

**REPORTABLE****IN THE LABOUR COURT OF SOUTH AFRICA**

HELD AT DURBAN

NO: D740/99

: 2 MARCH 2000

In the matter between:

Applicant

and

First Respondent

Second Respondent

COMMISSION FOR CONCILIATION,

Third Respondent

Fourth Respondent

**JUDGMENT**

LYSTER AJ

[1] This is a review application brought in terms of section 145 of the Labour Relations Act in which the applicant seeks to set aside the award of a Commissioner of the CCMA. In terms of the award the Commissioner, being fourth respondent in this matter, confirmed the dismissal of the first and

second respondents but awarded substantial compensation for procedural unfairness.

[2] In short, the fourth respondent found that the disciplinary procedure was flawed because the question of mitigation was not properly dealt with. He expressed himself as follows.

"I am, however, inclined towards the view that the purpose and function of mitigation should be properly and thoroughly explained to employees only after a verdict has been announced. It may not always be satisfactory to deal with it in the initial stages. There could be a number of reasons for this. Firstly, the accused employee might not focus his or mind as clearly and sharply upon mitigating factors as on matters pertaining to the substance of the charges. On the other hand, if part of the inquiry is set aside to deal only with sanction, then such an employee might well deal with it differently and certainly in a more focused manner. Secondly, it is an opportunity for an employee who is denied guilt throughout to make a confession of guilt and give an explanation for the earlier denial, for example, he or she might say that guilt was originally denied because of fear about the reaction of a spouse coming to know about the incident, but after guilt has been proved and found that there is no longer any space for such fear, the employee might then wish to come clean."

[3] The critical question, therefore, to be decided is whether the fact that mitigating evidence was not presented after the verdict stage is a sufficiently material procedural flaw warranting an award of compensation.

[4] The respondent is of the view that the Commissioner is not correct in finding that a two stage procedure is necessary, and furthermore, argues that if it was a defect in the inquiry this would have been cured at the appeal stage.

[5] In this matter first and second Respondents presented brief evidence in mitigation at the end of their evidence, prior to the chairperson having considered as to whether they were guilty of the offences with which they were charged.

[6] The law on this matter is very clear on the question that the failure to take into account mitigating circumstances of the employee renders a dismissal procedurally unfair. As far back as 1987 the Industrial Court said that the distinction between substantive and procedural fairness and the need to ensure the full consideration of both, require the question of the appropriate sanction to be distinctly addressed at a disciplinary enquiry with an opportunity for the employee to advance arguments on the point. This principle has been consistently upheld by the Courts in a number of subsequent cases.

*(See : National Auto Mobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369C at 378 E-F; Bassett v Servistar (Pty) Ltd (1987) 8 ILJ 503 IC at 509 C; Chemical Workers Union & Another v AECL Paints Natal (Pty) Ltd (1988) 9 ILJ 1046 IC at 1051 A-E; Moahlodi v East Rand Gold and Uranium (1998) 9 ILJ 597 IC at 605 F; NUM v Amcoal Collieries Limited (1989) 10 ILJ 733 IC at 742 I ; Nkomo v Pick and Pay Retailers (1989) 10 ILJ 937 IC at 941 B; Muller v Yichiho Plastics (Pty) Ltd (1993) 4 (8) SALLR 5 IC 8L; Molete v Industrial Lead Works (1995) 4 LCD 51 IC; Nyembezi v NEHAWU (1997) 1 BLLR 94 IC at 106F).*

[7] While the Courts are clear, as is the guideline provided by item 3(4), Schedule 8 to the Labour Relations Act, on the need to hold a distinct inquiry into the

question of sanction, and to take personal and other circumstances of the employee into account, they are silent as to whether this should be a two stage inquiry in the sense that the distinct inquiry spoken about should only take place after the finding of guilt has been made.

[8] In my view, it is desirable that it should, for the reasons which were put forward by the fourth respondent, and in an ideal world this is undoubtedly how a chairman of a disciplinary inquiry would conduct himself. It is certainly how presiding officers in criminal proceedings are required to conduct themselves. However, we do not live in an ideal world.

[9] The sorts of people who are called upon every day to conduct disciplinary enquiries are departmental managers and heads and the like. They are not legally trained and they often dispense a robust form of justice which is tolerated within the parameters of our law.

[10] Are they to be held to the same high standard of procedural fairness as would be followed, for example, in a criminal court? The Code at schedule 8 provides very clearly in item 4, that the employer must conduct a fair procedure and even goes as far as saying that it need not conduct a formal inquiry when called upon to consider the dismissal of the employee provided that the basic rules of natural justice are complied with.

[11] The Act, when dealing with the manner in which the CCMA is to deal with arbitration hearings provides as follows:

“138(1) The Commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the *dispute* with the minimum of legal formalities.”

[12] A fortiori it must follow that an employer when chairing a disciplinary inquiry, must at best be held to a similar standard and at worst, a far less formal approach than is required of a CCMA arbitrator. What the Commissioner appears to have done in this matter, with the best of motives, is to require of the employer to conduct himself according to a formal procedural process which he, the Commissioner, is not required to be bound by. This approach has been expressly applied by the Labour Appeal Court in *Mondi Timber Products v Tope 1997 (18) ILJ at 149*.

[13] It is clear that some evidence in mitigation relating to personal circumstances and length of service, was given during the course of the employee's evidence. There was nothing to suggest, certainly at the appeal stage, that if the employees had been given a opportunity after the verdict of guilt had been handed down, that they would have been any more fulsome in their evidence in mitigation. Thirdly, it does not appear from the summary in the arbitration award of the employees' evidence, that they felt that the opportunity to give evidence in mitigation was inadequate in any way. The issue seems to have been raised *mero motu* by the Fourth Respondent, the arbitrator, himself.

[14] Accordingly, the fact that a two stage inquiry was not held is not a flaw which would amount to procedural unfairness within the meaning of our law. To

require a two stage inquiry, ie, a separate inquiry only after the finding of guilt, is to expect too much of lay employers. To punish them for failing to do so with a hefty compensation award, is to institute an overly technical and legalistic dimension into the employer/employee relationship which the new Labour Relations Act certainly did not intend.

[15] The fourth respondent appears not to have adequately applied his mind in these circumstances and the award of compensation is accordingly set aside. There will be no order as to costs.

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LYSTER A

aring : 2 March 2000

gement: 2 March 2000

