

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Not Reportable
CASE NO. D 739/10

In the matter between:

TOYOTA SA MOTORS (PTY) LTD

Applicant

and

CCMA

First Respondent

L PILLAY N.O

Second Respondent

SHERBON SAUNDERS

Third Respondent

Date Heard: 23 AUGUST 2011

Date of Judgment: 9 SEPTEMBER 2011

JUDGMENT

REDDY AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (the LRA)¹ to review and set aside or correct an arbitration award dated 16 June 2010 under

¹ 66 of 1995.

case number KNDB 12896-09 handed down under the auspices of the Commission for Conciliation Mediation and Arbitration (the first respondent).

[2] The Applicant seeks to have the award set aside and substituted with an award that the dismissal of the third respondent was substantively fair.

Factual background

[3] The salient aspects of the matter are that the third respondent was employed as a team member in the production line fitting airbags. He was employed from 10 November 2005 until his dismissal on 23 July 2009. At the time of his dismissal, he earned a salary of R 8 330.40 per month.

[4] On 6 July 2009, the third respondent was suspended and charged with misconduct for "Being absent from work (AWOL) without authority / leave for four days or longer without advising the company of your whereabouts and failing to provide acceptable reasons to management from 29 -06-09 to 03-07-09."

[5] The third respondent was married on 27 June 2009. He was absent from work on 25 and 26 June 2009. On 26 June 2009, the third respondent called his direct supervisor, Mr Sabapathy (Sabapathy), and informed him that he was to be married the next day, and required leave from 26 June to 3 July 2009.

[6] Sabapathy informed the third respondent that he did not have authority to grant leave and instructed that he return to work on Monday, 29 June 2009.

[7] The third respondent did not report for work from 26 June to 3 July 2009. He returned to work on 6 July 2009.

[8] An internal disciplinary and an appeal hearing were held. The third respondent was found guilty and dismissed.

[9] At the arbitration hearing, two witnesses, on behalf of the applicant, testified that an employee had to inform the team or group leader on the first day of any absence. The third respondent was aware of the rule.

[10] The third respondent did not contact the applicant between 29 June and 3 July 2009. On his return to work, the team leader enquired of the third respondent as to the reasons for this absence. The third respondent's response was that he was on honeymoon. He was informed of the wrongfulness of his actions and he responded that the employer can "do what the fuck they want to do".

[11] Policy dictates that leave had to be requested more than seven days in advance.

[12] A telegram was sent by human resources on 1 July 2009 but it was unknown whether the third respondent received it. The telegram required the third respondent to

contact the applicant within 24 hours or face disciplinary action. The telegram was sent because the third respondent's whereabouts were unknown to the applicant.

[13] The third respondent testified that he did not remember the applicant's policies on leave. He understood that if an employee did not report for work for three days he would face a charge of being absent without leave.

[14] He understood that once he had requested leave from the team leader, he, the team leader, would go to the group leader and to the manager for the leave to be authorised.

[15] He requested leave from the team leader who requested that he returns to work on Monday with his marriage certificate. He believed it to be Monday 6 July and not Monday 29 June 2009. He presented his marriage certificate on his return on 6 July 2009.

[16] He denied receiving the telegram from the applicant as he only received post at his physical address. The telegram was sent to his box address. Had he known about the telegram he would have contacted the applicant immediately.

[17] He conceded that it was unacceptable to stay away from work without informing the applicant.

[18] The second respondent found that the third respondent was aware of the leave policy that it was an offence to be absent for four days or longer without advising the applicant of his whereabouts and failing to provide acceptable reasons to management. The offence attracted a sanction of dismissal.

[19] He also found that the third respondent was untruthful in stating that he believed that he could return to work on 6 July and not on 29 June 2009.

[20] He held that in charging the third respondent with “being absent from work without authority (AWOL) without advising the Company” of his whereabouts and “failing to provide acceptable reasons to management”, the applicant was suggesting that it had no idea why the third respondent was absent. This was not true as the applicant was aware that the third respondent's request for leave pertained to his getting married.

[21] The second respondent found that the factual circumstances of the absence did not fall into the scope of desertion as alleged by the applicant. There was no evidence that the third respondent had abandoned his employment and the applicant could not reasonably believe this to have occurred. The second respondent reasonably found that the previous offences of poor time keeping were not relevant to the charge in question. He accepted that the third respondent had a clean disciplinary record. He found that if the principle of progressive discipline is applied, the sanction of dismissal was not appropriate. He reinstated the third respondent with limited retrospective backpay.

Grounds of review

[22] The applicant submitted that the second respondent handed down an award that is not an award of a reasonable and objective decision maker, failed to apply his mind, misconducted himself, committed a gross irregularity and exceeded his powers by acting unreasonably or unjustifiably by finding the sanction of dismissal to be too harsh.

Evaluation

[23] The applicant bore the onus of proving that the dismissal was the appropriate sanction.

[24] The analysis of the evidence by the second respondent commenced at paragraph 17 and ends at paragraph 32 of the award. It is detailed and careful.

[25] The second respondent in weighing the evidence before him considered the probabilities of the versions of each side.

[26] The second respondent found the third respondent's version, that he was unaware of the leave policy and that he was return to work on 6 July and not 29 June 2009, unbelievable. He therefore found that the third respondent was aware of the leave policy and that he had to return to work on 29 June 2009. Once this finding was made, it then followed that the third respondent was insubordinate in not returning to work on 29 June 2009.

[27] The second respondent however thereafter found that the applicant's version, that it was unaware of the third respondent's whereabouts, was unbelievable as it knew that he was on honeymoon. Being on honeymoon was an acceptable reason for being absent from work for the days in question. He also found that the third respondent had not deserted his job.

[28] These findings are unreasonable for the following reasons:

- i. The third respondent had conceded that it was unacceptable to stay away from work without informing the applicant;
- ii. The third respondent knew that he had to return to work on 29 June 2009. In staying away from work from 29 June to 3 July he was absent without leave – this supports the first portion of the charge that he was absent for four days or longer without authority [and] without advising the company of his whereabouts;
- iii. The third respondent was insubordinate in not returning to work on 29 June 2009 as instructed to do so;
- iv. The reason that third respondent was on honeymoon was not borne out by his evidence. He testified that he was busy with “chores” after his wedding during the week 29 June to 3 July 2009 – this is not a honeymoon. The second respondent's finding that being on honeymoon was an acceptable reason for the absence was not a reasonable finding;
- v. When he returned to work he furnished being on honeymoon as the reason for his absence – this was dishonest;

- vi. He was insolent when he uttered that the applicant can “do what the fuck they want to do”;
- vii. During the hearings he perpetuated the lie that he was on honeymoon.

[29] It is evident from the above that the third respondent's conduct was dishonest, insolent and insubordinate. This is hardly the conduct of an employee who should objectively be reinstated into his job.

[30] Whilst the charge he faced does not necessarily imply dishonesty on the part of the third respondent, his conduct in defending his actions should have been considered by the second respondent when he determined the appropriateness of the sanction.

[31] Even though the third respondent had a clean disciplinary record, the charge he faced attracted the sanction of dismissal as a first offence. Aggravating this is his conduct and the fact that this Court, in other cases, has not condoned dishonesty.

[32] It was also submitted that the third respondent's lack of remorse for his conduct does not support a reinstatement.

[33] I am inclined to agree with the applicant. It is understandable if the dishonesty relating to the absence and the vulgar and disrespectful utterance referred to above were knee-jerk reactions and the third respondent apologised for them. It is also understandable that an employee is not inclined to return to the dour responsibilities of

one's job immediately after the celebration of his marriage. Even if this were so, the third respondent had responsibilities toward the applicant and he should, at some stage in the various proceedings, have recorded that he valued his job and the tasks assigned to him.

[34] This would have in some way given the third respondent some credence and could have supported an award of reinstatement. Unfortunately for the third respondent, this was not his evidence.

[35] From the above, it is clear to me that the second respondent in finding that dismissal was substantively unfair and reinstating the third respondent did not reach a decision that a reasonable decision maker would have reached.

[36] In the premises, after having considered the law and fairness in respect of the costs order, the following order is issued:

1. The review application is upheld;
2. The award is reviewed and set aside;
3. The award is replaced with an award that the dismissal of the third respondent is substantively fair;
4. There is no order in respect of costs.

Reddy AJ

Appearances:

1. For the applicant: Mr B MacGregor of MacGregor Erasmus Attorneys
2. For the respondent: Mr Motane of NUMSA