



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 809/15

Not Reportable

In the matter between:

NTM obo HERBERT DIKGALE

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

First Respondent

AND ARBITRATION

TEBOGO MAFUJANE N.O.

Second Respondent

HOTEL AMENITIES SUPPLIER (PTY) LTD

Third Respondent

Heard: 30 November 2017

Order: 30 November 2017

Reasons: 18 December 2017

JUDGMENT

WHITCHER, J:

- [1] On 30 November 2017 I dismissed this review application to set aside the second respondent's arbitration award that the applicant's dismissal was substantively and procedurally fair.

- [2] The applicant has failed to demonstrate any material misdirection on the part of the Commissioner. The applicant's complaint is simply and improperly that the Commissioner was wrong and should have determined the issue in his favour.
- [3] The applicant was accused of gross insubordination. It was common cause that his superior, Van Tonder asked him to offload stock, but he refused to do so claiming that he does not work in the receiving section and that he is busy. The applicant thus failed to adhere to an instruction issued by his superior.
- [4] The next step in the arbitration was to determine whether the instruction was lawful and reasonable. The undisputed evidence was that the instruction was given in circumstances where it was busy and the receiving section was short staffed. Although there was a dispute of fact as to whether the applicant was busy or not at the time, the answer to the question as to whether the instruction was lawful and reasonable did not turn on a proper resolution of this dispute. I say this because a claim of being busy is not a proper defence to refusing to obey the instruction of a superior, particularly in the circumstances in which the instruction was given. Moreover, the applicant conceded that he was obliged to obey the instruction of his superior. The Commissioner's finding that the instruction was reasonable and lawful is thus an entirely reasonable conclusion.
- [5] The Commissioner then considered the next aspect of the enquiry, namely whether the sanction of dismissal was fair. In this regard it was common cause that the applicant had previously been issued with a final written warning for a striking similar offence (insubordination) which was still in effect when he committed the offence. Based on this evidence and case law, the commissioner reasonably concluded that progressive discipline seemed to have failed to have the desired effect and that dismissal was fair.
- [6] In *Transnet Freight Rail v Transnet Bargaining Council and others*¹ it was stated that:

¹ (2011) 32 ILJ 1766 (LC)

An employee on a final written warning for the same offence will normally be regarded as irredeemable, and dismissal will be justified if the employee commits a similar offence during the currency of the warning... Usually, the presence of a valid final written warning at the time of the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature. The principles of progressive discipline require such a re-offending employee usually to be considered irredeemable... I accept that the purpose of the warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again...²

[7] The applicant's complaint against the Commissioner's finding that the chairperson was not biased is also rejected. The applicant led no evidence that the chairperson was biased and it was common cause that the chairperson found him not guilty of the charge of incitement.

[8] Even if there are aspects of the Commissioner's award that could be open to criticism the eventual conclusions he reached cannot be interfered with. They all fall within a band of reasonable conclusions that could have been reached on the evidence before him.

Order

[9] In the premises, the following order is made:

1. The review application is dismissed with no order as to costs.

Benita Whitcher

Judge of the Labour Court of South Africa

² At para 39; See also *Timothy v Nampak Corrugated Containers (Pty) Ltd* (2010) 31 ILJ 1844 (LAC) at 1850A-C

APPEARANCES:

For the applicant:

M Raphetha, union official from NTM

For the third respondent:

Snyman Attorneys

LABOUR COURT