

Sneller Verbatim/MB

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J668/00

2001-06-28

In the matter between

BIG FIVE RECRUITMENT

Applicant

and

SHEAR LARRY AND CCMA

Respondent

J U D G M E N T

REVELAS J:

- 1.This is an application to review or set aside an arbitration award of the first respondent, in favour of the third respondent. The application is brought in terms of Section 145 of the Labour Relations Act 1995, (" the Act").
- 2.The third respondent in this matter filed its heads of argument as late as 25 June 2000. It has become a very strict practice in this court that heads of argument which filed late are not accepted. However, in view of the affidavit filed of record by the third respondent's counsel I granted the condonation of the late filing of the heads of argument.
- 3.The third respondent was employed by the applicant as a personnel consultant since 22 June 1998. It appears that Mr Walsh of the applicant, was not particularly satisfied with the third respondent's work and had counselled and addressed this issue with her.
- 4.On 15 October Mr Walsh wanted the applicant to attend to certain paper work in respect of a task allocated to her, referred to as "the Osmon

Placement". This placement had to be completed on that day and since it was not, Mr Walsh contacted the third respondent on her cell phone and asked her to return to work to complete the paperwork. Mr Walsh was informed that she was on her way to see a client. It is in dispute what the third respondent's real whereabouts was on this day, but according to Mr Walsh she had told to him that she had an appointment with a certain Mr van Staden, who upon further telephonic investigation by Mr Walsh, denied any knowledge of any appointment with the third respondent.

5.The third respondent also then changed her version, according to Mr Walsh, when confronted and stated that her appointment was with one Joan Robertson and according to Mr Walsh, the third respondent could not have had any appointment with Mrs Robertson as the latter only worked for half a day. He therefore believed the applicant had lied to him.

6.The third respondent also denied that she ever had an appointment with Mr van Staden.

7.Mr Walsh felt that the third respondent was dishonest and this apparently angered him. It is common cause that he then called the third respondent into his office, which had glass windows, and there confronted her with these aforesaid allegations. He felt that she was dishonest. She testified that he had called her a liar.

8.According to Mr Walsh, and this is what he had told the arbitrator, he told the third respondent that she should rather "go". On the other hand the third respondent testified that he told her to "pack her things and go", whereas she had previously in evidence said he had told her that she "was fired". She maintained that Mr Walsh had dismissed her and that she had understood that she was dismissed. Mr Walsh contended before the arbitrator that he never intended to dismiss the third respondent.

9.On 19 October the third respondent's attorneys addressed a letter to the

applicant claiming that the third respondent had been unfairly dismissed on 16 October 1998 and demanded compensation. Here it is important to note that the third respondent, (at page 77 of the record), stated that when she went to see her attorneys she did not regard herself as being dismissed.

10. It was argued on behalf of the third respondent at the arbitration hearing, that a dismissal had indeed occurred, otherwise the applicant's attorneys would not have on 20 October 1998 addressed the letter to the third respondent's attorneys advising that the third respondent, insofar as it may be considered that she had been dismissed, was immediately and unconditionally reinstated in her position without any loss of benefits.

11. She was asked to report for work on 22 October 1998. There was no response. Despite this request the applicant afforded the third respondent a third opportunity to report for duty by 26 October. On this day, when the third respondent did not arrive the applicant regarded her as having absconded.

12. The arbitrator found that the third respondent was unfairly dismissed and that she had not unreasonably refused to resume her duties.

13. In this regard it is significant that the applicant offered a full investigation into all of the allegations made in the letter written by the third respondent's attorneys. According to her evidence during cross-examination, the third respondent stated that she did not want to return to work because Mr Walsh would continue to give her warnings and finally dismiss her.

14. The arbitrator remarked that he was "aware that the labour court has held that if an employee unreasonably refuses an offer of reinstatement which is made in good faith and within reasonable proximity of the date of dismissal, the refusal to accept the offer without good cause may disallow an employee from seeking and receiving compensation."

15. There is no evidence, and the arbitrator gives no reason as to why, and makes no specific finding either, that the applicant's offer was not made in good faith. There is nothing on the evidence before the second respondent to suggest that it was made in bad faith. The offer was also twice repeated without any reservation. The offer was also made clearly in very close proximity to the dismissal, being made on the second working day after the incident took place and may repeated two days later.

16. Insofar as the question is concerned whether the refusal of the applicant to return to work was reasonable, the second respondent merely accepted that the third respondent was humiliated because she was called a liar in front of third parties. This is factually incorrect. He spoke to her in his office. The fact that it had glass windows does not render it as part of the public area.

17. On the applicant's version, the third respondent had lied to him about her whereabouts on two occasions and shirked her duties. In such circumstances an employer is entitled to demand from an employee where she had been all day and if he had been given information which indicated misconduct, most certainly Mr Walsh was entitled to investigate this. It was not open to the third respondent to avoid an investigation by refusing to accept the offer of re-employment.

18. The third respondent's refusal to return to work was thus expressed as:

"no, so that he can give me written warnings and make good his mess up".

In my view, such an answer indicates that the third respondent did not want to afford the applicant an opportunity to remedy the defect that existed, as it would prejudice her claim for compensation. If she was innocent of the misconduct as alleged by Mr Walsh, this would have been proved at a hearing and she could have remedied the matter there. If she was then dismissed and she felt the dismissal was unfair she could

then pursue other remedies from there, such as invoking the mechanisms of the Labour Relations Act and refer the dispute to the Commission for Conciliation, Mediation and Arbitration. It is in my view not open to an employee to frustrate such an investigation and the remedy formula contained in section 194(1) of the Labour Relations Act should not be abused.

19. In *Johnson & Johnson (Pty) Ltd. v CWIU* 1999 (20) ILJ 89 LAC [1998] 12 ELLR 1209 LAC, the Labour Appeal Court stated as follows at 1219J to 1220E:

"If a dismissal is found to be unfair solely for want of compliance with the proper procedure, the Labour Court or an arbitrator appointed under the LRA, does have a discretion whether to award compensation or not. If compensation is awarded, it must be in accordance with a formula set out in section 194(1), nothing more, nothing less. The discretion not to award compensation in the particular circumstances of a case, must of course, be exercised judicially. The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial loss or actual loss, it is in the nature of a solatium for the loss of the right and is punitive to the extent that employers who breach the right must pay a fixed penalty - the party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another, so too in this instance. The nature of an employee's right to compensation under Section 194(1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress [always taking into account the provisions of Section 194(1)] or where the employer's ability and willingness to make that redress frustrated by the conduct of the employee."

20. Another matter in point, is *Mkhonto v Ford & Others* 2000 (21) ILJ 1312 LAC. This judgment concerned a matter where it was not disputed by the employer that the dismissal was procedurally unfair, as indeed the CCMA

commissioner found it was. The dispute centred around an offer of reinstatement made to the employee immediately following the dismissal. The Labour Court held that by making such an offer, the employee had been offered substantial redress and that the award of compensation for her procedurally unfair dismissal was insupportable. In this matter *Conradie JA*, held that **"without a consideration of this aspect of the case (referring to the letter with an offer of reinstatement) the first respondent misconceived the whole nature of the inquiry. The inquiry was not merely whether the appellant was entitled to compensation according to the formula in Section 194(1) of Act 66 of 1995 ("The Act") but whether she should have received any compensation at all."** (See also: *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 LAC at 991 to 100A.)

21. In *Scribante v Afgold Ltd Hartebeesfontein Division* 2000 21 ILJ 1864 (LC), it was held as follows at 1872 A-C in the context of a retrenchment:

"Having weighed up all the authorities, in my view, the relevant factors to be taken into account in determining whether to award compensation or not are the following:

- **Whether the employer has already provided the employee with substantially the same kind of redress;**
- **Whether the employer's ability and willingness to make that redress is frustrated by the conduct of the employee;**
- **The degree that the employer deviated from the requirements of a fair procedure; and**
- **Whether the employer secured alternative employment for the employee. "**

(See also: *Fourie & Another v Eskol Ltd* 2000 21 ILJ 2018 LC at 2034G to 2035H).

22. The second respondent did not apply his mind to the issue whether the third respondent was indeed offered substantial redress and unreasonably refused to accept it. The conduct of the third respondent was clearly motivated in pursuance of compensation. The third respondent was in

fact, and in law, not entitled to any compensation, and the first respondent's finding to the contrary, is not reasonably connected to the facts of the matter.

23. In the circumstances the arbitration award issued under case number GA48154 dated 9 December 1999 is reviewed and set aside, and the third respondent is to pay the applicant's costs.

E. Revelas