IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Of interest to other judges

Case no: JR637/2012

In the matter between

Numsa obo William Julian Harris **Applicant**

and

Bargaining Council **First respondent**

COMMISSIONER CLAIRE HOCK **Second Respondent**

Hitachi Construction Machinery SA Company Ltd **Third Respondent**

Heard: 29 July 2015

Delivered: 29 July 2015

***EX TEMPORE* JUDGMENT**

COETZEE AJ

[1] This is the ex-tempore judgment in case JR637/2012 between the National Union of Metalworkers of South Africa on behalf of William Julian Harris against Hitachi Construction Machinery SA Company Ltd, the Third Respondent. The First and Second Respondents are the Bargaining Council and the Commissioner respectively.

[2] The Applicant asks the court to set aside an arbitration award dated 21 February 2012 with reference MEGA32669 in which the Commissioner determined that the dismissal of the Applicant, William Julian Harris was fair.

[3] The dismissal of the Applicant came about as a result of being tested positive for the use of cannabis.

[4] The employer conducts random tests on its employees and in this particular case a random test was conducted and some three or four individuals tested positive.

[5] What then happens in terms of the procedure is that they receive a warning and get paid leave for a determined period where after they are re-tested and then depending upon the outcome of the re-test, certain consequences follow.

[6] The Applicant was granted 30 days paid leave where after he had to submit to a retest. The Applicant after 34 days was re-tested and again tested positive.

[7] In this regard the issue arose as to whether 34 days, or 30 days as testified by the employer, was a sufficient period of time in which to become clean. The evidence by the employer was that generally 30 days were sufficient and then people normally were clean.

[8] But there are further evidence from the employer indicating that it may take from six to nine weeks for a person to get rid of the cannabis in the body. The issue as to how long it takes the body to clean itself from the substance was never pertinently dealt with by the Commissioner, who in fact referred to the various periods of time mentioned but he did not make a finding.

[9] The employer charged the employee with a breach of the following rule:

> 'You have tested positive for cannabis. Now we draw your attention to two Regulations in terms of the Occupational Health and Safety Act. Those two regulations state explicitly that it is a breach of the Act and the Regulations to be under the influence and that would include the influence of cannabis'

[10] What the employer needed to prove to justify the dismissal of the employee was that the employee was under the influence of a substance in breach of the two Regulations.

[11] A breach of the Regulations demand being under the influence, not merely testing positive for a prohibited substance.

[12] During the arbitration, the employer was limited to the reasons advanced for dismissing the employee. The Employer attempted to justify a case to establish that the reason why it dismissed the employee was because the employee tested positive in breach of the two Regulations.

[13] It was common cause that he employee did not show any sign of being under the influence of any drug. He was conducting his work properly. It was a random test and it so happened that he tested positive for the use of cannabis.

[14] There can be no doubt that in order to breach the Regulations that the employee had to be under influence of a drug such as cannabis.

[15] All that the employer established was that he tested positive for use of cannabis and on the employer's evidence he could have tested positive for another six weeks without having been under the influence of cannabis.

[16] Dismissing the employee after a disciplinary inquiry on a lack of evidence that he was under the influence is unfair. That was a substantive problem for the employer.

[17] The same case is put before the commissioner and the commissioner adopted the same reasoning as that of the employer. The Commissioner effectively equated testing positive with being under the influence which is certainly not what the law requires in this regard.

[18] Being under the influence has a specific meaning and testing positive has a different meaning - the one does not equate to the other.

[19] This Court has the greatest sympathy for an employer who wishes to protect its employees and its equipment and to comply with OHSA and have a save work environment, but then the employer must go about it in the correct way.

[20] The employer introduced the concept of a zero tolerance policy during the arbitration. This really is a red herring because that is not what the employee was charged with.

[21] The employee was not charged with the breach of a zero tolerance policy. A zero tolerance policy that the Commissioner was not told what it is or exactly what it means.

[22] The only rational interpretation of this 'policy' is as suggested on behalf of the Applicant that it relates to enforcing the employer's policy with regard to the Use and Abuse of Alcohol and Drugs as contained in its disciplinary code without exception.

[23] It means the employer has a zero tolerance policy in respect of the provisions of its disciplinary code.

[24] There is no evidence that there was a different policy with a different content and if so, that the employee was charged with a breach of that other policy.

[25] No reasonable commissioner could have come to the conclusion that the employee was under the influence, merely for having tested positive for cannabis. That is so unreasonable that it stands to be reviewed and set aside.

[26] My finding is that the Commissioner rendered an award that was unreasonable to the extent that no reasonable Commissioner would have rendered.

[27] As far as costs are concerned, I am not persuaded that a cost order is appropriate having regard to the principles that apply. It is fair and equitable to not make any order for costs.

[28] I make the following order:

[28.1] The arbitration award of 21 February 2012, reference MEGA32669 is hereby reviewed and set aside and the matter is referred to the First Respondent for arbitration before a different commissioner.

[28.2] There is no order as to costs.

_____

Coetzee AJ

Acting judge of the Labour Court

Appearances:

For the Applicant[s]: David Cartwright Attorneys

For the Respondent[s]: Fluxmans Inc