



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

REASONS FOR THE ORDER

Not reportable

Case no.: D749/2013

In the matter between:

BRAVO GROUP MANUFACTURERS (PTY) LTD

Applicant

And

VINO SUBRAMONEY N.O.

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

AZMATH NABEE BUKUS

Third Respondent

Heard: 12 September 2014

Order: 12 September 2014

Reasons: January 2015

Summary: Review — no case made to disturb award

REASONS FOR THE ORDER

MOOKI AJ

[1] The court gave an order on 12 September 2014 dismissing the review application. These are the reasons for the order.

- [2] The applicant employed the third respondent as a debtor's clerk. It dismissed the third respondent on 23 April 2013 on two charges, namely "gross insubordination – the refusal to carry out a fair and reasonable instruction from a superior and "totally unacceptable work performance". The Commissioner gave an award that:

"AWARD

41. I find the dismissal of the Applicant substantively unfair and make the following order:
42. The respondent, Grafton Everest, is ordered to pay compensation to the applicant, Azmath Nabee Bukus, in the amount of R70,240.
43. The aforementioned amount must be paid to the Applicant within fourteen (14) days of the Respondent being informed of or becoming aware of this award.
44. No order as to costs is made."

- [3] The applicant contends that the award is reviewable because:

- 3.1 "By finding that the third respondent's dismissal was substantively unfair;
- 3.2 By finding that the instruction to the third respondent to follow up with obtaining outstanding proof of delivery notes fell outside of the third respondent's employment duties in circumstance (sic) where the Commissioner found that:

"... I also accept that the following-up on PODs may be a debtor's function..."

- 3.3 By finding that the third respondent did not refuse to follow up with

obtaining outstanding proof of delivery notes;

3.4 By finding that the applicant was obliged not to comply with the instruction to follow up with obtaining asked any proof of delivery notes.

3.5 By finding that the instruction to the third respondent to follow up with obtaining outstanding proof of delivery notes "... was unreasonable given the fact that the task allocated to the applicant (third respondent) was not a once off event but likely to become a permanent element of his duties and workload from there on."

3.6 By awarding the third respondent 10 months' compensation.

[4] The applicant addresses two aspects in its supplementary affidavit. First, it sets out why the instruction was within the job description of the third respondent. Second, it sets out that the Commissioner did not give reasons why she gave compensation for 10 months. The applicant contends that the third respondent did not seek reinstatement and that his loss was approximately three months.

[5] The review is ultimately on the bases that the Commissioner should have found that the third respondent disobeyed an instruction from a superior and that the Commissioner ought not to have awarded compensation equivalent to 10 months.

[6] The applicant is silent on the second charge, namely "totally unacceptable work performance".

[7] The Commissioner took the following evidence into account. The applicant's HR manager gave evidence that he (i.e. the HR manager) could not remember whose function it was to follow up on proof of deliveries ("PODs") and that the HR manager stated could not comment when it was put to him that the function was carried out by the credit controller in the past.

- [8] The HR manager, in his evidence, stated that a prior warning given to the third respondent had no impact on the third respondent's dismissal and that the warning was to show the third respondent's insubordination. The HR manager did not dispute that the third respondent was told, during the disciplinary hearing, that he was being dismissed because he had a final written warning.
- [9] The applicant's debtor supervisor gave evidence that: thousands of PODs were outstanding and that attending to them was time-consuming; the follow-up of the PODs was done by the creditors' staff but that three employees in debtors also did the job; the follow-up of PODs was a debtor function although everyone did that in the past. The respondent wanted one person to do the work, and that she did not know the capabilities of the third respondent and wanted the third respondent to do the work before she could approach the applicant's financial director.
- [10] The chairman of the disciplinary enquiry denied taking a written warning into account in recommending the dismissal of the third respondent. He admitted however under cross examination that the final written warning was not the sole reason for his recommendation that the third respondent be dismissed. He did not dispute that the third respondent did not refuse the instruction but that the third respondent was awaiting feedback from the financial director.
- [11] The third respondent gave evidence that the debtor's supervisor approached him to take over the task of following-up on PODs, which was previously done by the creditors. The third respondent responded by saying that it would be fair if he is remunerated and that he was being asked to do work that was previously done by someone else. Doing the PODs would be twice the work he was normally employed to do. The debtor's supervisor then indicated that she would speak to the financial director and give feedback to the third respondent.
- [12] The third respondent did not receive feedback following his discussions with

the debtor supervisor. He was instead served with a letter suspending him.

- [13] The Commissioner identified the issue for determination as the substantive fairness of the dismissal of the third respondent. He had regard to the contention by the applicant that the third respondent had repeatedly refused to carry out a fair and reasonable instruction from a supervisor by not following-up on outstanding PODs. The Commissioner also had regard to the explanation by the third respondent that he (i.e. the third respondent) did not refuse to do the work but felt that his salary package should be reviewed because he would be performing work that had been done by other staff for years; that he had done work for the applicant in the past that did not fall within the ambit of his duties but was not recognised for doing so.
- [14] The Commissioner determined that the evidence established that the applicant wanted the third respondent to do work that had been done by other staff for the last seven years. He also had regard to the evidence by the debtor supervisor that she decided to put measures in place specifically to address the outstanding PODs.
- [15] The Commissioner found that it was improbable that the third respondent was asked to do work that was part of his duties or that the third respondent had been doing the work and had simply refused the instruction. The Commissioner had regard to the evidence by the debtor's supervisor that she first wanted the third respondent to undertake the task of the PODs to decide whether the third respondent had the capability. The Commissioner found that it made no sense for the debtor supervisor to speak to the financial director to review the third respondent's remuneration if the third respondent was already doing the POD follow-up.
- [16] The Commissioner found that the third respondent had compelling reasons in hesitating to take on the tasks required of him. He also found that the third respondent did not flout the authority of the applicant nor was the third respondent defiant: the third respondent was still engaging the applicant regarding the additional work required of him at the time of his suspension.

He found that the instruction was unreasonable absent consultation and agreement by the third respondent because the third respondent was not being asked to undertake a once-off event, but that the applicant was requesting the third respondent to undertake a task that was likely to become a permanent element to the third respondent's duties and workload henceforth. The Commissioner also found that the particular offence did not attract a sanction of dismissal as a matter of course.

- [17] The Commissioner, in dealing with relief, had regard to the fact that the third respondent had been in service with the applicant for 14 years and that the applicant did not seek reinstatement. He determined that the circumstances were such that it was just an equitable to grant compensation equivalent to what the applicant would have earned over a period of 10 months.
- [18] The applicant has not made out a case to disturb the award. It can hardly be said, when taking into account the evidence before the Commissioner, the manner in which the Commissioner dealt with such evidence (as illustrated by what the Commissioner says in paragraph 38 of the award), that no reasonable decision-maker could not have made such an award. The Commissioner explained that the evidence pointed to the fact that the applicant was being asked to take on additional functions that had been done by other employees.
- [19] The Commissioner determined that the applicant had not refused to carry out the task required of him and that the third respondent was suspended and eventually dismissed whilst waiting to hear whether or not he would be paid more for taking on the additional task. The Commissioner was of the view that the third respondent should have been consulted on what he was being asked to do and should have agreed to that because what was asked of him was "... likely to become a permanent element of his duties and workload from thereon".
- [20] The criticism concerning compensation also lack merit. The Commissioner had regard to the fact that the third respondent did not seek reinstatement and that he had been in service for 14 years. I do not consider it necessary for

the Commissioner to have gone beyond the bases that he gave in justifying the compensation. There is no requirement that a Commissioner should give a detailed account justifying the particular compensation being awarded. It can hardly be said that no other reasonable decision-maker could not have given the particular compensation having found the dismissal unfair and where the employee, who had been in service for a period of 14 years, did not seek reinstatement.

O Mooki
Judge of the Labour Court (Acting)

LABOUR COURT

APPEARANCES:

Applicant's Attorneys: Norton Rose Fulbright South Africa

LABOUR COURT