



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: JR510/14

In the matter between:

MZWANDILE NTAMBO

Applicant

and

TOKISO DISPUTE RESOLUTION

First Respondent

TSHEPHO MASHIGO N.O.

Second Respondent

TRANSNET FREIGHT RAIL

Third Respondent

Date heard: 5 August 2015

Delivered: 17 December 2015

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award under case number TOKISO 2742. The second respondent (the arbitrator) found that the dismissal of the applicant was fair.

[2] The applicant was employed in the capacity of Train Driver Specialist based at Sishen Depot. His employment was terminated as of 30 August 2013, purportedly in terms of clause 5.9 of the 'Transnet Termination of Employment Policy'. This reads in relevant part as follows:

“5.9 Desertion or abscondment by employee

5.9.1 On desertion or abscondment by the employee, the employee will be deemed to have resigned without notice.

5.9.2 Transnet will assume an intention of not returning to the workplace if the employee fails to render services, fails to provide an explanation for his/her absence and fails to contact Transnet within seven (7) days' of having abandoned his or her work and Transnet's reasonable efforts to contact the employee are unsuccessful.

5.9.3 Unless good cause is subsequently demonstrated, by the employee for the apparent desertion or abscondment, Transnet will accept the above desertion or abscondment as a repudiation of the contract by the employee and the employment contract will terminate on the basis of the employee's repudiation, Transnet's acceptance of the repudiation by the employee will be backdated to the date of the employee's last day of service with Transnet.”

[3] At the arbitration proceedings, Ms J Mani (Mani), the company's chief shedman testified that her duties included monitoring train crew personnel and compiling the roster for the crew. Applicant called her on Thursday 22 August 2013 to inquire about his next shift. She told him that his next shift was on Friday 23 August from 6 a.m. until 14:48. He asked her whether this was the 848 shift and she confirmed it was. He then requested her to get his supervisor to call him as he was not going to work that shift. His supervisor, the section manager Mr Matido (Matido), did call him. In his evidence Matido explained that when he spoke to applicant and confirmed it was the 848 shift on August 23 and not a 12 hour shift which applicant

normally worked. The applicant said he would 'never come to work for this...' The 848 shift is one in which employees do not benefit from getting any overtime.

- [4] Under cross-examination, Matido was taken through documents comprising the roster. He confirmed that on the 18 and 19 August the applicant was on 2 days rest time. He worked on 20, 21 and 22 August. On 23 August he didn't come to work. He was not on the roster for the 24th and 25th August because that was his weekend off. It was put to him that applicant could not have been off for 7 consecutive days given that the 25th and 26th of August were his rest days. The transcript records two explanations proffered by Mr Matido as follows:

"Mr McDonald Matitho: No I don't agree with you due to the fact of the moment when you absenteeism started, when you are absent for that day, you, you, you break down all the argument that you must not claim that rest day because you are not worked for that rest day. You have to, to worked uhm for to, to gain the rest days, but he didn't fully worked for his rest day, he was aware before he went to his rest day.....

No according to the policy even you are, even though you, you work on that day but you booked off sick that day, they regard it as off sick and at the moment when he booked off, he was away from work not reported on duty by that time where he was supposed to reported on duty, have broken the whole, whole procedure and rules and then that's why I say he can't claim his rest day whereby he didn't work for it."

- [5] In terms of the company's disciplinary code one of the examples of misconduct of a serious nature is "serious forms of absences from work without authorisation". In terms of the code: "The employer may issue a written warning or must convene a disciplinary hearing for misconduct of a serious nature if the commission of a misconduct of a serious nature could lead to a final written warning or dismissal". Mr Matido confirmed that no written warning was issued or disciplinary hearing held in respect of applicants' absence.
- [6] It was common cause that there was contact between Mani and the applicant on 25 August 2013 when she called him to inform him he was scheduled to work on the morning of Monday 26 August 2013. Applicant was in Beaufort West attending the funeral of his niece and said he would be unable to do the shift. It was also

common cause that on 29 August 2013, applicant telefaxed a copy of his niece's death certificate to the company. His relative had died on the 15 December 2013.

[7] The Arbitrator found that on the evidence before him:

"The Applicant had failed to report for duty when he was instructed to do. His open defiance of instructions to report for duty left the Respondent with no option but to terminate his services. Such an offence is described as serious in the Respondent's disciplinary code. It was not possible for the Respondent to hold a disciplinary hearing as he did not report for duty. They therefore invoked clause 5.9.2 of the disciplinary code."

[8] It was submitted on behalf of the applicant *inter alia* that in accepting that the company correctly invoked clause 5.9.2 of the termination code, the Arbitrator failed to construe the very provisions of that Code. Further, that in finding that it was impossible for the company to hold a disciplinary enquiry, he failed to apply his mind to the fact that the company dismissed the applicant with undue haste relying on a policy that was not applicable.

Evaluation

[9] The clause relied on by the company providing for 'desertion and abscondment' qualifies the acceptance of an alleged repudiation of the contract of employment by an employee, by including the words "unless good cause is subsequently demonstrated." In my view, this has to be read to afford a right to be heard to an employee in such circumstances. This clause is not the type of deeming provision in which a termination takes place by operation of law. It is a clause which deems an absence of 7 days as a resignation unless good cause is subsequently shown by an employee. That a disciplinary course of action was the correct path for the company to follow was reflected in a letter written to applicant on 28 August 2013 from Madito reading as follows:

"You have been absent from duty without authority since 23 August 2013.

You are hereby reminded that, in terms of company policies, such behaviour is regarded as serious misconduct and may lead to disciplinary action being taken against you, which could include dismissal.

You are therefore urged, in your own interest, to report for duty at your depot as soon as possible, but no later than 29 August 2013 at 09:00.”

- [10] On the 30 August 2013, however, the company appears to have taken a different approach in that a follow up letter from Madito reads:

“Our previous letter on this matter, dated 28 August has reference.

You have failed to report for duty since 29 August and have to date failed to explain your unauthorised absence to your Manager/Supervisor as you are required to do. Our various attempts to contact you have also failed.

Your continued unauthorised absence from work is now regarded as desertion and represents a breach of your employment contract. Your employment is therefore terminated on this basis, with effect from 30 August 2013.

You are required to contact the Human Resources Department if you have any queries.”

- [12] Given the proper meaning of Clause 5.9 of the company’s termination code, I cannot find that a reasonable decision maker could pronounce the dismissal procedurally fair. In addition, the finding that the applicant had ‘absconded’ when on the facts of this matter the employer knew where the employee was, had communicated telephonically with him on the 25th of August, and had been provided with the death certificate before the termination of the seven day period, is not a finding that a reasonable decision-maker could make. I must also agree with the submissions for the applicant that the award does not reflect an enquiry into the issue of whether dismissal was a fair sanction in all the circumstances, or whether any account was taken by the arbitrator of the employees 8 years’ service and disciplinary record. The arbitrator therefore misconstrued the nature of the enquiry before him and reached an unreasonable result.

- [13] In view of the above, the award stands to be set aside. I do not see that any purpose would be served in remitting it for re-hearing. It should be substituted. In

so doing, I am mindful of the fact that the applicant displayed an insubordinate attitude towards his superiors and himself conceded that his absence for at least 4 of the days in question was unauthorised. He is a young man with scarce skills but should nevertheless be made aware that he has obligations to respect the lawful instructions of his superiors. With this in mind, I do not believe that the remedy of full retrospective reinstatement is apposite. I therefore make the following order:

Order

1. The award under case number TOKISO 2742 is hereby reviewed, set aside and substituted as follows:
 - “1.1 The dismissal of MW Ntambo was procedurally and substantively unfair;
 - 1.2 The third respondent is ordered to reinstate MW Ntambo;
 - 1.3 The reinstatement is operative from the 1 September 2014.”
2. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Adv XD Matyolo

Instructed by: Matholoe Attorneys

Third Respondent: Cliffe Dekker Hofmeyr Inc

LABOUR COURT