



THE REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable
Of interest to other judges
Case no: JR 314/2011

In the matter between:

MONTE CASINO

Applicant

and

COMMISSION FOR CONCILIATION,

First Respondent

MEDIATION AND ARBITRATION

Second Respondent

COMMISSIONER NTOMBELA

Third Respondent

TONY VINCENT MASILO

Heard: 06 August 2012

Date delivered: 27 December 2012

Summary: Review application- inconsistent application discipline

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the second respondent (the Commissioner) under case number GAJB 27207–10, in terms of which the dismissal of the third respondent (the

employee) was found to have been unfair. The applicant was for this reason ordered to reinstate the employee.

Background facts

- [2] The employee who was employed by the applicant as a Casino dealer was dismissed on 23 August 2010. The employee was dismissed for gross misconduct relating to the allegation that he was rude to one of the applicant's customers.
- [3] The employee being unhappy with the outcome of the disciplinary hearing referred a dispute to the third respondent concerning an alleged unfair dismissal.

Grounds for review

- [4] The applicant contends that the arbitration award is susceptible to review because the Commissioner failed to apply his mind to the issues before him in particular relating to the principles governing inconsistency in disciplinary matters. In the supplementary affidavit, the respondent contends that the Commissioner misconceived the nature of the enquiry before him concerning the issues of the sanction and inconsistency.

The arbitration award

- [5] In his analysis and evaluation of the evidence before him the Commissioner identified the issue raised by the employee to relate to the inconsistent application of discipline.
- [6] In arriving at the conclusion that the applicant acted inconsistently in dealing with the sanction imposed on the employee, the Commissioner relies on the decision in *National Union of Mineworkers and Others v Free State Consolidated Goldmines (Operations) Ltd –President Steyn and others*¹ in which the court held that, "like cases should be treated alike."
- [7] The Commissioner rejected the explanation of the applicant that it has previously acted against employees, in a similar situation as that of the employee. In this regard the Commissioner distinguished the case of Mr Larry Mntambo, which the applicant sought to use to demonstrate that it had previously taken action against employees who had been rude to

¹ (1983) 14 ILJ 341 (LAC),

customers. The Commissioner distinguished that case on the basis that the employee in the Mntambo's matter was not only rude but was also accused of having assaulted a customer.

- [8] The Commissioner further found that, but for the inconsistent application of discipline by the applicant, he would not have hesitated to confirm the dismissal of the employee. It was for the above reasons that the Commissioner found that the sanction of dismissal, which was imposed on the employee was too harsh, and as indicated earlier, ordered the reinstatement of the employee, with a final written warning valid for 12 months.

The legal principles

- [9] The issue of the application of the consistency principle in disciplinary hearings received attention by this court in *Hullet Alluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others*², a judgment which is relied on by the applicant in support of its case. In considering the issue the court analysed a number of judgements including in particular the leading case of *SACCAWU v Irvin & Johnson*³

- [10] In the *Irvin and Johnson*, Labour Appeal Court at paragraph [29] held that:

"In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle.' Consistency is simply an element of disciplinary fairness. Every employee must be measured by the same standards. Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair "(references not included).

- [11] And at paragraph [35] the Court went further to say:

"If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It

² [2008] JOL 21224 (LC)

³ [1999] 20 ILJ 2302 (LAC).

cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or is induced by improper motives or, worse, by a discriminating management policy. Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself."

- [12] The decision of *Irvin & Johnson* was confirmed by the Labour Appeal Court, in *Gcwensha v CCMA & Others*⁴, where the court observed that:

"Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards."

- [13] The consideration of the gravity of misconduct in cases where inconsistency has been raised as an issue plays a critical role and is a factor to take into account in weighing particular whether the sanction imposed by the employer is unfair.

- [14] It is trite that the key person in determining whether a dismissal is fair or otherwise is the arbitrator who does that by answering the simple question posed in *Engen Petroleum Ltd v CCMA & others* as being, "Is this dismissal fair?" The Commissioner answers this question on the basis of his or her own sense of fairness and as stated in *Engen Petroleum*, "The question cannot possibly be answered on the basis of somebody else's notion of fairness."

- [15] In *Westonaria Local Municipality v SA Local Bargaining Council & others*⁵ this court in dealing with the same issue of inconsistency held that:

⁴ 2006] 3 BLLR 234 (LAC)

'It has been consistently held by the courts that the responsibility for determining the appropriateness of dismissal as a penalty is a matter to be left to the discretion of the arbitrator. In this respect the Constitutional Court in *Sidumo* said the following:

'[75] It is a practical reality that, in the first place, it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are, therefore, no competing 'discretions'. Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace."

[20] At paragraph [78] of its judgment the Constitutional Court held that:

'In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.⁶"

Evaluation

[16] The two main complaints of the applicant as concerning the outcome of the arbitration award is that the Commissioner failed to apply his mind to

⁵ [2009] JOL 24695 (LC),

⁶ *Sidumo and Another v Rustenburg Platinum Mines and Others* 2008 (2) SA 24

the legal principles governing inconsistency in disciplinary matters and reinstatement.

- [17] In seeking to show that it was consistent in its application of discipline the applicant referred to the case of Mr Mtambo who it had dismissed. The case of Mr Mtambo is distinguishable from that of the employee and that of Ms Tsitsi. Mr Mtambo was in addition to being rude charged with assaulting a customer. The charges against him reads as follows:

"Gross Misconduct: in that on 26/06/2010, while dealing on AR19 you grant the company into disrepute by approaching a guest on the table and assaulting him."

- [18] The issue of inconsistency in the present matter has to be assessed in the context wherein Ms Tsitsi was also charged for the same offence, found guilty and given a final written warning, and not been dismissed.

- [19] It is common cause that the employee was previously found guilty and issued with a verbal warning for the same offence, which at the time of the disciplinary hearing had expired. A year and a half later the employee was charged with the following offence:

"Gross misconduct: conduct not in the best interest of the company in that on the 18 July 2010, while allocated to AR4:

1. You are rude to the guest and contravened the language policy.
2. Your behaviour or conduct was such that a proper name of the company into disrepute."

- [20] It was not denied and as will appear later the record shows that Ms Tsitsi also received several warnings for misconduct over a period of four years. The charge for which she received the final written warning for the misconduct she committed on 16 May 2010, read as follows:

"Misconduct: conduct not in the best interests of the company in that on 16th May 2010, while allocated to the AR4;

1. You refused to place bets for a customer.

2. You are rude to a punter in that you, stated that you don't care if management gets informed about the conduct,
3. You grant the company's name into disrepute."

[21] In comparing the facts of the case of Ms Tsitsi and that of the employee, there can be no doubt that the applicant acted unfairly, in dismissing the employee. The charges of the two employees which are quoted above, are essentially the same. And more importantly, the employee pleaded guilty and sought to explain his behaviour on the day in question. The employee explained that he was feeling stressed and short-tempered on the day in question and attributed that to the two operations he had recently undergone.

[22] It is clear that the employee showed remorse by immediately pleading guilty to the charges, requesting to be taken for training and being given a mentor. Ms Tsitsi on the other hand pleaded not guilty and showed no remorse for her conduct. The testimony of the witness, who initiated the charges against both the employees indicates that Ms Tsitsi initially declined to undergo training when it was offered to her.

[23] The hurdle which the applicant faced at the arbitration proceedings was that of explaining the inconsistency in the application of discipline. The fact that the disciplinary hearings were handled by two different chairpersons is in my view insignificant when regard is had to the fact that the initiator was the same person. It was in my view, the duty of the initiator, as the representative of the applicant, to have brought to the attention of the chairperson of the employee's disciplinary hearing that in a similar case another employee received a final written warning, and not dismissal.

[24] I agree with the Commissioner that but for the failure to provide a justification for the inconsistent application of the discipline the appropriate sanction for the employees would have been dismissal. This would have been the case because in terms of the provisions of the applicant's disciplinary code. This was a dismissible offence in terms of Item 53 of the disciplinary code of the applicant reads as follows:

“There shall be no counselling sessions, no verbal warnings, no written warnings and no final written warnings for, inter alia, the following offences:

1. insubordination,
2. Abuse towards or wilful disregard of the needs of the guest.’

[25] The approach adopted by the applicant in the case seems to have treated the disciplinary code as a guideline, an approach that has to be welcomed because it accords with progressive discipline that fairness would always expect a flexible approach to discipline particularly where there is no evidence showing breakdown in the relationship between the parties. In the case of the employee where the facts are very much the same as that of Ms Tsitsi, where there are even strong mitigating factors and there is no evidence that shows breakdown in the relationship between the parties, the applicant adopted a differentiated and clearly unfair approach.

[26] It is for the above reasons that I find no irregularity or unreasonableness in the Commissioner’s conclusion.

Re-instatement

[27] There is nothing in the arbitration award nor the record that shows that the Commissioner considered the provisions of section 193 of the LRA. In this regard section 193(2) of the Labour relations act reads as follows:

“(2) The Labour Court or the Arbitrator must require the employer to reinstate or re-employ the *employee* unless -

- (a) the *employee* does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or
- (d) the *dismissal* is unfair only because the employer did not follow a fair procedure.”

[28] I agree with the applicant that the decision of the Commissioner is reviewable in as far as the issue of reinstatement order is concerned. The question that then arises is whether this failure by the Commissioner vitiates the whole of the arbitration award, if it does not the question that then arises is whether the matter should be remitted back to the Commissioner for consideration of this point.

[29] In my view, the failure by the Commissioner to properly exercise his discretion in terms of section 193 of the LRA does not vitiate the whole of the arbitration award. I am also of the view that in the interests of expeditious resolution of the dispute, the matter should not be remitted back to the CCMA but that it be considered by this court.

[30] It is trite that the primary relief in the case where it has been found that the dismissal was substantively unfair is reinstatement. There is no evidence that the disciplinary code is part of the contract of employment of the employee. I will for the reason that the applicant in the case of Ms Tsitsi deviated from the provision of clause 53 of the disciplinary code and on the authority of *Highveld District Council*,⁷ treat it as a guideline. Adopting the approach which the applicant followed in the matter *Ms Tsitsi*, I see no reason why the primary relief of reinstatement should not apply in the case of the employee. On the facts and the circumstances of this case, I see no reason why the primary relief of reinstatement should not be made.

[31] As concerning the costs, I see no reason in law and fairness why the costs should not follow the results.

Order

[32] In the premises, the applicant's application to review the arbitration award made under case number GAJB 2727/10, is dismissed with costs.

Molahlehi J
Judge of the Labour Court of
South Africa

⁷ *Highveld District Council v CCMA and others* (2002) 12 BLLR 1158 (LAC).

APPEARANCES

FOR THE APPLICANT: Deneys Reitz Attorneys

FOR THE RESPONDENT: Adv S Msimanga instructed by Maringa Attorneys

LABOUR COURT