REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

~~Reportable~~/Not Reportable

Case no: JR 2493/2012

In the matter between:

ENGEN STARGAN (PTY) LTD t/a KROONVAAL 1 STOP	Applicant
and	
NUMSA obo MARIA PULANE NTOAHAE	First Respondent
E N THOABALA	Second Respondent
DISPUTE RESOLUTION CENTRE OF THE	
MOTOR INDUSTRY BARGAINING COUNCIL	Third Respondent

Heard: **9 July 2015**

Delivered: **13 November 2015**

JUDGMENT

Bank; AJ

[1] This is an application for the review of an arbitration award handed down by the second respondent ("the Commissioner") on 26 August 2012 in which the dismissal of the first respondent ("the employee") was found to be substantively unfair. The applicant ("the employer") was ordered to make a retrospective payment to the employee equivalent to four months' salary in the amount of R9,052.20 before 30 September 2012 and she was also reinstated with effect from 15 September 2012.

[2] The employee was dismissed on 20 March 2012 for gross misconduct in having taken a hamburger without permission and without following the proper procedure for the employer's staff to purchase food. The employee was working at the employer's Wimpy Restaurant found on the N1 Highway between Johannesburg and Kroonstad.

[3] The evidence from the employer is to the effect that the proper procedure for staff wishing to purchase food is to inform the manager of the Wimpy that they wish to do so, whereupon the manager must go to the cashier, order the food on behalf of the employee, accept money from the employee for payment of such food and pay the cashier. Once the manager obtains a cash register slip from the cashier, he must then sign it. The slip is taken to the restaurant, the food is ordered, and then given by the manager with the signed register slip back to the employee who consumes the food (presuming such food has not gotten too cold by this time).

[4] The incident in question was discovered when the employer viewed certain video footage in relation to an investigation into another employee's

disciplinary transgression. This led to a disciplinary enquiry against the employee in which it was found that she had been dishonest in what she had done. A sanction of dismissal was imposed.

[5] Thereafter, the employee referred a dispute to the DRC for the MIBC and the matter was arbitrated at Welkom on 9 July 2012.

The arbitration award

[6] During the arbitration proceedings, certain video footage was shown to the Commissioner and oral evidence led as well. Sina Bangane ("Bangane"), the Wimpy manager, testified on behalf of the employer that co-employees could only purchase food from her own allowance with her permission, provided that she was consulted first. Under cross-examination she appears to have conceded that she had earlier testified at the disciplinary enquiry that she had in fact consented to allow the employee to purchase a Dagwood sandwich and had also earlier testified at the enquiry that this was not the first time the employee had obtained food in this manner. Bangane, however, denied this at the arbitration.

[7] The employee's managing director Mr JJ Du Toit also led evidence of some 10 written warnings that had been handed down to the employee in question between 13 January 2011 and 25 February 2012. All of these warnings were, however, regarding failures to adhere to certain procedures or mistakes made in the course of work. None of these constitute offences involving dishonesty nor was a final written warning ever imposed on the employee.

[8] The employee testified that she had worked as a griller at the Wimpy Kroonvaal for some nine years and vehemently denied that she had stolen from the company. She did acknowledge that she had taken a Dagwood sandwich on the day but this had been done with authorisation and permission. She gave testimony regarding her friendship with Bangane who would sometimes buy food for the employee, despite the rule that this should

not be done without a cash register slip being provided. She confirmed that she and Bangane would share food in this manner.

[9] Only the substantive fairness of the dismissal was in issue. The Commissioner found that there was indeed a rule in place regarding the correct procedure for signing off slips where staff purchase food, but found that this was a rule directed at cashiers and not towards other employees. The Commissioner also found that certain contradictions arose from the respondent's witnesses.. In essence, the Commissioner found that the employer's evidence relating to the employee's possession of company stock (ie food) "had weaknesses" in that a practice had developed in the workplace which flouted the rule that cashiers could not purchase food for other staff.

Grounds of review

[10] The grounds of review set out in the founding affidavit are rather scant and are confined to a complaint that the Commissioner did not interpret and recollect the company's evidence correctly. It is also stated that further evidence was presented during the arbitration as to the impact that the alleged dishonesty had had on the trust relationship thereby justifying dismissal as the appropriate sanction. Finally, it is alleged that the Commissioner disregarded the overwhelming evidence of the employee's guilt but decided the matter on the fact that the rule in question did not apply to the employee in question. The Commissioner thus held that the employee had not contravened a rule applicable to her and found the dismissal to be substantively unfair. This reasoning and finding, it is complained, constitutes misconduct that renders the arbitration award reviewable.

Analysis

[11] The arbitration award does not provide the level of detailed analysis that one would have hoped for but, reading between the lines, it is clear to me that the Commissioner was of the view that the dismissal was substantively unfair without going so far as to state that the employee was entirely innocent.

There is nothing wrong with such a conclusion. The employee's evidence to the effect that she and Bangane were friends and had a good relationship was not contradicted. It seems clear to me, on a review of the evidence led, that the employee and Bangane had cooperated in forming a private arrangement to help each other with the sharing of lunches and the buying of food, despite the fact that there was a rule in place. The Commissioner's finding that this rule was not only not directly applicable to the employee in question but, more importantly, that it was not consistently applied, cannot be faulted. It is clear to me that whatever rule was in place, it was more honoured in the breach than in the observance. I take note of the employee's argument that, apart from Du Toit's say-so, there was no clear evidence of a breakdown of the trust relationship between the parties and also, that the sanction of dismissal was too harsh in the circumstances. It is regrettable that the Commissioner did not state this in so many words, but there is of course reference (in paragraph 5.5 of the award) to the question of whether dismissal is an appropriate sanction for the contravention of the rule of standard in question. Having found that there was in fact no such rule and that, even if there were such a rule, it had not been consistently applied by the employer, then it goes without saying that the sanction of dismissal imposed would be inappropriate and fall to be set aside.

[12] In my view, the arbitration award, though flawed, does not meet the threshold of unreasonableness that has been laid down in the well-known decisions of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 *ILJ* 2405 (CC) and *Palaborwa Mining Co Ltd v Cheetham and Others* (2008) 29 *ILJ* 306 (LAC). I find that a reasonable decision-maker in the position of the Commissioner could have well reached the decision that the employee's dismissal was substantively unfair, particularly in light of the existence of an alternative, such as a final written warning.

[13] A review is not an appeal. Even if I find the arbitration award to be somewhat lacking in detail, I am not empowered to interfere with the award in any material respects, whether this be the Commissioner's analysis of the facts or

the method by which he reached his conclusion and the reasons given for this. Ultimately, the Commissioner's decision in finding the employee's dismissal substantively unfair certainly meets the threshold of reasonableness as expounded and refined in the most recent case law. I therefore find no reason to interfere with the arbitration award.

[14] For these reasons, the application for review falls to be dismissed. I am disinclined to make any costs order either.

[15] In the result, I make the following Order:

1. The application for review of the arbitration award dated 26 August 2012 is dismissed;

2. There is no order as to costs.

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Bank; AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	Mr S Simpson
Instructed by	Simpsons Attorneys
For the Respondent:	S Mthiyane
Instructed by:	NUMSA