

IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

Case No. J2381/98

In the matter between:

FLEMING, MARTIN ASSET MANAGEMENT

Applicant

and

NGWENYA, N.O

First Respondent

LEISEGANG, JEANETTE

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Third Respondent

JUDGMENT

REVELAS, J:

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act"). The applicant seeks to set aside an award made by the first respondent in favour of the second respondent, the

erstwhile employee of the applicant.

[2] The second respondent had been in the employ of the applicant for six weeks when her services were terminated by the applicant on the basis of poor performance and incapacity.

[3] The first respondent found that the second respondent was not trained and received no proper instructions, evaluation, guidance or counselling to improve herself and render satisfactory work performance. The first respondent consequently found that the dismissal was unfair and awarded the applicant compensation in the amount of R 64 614,40 which is equal to ten months' salary.

[4] There is no proper record in this matter and consequently I am bound by the arbitration award of the first respondent and the papers in the matter. There are many disputes of fact in the affidavits as well.

[5] In terms of the award, evidence was led before the first respondent by Mr Linell of the applicant. He alleged that there were attempts on the respondents

part to train the applicant, and that the nature of the work situation at the applicant's offices was such, that ongoing training was part and parcel of the work there. Evidence was also led before the first respondent that the second respondent had been well briefed as to the applicant's methods of operation. She, inter alia, was given a voluminous Trust Deed which was essential for her to read as part of her training, but she spent very little time on it (only thirty minutes). She also treated another important document given to her to study, as a necessary part of her training, with an equal lack of enthusiasm. The award reflects that a substantial part of the evidence led before the first respondent, was about the training which was indeed given to the second respondent. This evidence was led by Mr Linell and the first respondent did not reject his evidence anywhere in his award.

[6] It is common cause between the parties that there was at least one counselling meeting which took place in Mr Linell's office which the second respondent attended. I therefore fail to understand the first respondent's finding that there was neither counselling nor training. To have made this finding, the first

respondent would have had to reject the testimony of Mr Linell out of hand, which he did not do. If he did, he should have said as much, and given reasons.

[7] The first respondent did not make a finding as to procedural unfairness in this matter. His award reads as follows:

"That the dismissal of the employee party by the employer party was not proved to be fair, in terms of section 192(2) read with Schedule 8 (Code of Good Practice)."

[8] One has to infer from the fact that only section 192(2) is referred to, that the first respondent only made a finding as to substantive unfairness. Therefore the first respondent had a discretion with regard to the amount of compensation he could grant in this matter. He chose to exercise this discretion by awarding the second respondent an amount equal to ten months' salary. That was for the period from the date of the dismissal to the date of the arbitration hearing. The applicant was on probation for six weeks when her services came to an end.

[1] [9] Section 8 of the Code of Good Practice ("the Code") under schedule 8 of the Labour Relations Act 66 of 1995 as

amended, (“the Act”) imposes certain obligations on the employer before dismissing a probationer for poor work performance.

The Code reads *inter alia*:

“A newly hired **employee may be placed on probation for a period that is reasonable given the circumstances of the job. The period should be determined by the nature of the job, and the time it takes to determine the employee’s suitability for continued employment. When appropriate, an employer should give an employee whatever evaluation, instruction, training, guidance or counseling the employee requires to render satisfactory service. Dismissal during the probationary period should be preceded by an opportunity for the employee to state a case in response and to be assisted by a trade union representative or fellow employee.”**

[10] On the evidence led by the applicant, the aforesaid guidelines were followed. This evidence was not rejected and the finding that there was no training, was factually incorrect.

[11] The first respondent exercised his discretion to award compensation to an employee on probation, for a very large amount, without any proper finding of conduct on the part of the applicant,

which warranted such a punitive award as the one in question. Even if there was no proper training but the employee does not wish to be reinstated, and trained, and counselled, then in my opinion, commissioners should be very cautious when granting compensation awards as they may be punitive in nature. If the employee does not wish to be reinstated, after the probationary period, then there is an acknowledgement that an employment relationship is not feasible. A probationary period is designed to see if the employee is a fit person to perform the functions for which he or she had been appointed.

[12] It seems very unfair towards the applicant, who employed the second respondent in good faith, to be penalised because, in the opinion of a commissioner, he did not train her, when there was evidence to the contrary. The second respondent had an obligation to respond positively to training during her probationary period, and it does not appear that she did. She also did not want to be reinstated. To award large amounts as compensation to employees who were on probation, but do not wish to be reinstated, could lead to abuse if the discretion to grant compensation is not exercised with due regard to all the facts.

[13] The first respondent did not consider at all, that the second respondent was on probation when awarding her ten months' compensation after a working relationship of only six weeks. The first respondent's conclusion is unjustifiable if one has regard to the facts of the matter. The application for review should therefore succeed. There would be no purpose in my opinion, in sending the matter back to the Commission for Conciliation, Mediation and Arbitration, as I believe there is no reason why the second respondent should be entitled to compensation.

Consequently, it is ordered that:

1. The award of the first respondent is reviewed and set aside.
2. The second respondent is to pay the applicant's costs in this matter.

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E REVELAS

Date of Hearing: 28 October 1999

Date of Judgment: 28 October 1999

On behalf of Applicant:

Adv M van As

Instructed by Webber Wentzel Bowens

On behalf of Respondents:

Mr Ian McLaren

Instructed by McLaren & Associates