



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D881/12

SAMWU

First Applicant

AA DAWOOD

Second Applicant

and

ETHEKWINI MUNICIPALITY

First Respondent

SALGBC

Second Respondent

COMMISSIONER NDABA N.O.

Third Respondent

Heard: 11 February 2016

Order delivered: 11 February 2016

Judgment delivered: 8 April 2016

JUDGMENT

WHITCHER J

- [1] This is an application to review and set aside “part” of an arbitration award by the Third Respondent (the Commissioner). The First Respondent (the Respondent) opposes the application.

- [2] The Second Applicant (the Applicant) was employed as a faults man for more than 20 years with the Respondent. In June 2009 the Respondent introduced a new formatted running sheet (NFRS), which had to be completed to assist among other things, collecting information for the purposes of an outage management system.
- [3] The Applicant was given a recorded verbal warning on 21 October 2009 for insubordination, as he refused to fill in the NFRS.
- [4] He continued to refuse to complete the NFRS and in March 2010 he was suspended and charged with gross insubordination. He was dismissed for same in August 2010.
- [5] The Commissioner found that the dismissal was substantively unfair on the basis of inconsistency in that the Respondent had not disciplined two other employees, Majozi and Kumalo, who had failed to complete the NFRS on certain dates in October 2009 and March 2010, and awarded the Applicant compensation.
- [6] The review is directed at the Commissioner's refusal to grant the Applicant's request for retrospective reinstatement. It is contended that the Commissioner wrongly concluded that a reinstatement order was not appropriate because, as found by him, the dismissal of the Applicant was substantively unfair on the basis of inconsistency in the application of discipline and there was no evidence before the Commissioner to justify him finding that the misconduct of the Applicant amounted to gross insubordination. The Applicant performed his other daily duties as expected and never received a written or final written warning.
- [7] As correctly submitted by Ms Naidoo, on behalf of the Respondent, inconsistency is not a rule unto itself. It is not a separate principle which is determinative of the fairness of a dismissal. Consistency is simply an element of disciplinary fairness. The finding that the Respondent applied discipline inconsistently does not render irrelevant factors justifying exception to reinstatement as listed in section 193 (2) of the LRA; in this case whether the

circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable.¹

- [8] On my assessment, the Commissioner's finding that reinstatement was not appropriate and would not be fair to the Respondent, is reasonably supported by the following materially relevant evidence that was before the Commissioner.
- [9] From June 2009 to November 2009, the Applicant was repeatedly instructed by his superiors to complete the new running sheets; a lawful and reasonable instruction.
- [10] In October 2009 the Applicant received a recorded verbal warning for failing to comply with the instruction.
- [11] In November 2009 and pursuant to various complaints from his superiors, the Applicant was summoned to a meeting with a senior manager, Laban, who instructed him to complete the new running sheets. He was warned that his conduct constituted gross insubordination.
- [12] The Applicant actually testified that he had no intention of complying with Laban's instruction.
- [13] In November 2009, the Applicant was called to a further meeting with two of his managers, Moodley and Nayager, and once again instructed to complete the new running sheets, failing which he would be disciplined. The Applicant's response was "Go ahead, do whatever you want to do. I'm not even worried"
- [14] Moodley testified that the Applicant was rude, belligerent and disrespectful during the meeting. His attitude was that he was untouchable with the protection of the union.
- [15] Notwithstanding the threat of disciplinary action, the Applicant persisted with his refusal to comply with various instructions from his superiors.

¹ See *SACCAWU & Others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para [29].

- [16] The Applicant's testimony at the arbitration that that he had no intention of complying with Laban's instruction and his response to the threat of disciplinary action (as described above) makes nonsense of his contention that he should have been issued with a series of written warning prior to dismissal.
- [17] All the above demonstrates a wilful and serious refusal by an employee to obey a lawful instruction and a direct challenge to the employer's authority; such conduct amounts to gross insubordination.
- [18] In addition, Moodley and Laban testified that they could not work with the Applicant. The manner in which he had articulated his refusal to comply and his continuous refusal to submit to their authority had resulted in a breakdown in the trust relationship.
- [19] The inconsistency factor was not such that it outweighed the above factors and displaced the reasonableness of the outcome on relief. The Applicant's case was distinguishable from Majozi and Khumalo. Moodley testified that the lapses in respect of Majozi and Kumalo were sporadic as opposed to a consistent and deliberate refusal not to comply by the Applicant. The Applicant moreover conceded at the arbitration that other faultsmen were complying with the instruction.
- [20] In the result, on the broad merits of the dispute, the outcome is not so unreasonable that no reasonable commissioner could have come to the same decision.

Order

- [21] The review application is dismissed with no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: Tomlinson Mnguni James Attorneys

For the First Respondent: Adv L R Naidoo, instructed by Hughes-Madondo Inc

Labour Court