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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 241/16

In the matter between:

CITY OF CAPE TOWN

Applicant

and

IMATU OBO D BRONKHORST

First Respondent

SALGBC

Second Respondent

A SINGH-BOOPCHAND N.O.

Third Respondent

Heard: 2 August 2017

Delivered: 22 August 2017

Summary: Review and condonation – misconduct – arbitrator found dismissal unfair but imposed a final written warning and effective sanction of 12 months' suspension without pay. Conclusion within a range of reasonable sanctions. No prospects of success on review. Condonation and review dismissed.

JUDGMENT

STEENKAMP J

Introduction

- [1] Mr Deon Bronkhorst¹ worked for the City of Cape Town for 20 years. He was dismissed after admitting that he had removed an electricity frame and panels without the necessary authority from an electricity depot; and that he had abused his authority as a superintendent by calling out a staff member to perform private work.
- [2] The employee referred an unfair dismissal dispute to the South African Local Government Bargaining Council². Conciliation failed. The arbitrator, Commissioner A Singh-Boopchand³, found the sanction too harsh. She ordered the City to reinstate him from 1 March 2016. That effectively meant that he was suspended without pay for 12 months. And she imposed a final written warning valid for 6 months.
- [3] The City applies to have that award reviewed and set aside. It also seeks condonation for the late delivery of its review application.

Background facts

- [4] The employee had a clean disciplinary record for twenty years. But on 15 November 2014 that changed. He was a superintendent in the City Electricity Department. On that fateful Saturday, he removed an item known as a “LV distribution frame and panels” from the Parow electricity depot without authorisation. He called a junior staff member, Johannes Visser, out with him. He told Visser that they had to take the panels to the Murray Street depot in Parow North. But first they went to the home of an electrical contractor, Gavin Adriaan, in Elsiesrivier. Adriaan had to do some measurements. But then the panels remained there. Bronkhorst wanted Adriaan to do the measurements because he (Adriaan) is disabled and Bronkhorst wanted to help him out. Visser was unhappy because it now meant that he wouldn’t get overtime payment – this was clearly not an officially sanctioned job. So Adriaan gave Visser R500 out of his own pocket.

¹ The first respondent, represented by his trade union (IMATU).

² The second respondent (SALGBC).

³ The third respondent.

- [5] Visser resigned when this incident came to light. Bronkhorst was called to a disciplinary hearing. He admitted to the following two allegations:

“Charge 1:

You misconducted yourself in that, on Saturday 15 November 2014 at approximately 09:57 you removed a LV distribution frame and panels without the necessary authority from Management of Parow Electricity Depot which was the property of the City of Cape Town.

Charge 3:

You misconducted yourself in that you abused your authority as a superintendent by calling out a staff member, O Visser, on Saturday 15 November 2014, when there was no official requirement to do so, for the sole purpose to assist you to perform private work.”

- [6] Bronkhorst denied, but was found to have committed, the following misconduct as well:

“Charge 4

You misconducted yourself in that you were dishonest and you abused your authority as superintendent when you allowed Mr O Visser to accept a cash payment of R500, 00 from Mr Gavin Adriaan for performing private work.”

- [7] The City dismissed Bronkhorst on 15 April 2015.

The arbitration

- [8] The City called six witnesses at the arbitration. They included Adriaan and Visser. Bronkhorst called no witnesses other than himself.
- [9] The arbitrator correctly honed in on the disputed charge 4 as the crux of the matter. As the employee had admitted the misconduct complained of in charges 1 and 3, only the issue of sanction had to be considered in respect of those charges.
- [10] It is common cause that the contractor, Adriaan, paid Visser. The question was whether Bronkhorst had acted dishonestly by allowing the private payment.

[11] The arbitrator correctly proceeded from the premises that the City bore the onus to prove on a balance of probabilities that dismissal was for a fair reason. In the case of charge 4, it had to prove that the employee was dishonest.

[12] The arbitrator found that the City had not discharged that onus. Turning to the question of a fair sanction for the misconduct outlined in charges 1 and 3, she took into account aggravating and mitigating circumstances and ordered the City to reinstate Bronkhorst from 1 March 2016, coupled with a final written warning.

Condonation

[13] The principles relating to condonation are well known, as set out in *Melane v Santam Insurance Co Ltd*.⁴

Extent of delay

[14] The application was filed two and a half weeks outside of the six week time period prescribed by the LRA. It is not insignificant.

Reasons for delay

[15] The delay is mainly blamed on a new software management system implemented by the City. It is quite persuasive. It explains at least a large part of the delay. The main factor to balance the scales of justice either way lies with the City's prospects of success.

Prejudice

[16] The prejudice to the employee is not significant; the review application has been set down within a relatively short time, and should he be successful, any prejudice to him will be cured by his reinstatement retrospective to March 2016. Again, the question whether the City should be granted condonation turns on its prospects of success in the review application.

⁴ 1962 (4) SA 531 (A).

Prospects of success

- [17] The arbitrator noted that two witnesses corroborated Bronkhorst's evidence that he did not see Adriaan giving Visser the money. Visser knew that he was doing private work and that he was doing Bronkhorst a favour; that is why he raised the question of payment at Adriaan's house. It was clear to everyone at this stage that Visser was not entitled to official overtime payment. That is why Adriaan gave him cash from his pocket. Adriaan testified that it happened on his stoep when Baddenhorst was already sitting in the bakkie. Visser confirmed it. There was no evidence to the contrary. And Visser, having resigned already, had no reason to protect his superior who landed him in that position in the first place. On the probabilities, and on the evidence before her, the arbitrator's conclusion is not so unreasonable that no other arbitrator could have come to the same conclusion.⁵
- [18] That left the question of sanction, given that the employee had committed the misconduct set out in charges 1 and 3. At the outset, it must be noted that – having found that the City had not proven charge 4 – the element of dishonesty had fallen away. The arbitrator took into account that the employee had more than 20 years' clean service; that he had expressed remorse and admitted his misconduct (in charges 1 and 3) straight away; and that, at the internal disciplinary hearing, the City's own initiator had only asked for the employee to be suspended without pay for 10 days. In those circumstances, her own assessment that dismissal was too harsh a sanction, is not unreasonable. And her award that Bronkhorst was to be reinstated from March 2016 – having been dismissed in April 2016 – effectively meant that he was suspended for almost 12 months without pay --- a much harsher sanction than the one that the City's initiator had asked for at the disciplinary hearing. She also applied progressive discipline and ruled that he must be given a final written warning valid for 12 months. She applied her mind to a fair sanction, given her finding on the proven misconduct on the evidence before her, and imposed a sanction that falls within a range of reasonable sanctions.

⁵ *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

Conclusion

[19] The conclusion reached by the arbitrator falls within a range of reasonable conclusions. It is not open to review. Accordingly, the City has no prospects of success in its condonation application. Coupled with the extent of the delay and the rather poor explanation therefor, the condonation application could not succeed.

[20] With regard to costs, I take into account that there is an ongoing dispute between IMATU and the City; that the employee was represented by his union and did not incur any legal costs; and that the union was ably represented by its own official, and did not instruct attorneys or counsel. A costs order is not, in my view, appropriate when the requirements of both law and fairness are considered.⁶

Order

The application for condonation – and thus the application for review – is dismissed.

Steenkamp J

APPEARANCES

APPLICANT:	N Mangcu-Lockwood Instructed by Marais Muller Hendricks Inc.
FIRST RESPONDENT:	Nelia Geldenhuys (union official) of IMATU.

⁶ LRA s 162.

LABOUR COURT