

IN THE LABOUR COURT OF SOUTH AFRICA

Case No. D288/09

Not reportable

In the matter between:

TIGER BRANDS

Applicant

and

CCMA

First Respondent

COMMISSIONER SAROJINI BALKARAN

Second Respondent

IVAN JASPER DAVID

Third Respondent

JUDGMENT

GUSH, J.

1. In this matter the Applicant seeks to have the award of the Second Respondent reviewed and set aside. At the conclusion of the Arbitration the Second Respondent found that the Applicant's decision to dismiss the 3rd Respondent on the 26th August 2008 was unfair and ordered that the Applicant reinstate him retrospectively from the 1st December 2008, pay to the 3rd Respondent the amount of R30,887.24 in respect of arrear salary and declared that the 3rd Respondents service with the Applicant was to be regarded as unbroken service.

2. The background to and the facts surrounding the 3rd Respondents dismissal were as follows:

2.1. At the time of his dismissal the 3rd Respondent had been employed by the Applicant for 26 years as a storeman.

2.2. On the 20th August 2008 an incident took place between the 3rd Respondent and a fellow storeman, Mudaly, who had been employed by the Applicant for 21 years. It was this incident that ultimately lead to the Applicants dismissal.

2.3. The 3rd Respondent and his colleague were not on good terms and had previously been involved in heated exchanges. In his evidence Mudaly initially said that he had had a normal working relationship with the 3rd Respondent. However he subsequently conceded that there had been tension between them and that about two weeks prior to the incident the 3rd Respondent had complained to his manager that he, Mudaly, had disrespected the 3rd Respondent. This had resulted in the Applicant's unit manager, Pillay, meeting with both 3rd Respondent and Mudaly in an attempt to mediate and resolve their dispute.

2.4. Under cross examination Mudaly also conceded that two days prior to the incident he had had a verbal altercation with the 3rd Respondent over the phone. ("we exchanged words")

2.5. On the day in question 3rd Respondent had phoned Mudaly to enquire about sugar usage figures. Mudaly explained he advised 3rd

Respondent that it was his responsibility to calculate the figures and that the requisition he needed to do so was still in his office as the 3rd Respondent should have but had not fetched it. His evidence was that he felt that the 3rd Respondent “was a bit abrupt so [he] put the phone down” and processed the requisition himself.

2.6. The 3rd Respondent evidence was that he had as a result of this telephone conversation then decided to go to Mudaly’s store and fetch the document. He was clearly annoyed at what had transpired. The 3rd Respondent’s evidence was that when he arrived at the store he had argued with Mudaly which argument had become heated. Mudaly however said that when he arrived at the store the 3rd Respondent was enraged.

2.7. What is noteworthy is that the versions of Mudaly and the 3rd Respondent regarding what transpired during the incident are remarkably similar.

2.8. Mudaly’s evidence was as follows:

“[3rd Respondent was] “very angry... I told him to go go...started swearing at me ... He said he’ll fuck me up and he’ll tell my mother, and he will tell Rhyno (his manager), he’s not worried, he don’t fright (sic) for anyone. ... Then he swore my mother’s poes (sic) and he walked towards me. ... He came with his clutched (sic) fist, pushed my face down. ... He pushed me ... and when he got to the door he said he would catch me outside, its not finished yet , he’ll fuck me up outside”

2.9. The 3rd Respondent's version was:

"...he said go go go from here... his tone was high he said get out of my office ... At the end of the argument, he picked his hand (sic) so he leaned forward and I just pushed him and I said 'I'll sort you out outside ... it was in the heat of the moment... we were exchanging words ... I was swearing ... then the situation got heated up... I pushed with the back of my hand"

2.10. Mudaly's evidence of what transpired after the incident is indicative of how seriously Mudaly regarded the incident and the extent to which he felt intimidated. He explained that he had reported to his manager, complaining that he didn't *"expect someone to swear on my mother's toes early in the morning"*. His manager had asked for an explanation of what had happened. Thereafter Mudaly was told to report the incident to "HR", he had initially refused to do so as he wanted his manager to sort it out between him and 3rd Respondent, but was told to report which he then reluctantly did. Mudaly explained that he wanted his complaint to be dealt with informally without having to suspend 3rd Respondent. He had wanted the matter resolved without the 3rd Respondent being suspended or fired. He had in fact later attempted to withdraw his complaint.

2.11. 3rd Respondent was charged with misconduct viz.

Charge: 1. ASSAULT in that on the 20TH August 2008 at about 06H25 you physically assaulted a fellow employee in the Candy Stores office which is in contravention of company policy and/or rules.

INTIMIDATION in that on the 20TH August 2008 at about 06H25 you verbally intimidated a fellow employee by stating that you would catch him outside the company premises which is in contravention of company policy and/or rules.”

- 2.12. 3rd Respondent pleaded guilty to the misconduct at the disciplinary hearing that followed.
- 2.13. At the conclusion of the disciplinary enquiry the 3rd Respondent was found guilty and was dismissed by the Chairperson of the enquiry who found that he had no choice but to apply the Applicant's rules which he held required him to dismiss for assault on the strength that there was precedent for dismissal in similar circumstances.
- 2.14. The Applicant's "*Rules and Notes on Severity ... Guidelines for Sanction*" indicate under the heading "*Assault and/or Intimidation*" that the recommended sanction for "*Assault and /or fighting*" is summary dismissal, but for "*Less serious assault (e.g. a push)*" a final written warning is the suggested sanction. There was no explanation given why the recommended lesser sanction was not imposed.
- 2.15. The 3rd Respondent appealed against the sanction on the grounds that the decision to dismiss him was too harsh. His appeal against his dismissal was unsuccessful also on the on the grounds that the Applicant's rules provided for summary dismissal.

2.16. The 3rd Respondent then referred a dispute regarding his unfair dismissal to the 1st Respondent again on the grounds that the sanction imposed on him was unfair and too harsh.

3. The Applicant complains that the 2nd Respondent's award declaring the Applicant's decision to dismiss 3rd Respondent was unfair is not *"that of a reasonable and objective decision maker was unjustifiable in relation to the reasons advanced and that accordingly the 2nd Respondent exceeded her powers ... and committed a gross irregularity including making mistakes of law, resulting in her misconceiving the nature of the enquiry..."*
4. A further ground of review concerned the 2nd Respondent's decision to disregard a statement of an erstwhile employee. At the arbitration the parties had included in their bundle of documents a statement by one Devi Ramjogi. Ramjogi had witnessed the incident but was not called to give evidence by either party. The Applicant wished to rely on the statement and at the end of the arbitration gave notice of its intention to apply to reopen its case to deal with this statement. This application was not pursued and the Applicant argued that the statement should nevertheless be "accorded full evidentiary weight".
5. In her award the 2nd Respondent considered the admissibility of the statement and concluded that she could not place any reliance on the statement.
6. The Applicant argued that the 2nd Respondent's reasons in deciding that she could not place any reliance on the statement of Ramjogi

amounted to a failure on her part to properly apply the criteria enumerated in Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998. Consideration of the 2nd Respondents award the award shows that she carefully considered the statement and in did in fact take into account the said criteria in exercising her discretion. It is clear from the record and the facts that there was no explanation as to why Ramjogi did not give evidence (save that he had been dismissed by the Applicant) and that the statement was at odds with the versions of the so called intimidation given by both Mudaly and 3rd Respondent. There is nothing to suggest that the rejection of the statement by the 2nd Respondent is in any way irregular or reviewable.

7. As far as the charge of intimidation is concerned the Applicant averred that the 2nd Respondent erred in failing to pay due regard to the importance of this issue. 2nd Respondent considers in some the import of this charge in her analysis of the evidence and quite justifiably concludes that in the absence of any reference thereto by the chairperson of the disciplinary enquiry and having regard to the evidence did pay due regard to the charge of intimidation. The charge was specific viz. that 3rd Respondent “*you verbally intimidated a fellow employee*”. There is no evidence that Mudaly felt intimidated. In his statement he did not make any reference to being intimidated and In fact his evidence suggests that he was not in any way at all intimidated. His evidence as to his initial complaint, his reluctance to formally report the matter and his attempts to withdraw the complaint do not justify a finding that he was intimidated.

8. As far as the appropriateness of the sanction is concerned the Applicant relied mainly on what it described as an error on the part of the 2nd Respondent in that she took into account Mudaly's actions surrounding the incident. There is nothing in the record to justify this conclusion. The evidence clearly suggests that the misconduct was the result of a spat between two colleagues precipitated by the telephone conversation which culminated in Mudaly putting the phone down on the 3rd Respondent.
9. Regarding the consistent application of the Applicant's *Rules and Notes on Severity ... Guidelines for Sanction* it is relevant that Mudaly described the "assault" both in his statement and in his evidence at the arbitration as having been "**pushed**". This description not only accords with the 3rd Respondent's evidence but importantly with the definition of "Less serious assault (e.g. a push)" as set out in the Applicant's "Rules and Notes on Severity...Guidelines for Sanction" where the recommended sanction is a final written warning. There is absolutely no evidence to support a finding that it was a serious assault. The Applicant not call the chair of the disciplinary hearing to explain his reasoning and adduced no evidence to substantiate why it had been necessary to deviate from the recommended sanction.
10. I am not satisfied that the finding of the 2nd Respondent that the sanction was inappropriate is reviewable. It is abundantly clear from the evidence of both Mudaly and 3rd Respondent that their relationship was strained e.g. they had "had words" some two or less days prior to the incident.

Mudaly conceded that his conduct on the morning in question *viz* putting he phone down on 3rd Respondent could have angered him. Mudaly's view of how seriously he took the incident is demonstrated in his evidence that after the incident his first concern was that 3rd Respondent had insulted his mother. His view that the matter could be resolved through their managers informally does not suggest that he had felt particularly threatened intimidated or seriously assaulted. His evidence certainly does not support the conclusions reached by the Applicant's disciplinary and appeal committees regarding the seriousness of the matter and in particular it certainly does not justify their view that they were required by the Applicant's "*Rules and Notes on Severity ... Guidelines for Sanction*" to impose a sanction of dismissal.

11. The evidence adduced surrounding the consistency issue did not support the averment that the findings of the 2nd Respondent were reviewable. That evidence was more in keeping with a practice that minor incidents involving pushing were visited with a sanction less than dismissal. The evidence the Applicant lead at the arbitration concerning consistency simply confirmed that where a push was involved dismissal was not the sanction imposed but rather, as recommended, a written warning was imposed.
12. The circumstances surrounding the incident, the fact that the 3rd Respondent had pleaded guilty at the disciplinary hearing and had 26 years service certainly supports the 2nd Respondent's conclusion that the 2nd Respondent's finding that the sanction was inappropriate and unfair.

13. In the circumstances I am not persuaded as averred by the Applicant that the 2nd Respondent's award was not reasonable and objective, nor that her decision was "unjustifiable" in relation to the reasons given for it.

14. I accordingly dismiss the Application with costs.

GUSH, J

Date of Hearing: 9th June 2010

Date of Judgment: 26th July 2010.

Appearances: For the Applicant: Advocate Swain, instructed by
Macgregor Erasmus Attorneys;

For the Respondent: R.B. Donnachie; Henwood
Britten and Caney