

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO D356/99

In the matter between

S BUNWARIE

Applicant

and

METRO DISTRIBUTERS

Respondent

JUDGMENT

LANDMAN J:

1. Mr Sham Bunwarie was employed by Metro Distributers, inter alia, as a driver. He had an unsatisfactory disciplinary record. His infractions since 1994 ranged from negligent driving and smelling of liquor to arguments with staff. He was warned about dishonesty in April 1998. Mr Bunwarie was absent for the week ending 30 August. He was summonsed to a disciplinary inquiry. He stated that he was absent as he had been hit by a vehicle which did not stop after the accident. His employer was of the view that he had not been in a motor vehicle accident but that he and his family had been involved in a drunken brawl.
2. Clearly his employer was of a mind to dismiss him. But according to his employer, Mr Bunwarie suggested that his services be terminated by mutual agreement. A document was drawn up and signed by the parties.

3. Mr Bunwarie, with the assistance of the Help-in-Hand Trade Union, complained to the CCMA that he had been unfairly dismissed. The matter proceeded to arbitration before the 2nd respondent, a commissioner of the CCMA.
4. The commissioner heard the evidence and concluded that he did not believe Mr Bunwarie. He found that there had not been a dismissal and that the parties had mutually terminated the employment relationship. Mr Bunwarie was dissatisfied with this result and seeks to review the award of the commissioner. The proceedings are challenged because the respondent was permitted legal representation. The award is also challenged on the basis of the factual findings eg it is submitted that there was no proof that the relationship was mutually terminated. The commissioner is accused of misconduct and of committing gross irregularities. Finally it is alleged that the commissioner exceeded his powers and prejudiced the applicant's case with malice.
5. If the employment relationship was terminated by mutual consent then the commissioner would not have had jurisdiction to entertain the matter. An admission that the relationship was terminated by dismissal would prima facie have conferred jurisdiction on the commissioner. There was such an admission. The arbitration proceeded on the basis that Mr Bunwarie had been dismissed. In writing up his award the commissioner came to the conclusion that Mr Bunwarie had terminated his employment. The commissioner, however, added that if he was wrong he would nevertheless have found the dismissal to have been fair as the employment relationship between the parties had broken down.
6. Mr Reheman of the union complained that the commissioner had allowed the employer to be legally represented. True the commissioner did not spend much time on his ruling but the fact that Mr Reheman, by his own admission, has a doctorate in law disposes of any prejudice which may have been present. It was, indeed, the principal reason (and a good one) for permitting legal representation.
7. I was concerned that Mr Bunwarie may not have had an adequate opportunity to deal with the issue of the mutual termination of the employment relationship. But it appears from the award and the commissioner's notes that this aspect was well ventilated. For reasons not explained to me the cassettes relating to the proceedings were not transcribed but I doubt whether they would have shown that the issue was not adequately explored. The commissioner's rejection of his evidence and that of his spouse is justifiable.
8. There is no merit in any of the other submissions which were addressed to me. I, however, do take cognisance of the commissioner's admission that he should not have fixed the quantum of the costs which he imposed. Otherwise his discretion was one he exercised judicially and there is no reason to interfere with it.

9. In the premises:

1. The respondent's late delivery of its answering affidavit is condoned.
2. Paragraph 3 of the award is reviewed and replaced with the following: "3. The employee is to pay the costs of the application". The award, as amended, is upheld.
3. The applicant is ordered to pay the costs of this application.

SIGNED AND DATED AT DURBAN THIS 9TH DAY OF AUGUST 2000.

A A Landman
Judge of the Labour Court

8 August 2000

: 10 August 2000

Mr A. Reheman of the Help-In-Hand Trade Union

nt: A. A. Gabriel