitive number of examples is provided:

15.1 the commissioner erred in finding that the reason for Elsey's conduct was work pressure. The applicant argued that the evidence established that her department was coping. The reason for the refusal to obey the instruction was that she was annoyed by the fact that Mr Lamb had not apologised and that she was annoyed and irritated by Lamb and Nel. Her refusal to obey the instruction was an attempt to hold the applicant to ransom;

- 15.2 the fact that Elsey was undergoing medical treatment was a "red herring";
- 15.3 the commissioner had erred in finding that the applicant was at fault in not assisting Elsey. The applicant argued that the evidence established that she had been offered assistance. Linked to this was the argument that the applicant had been held responsible for Lamb not apologising;
- 15.4 the commissioner had failed to take into account an incident of insolence that had occurred a month earlier;
- 16 As I understand it, Mr Crafford's argument is that the commissioner erred in assessing the relevant evidence. He disregarded certain evidence that should have been considered and considered certain evidence that should have been disregarded. He had regard to facts that were not, or should not, have been "properly before him".
- 17 I accept that in coming to a decision as to the appropriateness of the sanction imposed by the employer a commissioner must only consider facts that are properly before him and must not disregard relevant evidence. This is clear from **Sidumo**. See also **Karen Beef (Pty) Ltd v Bovane And Others[2008] 8 BLLR 766 (LC)** where it was stated that a decision which is not supported by any evidence or by evidence that is insufficient to reasonably justify a decision is reviewable.
- 18 The often expressed warning that a court should be careful not to blur the distinction between a review and an appeal seems to be relevant to at least some of the arguments made on behalf of the applicant.

- 19 I have gone through the record of the arbitration proceedings with the assistance of the arguments proffered the parties and have come to the conclusion that there is sufficient evidence to reasonably justify the commissioner's factual findings that lead to the conclusions he made. In so far as he accepted the evidence of Elsey in preference to that of other witnesses he can perhaps be criticized for not motivating his views in this regard but awards are not required to be "impeccable". See the comments by Davis JA in ***Ellerine Group Holdings v Commission for Conciliation, Mediation and Arbitration*(2008) 28 ILJ1899 (LAC)**. The contention that the arbitrator took into account evidence of Elsey that had not been put to the applicant's witnesses is also of less importance. It is clear from the question put to the witnesses what the essence of her case would be.
- 20 The Commissioner did not ignore relevant evidence. Much was made of the fact that the commissioner accepted that Elsey had a clean disciplinary record when the evidence established that there had been an incident approximately a month earlier. The evidence shows, however, that although the issue had been addressed with Elsey, no formal steps had been taken against her.
- 21 Two further points made by Mr Crafford should also be addressed.
- 22 He criticised the commissioner for taking the view that Elsey's request that the managing director should leave her office before she did something that she would regret, excused her behaviour was incorrect. This was in fact a further act of defiance rather than an attempt to defuse the situation. I can find no indication that this view was expressed by the commissioner when he analysed the facts and motivated his award.

23 He argued that the reasoning adopted by the commissioner in effect means that an employer in the position of the applicant is placed in an intolerable position because an employer cannot dismiss an employee simply because she is allegedly stressed at work. In my view this inference cannot be drawn from the award. Firstly, the award is not based on a mere allegation. It is based on a finding that she was in fact under stress. Secondly such an argument ignores that other factors taken into account by the commissioner in coming to its decision.

24 For the above reasons I find that the applicant has not made out a case that the award be set aside and reviewed.

ORDER

I therefore find that the application should be dismissed with costs.

LE ROUX AJ

On behalf of the Applicant: Mr Crafford

On behalf of the Respondents: Advocate Fourie

Date: 3 April 2009