

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C786/2000

In the matter between:

COUNTY FAIR FOODS (PTY) LTD

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

U BULBRING N.O.

Second Respondent

**OIL, CHEMICAL, GENERAL AND ALLIED
WORKERS' UNION obo J ALEXANDER**

Third Respondent

JUDGMENT

WAGLAY J:

- [1] The Applicant seeks to review and set aside various decisions of the Second Respondent acting in her capacity as Commissioner of the First Respondent. These decisions were made in the context of arbitration proceedings relating to the alleged unfair dismissal of one JOSEPH ALEXANDER ("Alexander").

[2] The matter is unopposed.

[3] The decisions the Applicant seeks to review and set aside are the following:

- (i) the decision to allow the arbitration proceedings to continue on 6 April 2000 with the Oil, Chemical, General and Allied Workers Union (OCGAWU) representing Alexander, despite the fact that the original referral of the dispute was made by the Farm, Food and Rural Workers Support Association (FFRWSA), a trade union that withdrew from the proceedings prior to the arbitration hearing;
- (ii) the decision on 15 September 2000 not to rescind the decision referred to in (i) above;
- (iii) the finding that the dismissal of Alexander was procedurally unfair;
- (iv) the decision not to exercise a discretion against awarding compensation;
- (v) the decision not to reduce the quantum of compensation by taking into account the default of OCGAWU and Alexander in respect of a two month delay in the arbitration proceedings.

[4] When the dispute was referred to the First Respondent, the referring party was cited as being FFRWSA, the Union of which Alexander was a member at the time. The nature of the dispute was recorded to be the unfair dismissal of Alexander. The matter was conciliated on 6 December 1999 and a certificate of non-resolution of the dispute was

issued. The certificate records the employee party as “*FFRWSA obo Joseph Alexander*”. On 7 December 1999 FFRWSA referred the dispute for arbitration and recorded its name under “*Details of the Party Requesting Arbitration*”. The First Respondent set the matter down for arbitration on 6 April 2000. Two days before the date, FFRWSA withdrew stating that Alexander would be representing himself at the arbitration.

[5] On 6 April 2000, the day of the arbitration, Alexander arrived with a representative of OCGAWU, a Union which Alexander joined on the same day. At the commencement of the arbitration Applicant objected to OCGAWU’s presence and its representation of Applicant. The Applicant argued that :

- (i) Since the party to the dispute was “*FFRWSA*” it could not simply be substituted with OCGAWU;
- (ii) Since OCGAWU was not party to the conciliation, it could therefore not take over the dispute as a substitute for FFRWSA;
- (iii) Since FFRWSA had withdrawn the dispute had to be referred afresh for conciliation.

[6] The Second Respondent considered these arguments and found that when FFRWSA referred the dispute to conciliation and arbitration it did so as a representative of Alexander - this is a patently reasonable decision as clearly the nature of the dispute and the relief sought was about the dismissal and reinstatement of Alexander and not FFRWSA. When

FFRWSA thus withdrew, it did not mean that the dispute had then been withdrawn, this is also evident from the fact that FFRWSA, on advising the First Respondent about its withdrawal, states that Alexander will be representing himself at the arbitration. If Applicant's argument is to be accepted, it would mean that because FFRWSA recorded itself as the party Alexander himself could not proceed with the arbitration as he was not cited as a party. This would lead to an absurd result. The fact that a party, who refers a dispute on behalf of another, withdraws from the dispute does not mean, as the Second Respondent properly found, that the dispute "*is no longer alive*". If the dispute remains unresolved, the party to the dispute, ie the grievant, should be and is allowed to proceed if he so desires. As the grievant is allowed to proceed with his dispute, he is entitled to such representation as is permissible in terms of the Labour Relations Act ("*the Act*").

[7] Applicant's argument that Alexander was not a party to the proceedings is so meritless a point that it simply needs to be rejected. It is if anything a desperate attempt and a rather superficial one to place barriers in the way of resolving a dispute that exists between Alexander and the Applicant. Mere technical arguments do not find much favour with this Court and even less so at arbitration proceedings, particularly because it hinders the promotion of the effective resolution of disputes which is the primary object of the Act. The point raised here by the Applicant I do not even consider to be technical. All it does is seek to delay the process and defeat the very object of the Act. The absurdity of the Applicant's argument becomes even more apparent when it contends that because FFRWSA was the party that had referred the matter to conciliation, the referral is negated by its withdrawal and Alexander must therefore refer the matter for conciliation anew.

What purpose this re-referral? The only purpose I suppose is to provide an applicant with an opportunity to argue that the application for conciliation should not be entertained because it is then out of time .

[8] Notwithstanding the above , I am satisfied that the Second Respondent conducted the matter properly and arrived at a decision which is neither wrong in law nor one which is capable of being reviewed or set aside on any of the permissible grounds.

[9] Having arrived at the decision aforesaid, Applicant's application to set aside the Second Respondent's decision dated 15 September 2000 falls away. I question the reason for Applicant making an application for rescission as was done by the Applicant but since it is irrelevant to the determination of the matter I have decided against commenting thereon.

[10] Turning then to the arbitration award, the evidence before the Second Respondent was that Kemp, a plant manager within the Applicant's business, was appointed to chair a disciplinary enquiry relating to an alleged misconduct committed by Alexander. The misconduct was that Alexander, a male, had assaulted a female member of Applicant's staff. Alexander admitted the assault and the sanction imposed by Kemp was that of a final written warning valid for 12 months and a five day unpaid suspension. Alexander was advised of this sanction and signed for the acceptance thereof . Two days later Applicant's general manager, one Midgley, was informed about the sanction imposed upon Alexander. Midgley also received a letter from the complainant in the matter. Midgley investigated the matter and believed that the sanction that should have been imposed was that of dismissal. He then confronted Kemp about this and also consulted the company's

managing director and, after receiving confirmation that the sanction was “*incorrect*”, notified Alexander that his services was being terminated.

[11] The letter forwarded to Alexander by Midgley reads in part as follows:

“Upon review of the incident that took place on the night of 22 September 1999 and following consultation with senior management and in accordance with previous assault cases where the company had the precedent of terminating all offenders’ services, the company has found your case identical to previous assault cases, and as such the penalty handed down by the chairman was totally contradictory to the principle and precedent of the Company, as established by all previous cases without exception.”

“You are herewith informed that the Company has overruled the decision of the chairman of the hearing, and your services are herewith terminated with immediate effect, as no different mitigating circumstances in your assault case from other cases could be found.”

[12] The company further disciplined Kemp for failing to comply with company policy and procedures in failing to dismiss Alexander. Alexander appealed this decision and the appeal was heard by one Potgieter, a processing manager at the company. The issue at the appeal was the unfairness of the overturning of Kemp’s sanction by Midgley. In fact at the appeal Alexander asked for the original sanction to be reinstated. Potgieter, the chairperson of the appeal, nevertheless, without deciding on the propriety of Midgley’s intervention, decided that dismissal was an appropriate sanction for the assault.

- [13] The Second Respondent, without deciding whether or not the dismissal of Alexander was substantively fair, found that Midgley's intervention was inappropriate and tainted the whole process and that the fact of appeal did not cure the inappropriate intervention.
- [14] I am in agreement with the Second Respondent's finding. The fact that the chairperson (Kemp) of the disciplinary enquiry was disciplined for failing to "*comply with Company policy and procedures*" in failing to dismiss Alexander indicates that he was charging the disciplinary enquiry as a representative of the Applicant and, in doing so, the decision he makes is not a decision of an individual who can be distinguished from the company. The decision he made, the sanction he imposed was the decision and the sanction of the company.
- [15] Once Kemp imposed the sanction he did, the Applicant had done so. Applicant could not then unilaterally alter the sanction - in doing so it destroyed the procedure which, until then, had been fair. To argue that once Alexander appealed he opened the door to suffer the imposition of the sanction of dismissal is once again an argument devoid of any merit. Alexander appealed against the intervention of Midgley, not the finding and decision of Kemp, the chairperson - this did not give the Applicant the right to re-hear the whole matter. The fact that it did do so and that their internal code may provide for an appeal to be heard as a hearing *de novo* cannot be used as an excuse to overturn the decision which the code does not provide any process to alter.

[16] Facts not dissimilar to the present matter were before Commissioner Van Dokkum in the matter of *Kohidh v Beier Wool (Pty) Ltd*, (1997) 18 ILJ 1104 (CCMA). In that matter the Commissioner found that where an employer changes the decision of the chairperson of a hearing to dismissal, such intervention constitutes a serious defect in the proceedings.

[17] I agree with that finding. An employer cannot alter a sanction already imposed with a more severe sanction, notwithstanding the reason for such a change. While a genuine desire to promote consistency in the workplace or protect women or other good reasons may call for the alteration of a sanction imposed to a harsher penalty, it can only be done where there is an agreement between an employer and employee for this to happen. I am prepared to accept that there may be exceptional reasons for interference by an employer, to alter a sanction to a more severe one, this is however not such a matter.

[18] With regard to the Applicant's further complaint that Second Respondent was wrong to award compensation alternatively was wrong not to reduce the amount of compensation on account of OCGAWU's default - these complaints like all the others raised, are also without merit.

[19] The Second Respondent has a discretion as to the granting of compensation - in exercising that discretion she is not bound to consider any pre-determined factors - if it is evident from the award that she has exercised her discretion and that it was done properly, this Court will not interfere with that decision. While there will always be arguments as to what a Commissioner must or must not consider or how much weight should be placed on

each of the considerations, these are subjective matters and cannot form a basis to review a discretion exercised by the Commissioner. In this instance, the Second Respondent took into consideration:

- (i) the fact that Applicant did not advance any reasons as to why it would be inappropriate to award any compensation;
- (ii) that Alexander had over 10 years of service with the Applicant;
- (iii) the amount of compensation was not unduly excessive;
- (iv) that had Midgley not interfered with Kemp's sanction, Alexander would not have lost his employment.

[20] There is nothing patently erroneous about taking the above considerations into account or not taking any others. If the Applicant wanted the Second Respondent to consider other issues, it should have raised them. The Applicant cannot sit quietly by and later complain that the Second Respondent should have considered one or other factor/s.

[21] With regard to the delay, s194(1) of the Act provides that compensation may not be awarded in respect of any unreasonable period of delay that was caused by the employee initiating or prosecuting its claim. Applicant argued that there was a delay of two months between the date for resuming the arbitration (8 June 2000) and the date on which it in fact resumed (8 August 2000) which was attributable to Alexander and/or OCGAWU and

the Second Respondent should therefore have reduced the amount of compensation as prescribed by s194(1) by two months.

[22] This delay the Second Respondent found was caused by the First Respondent failing to give notice to OCGAWU and/or Alexander of the date on which the matter was set down for hearing - Applicant however seeks to apportion blame on Alexander on the basis that OCGAWU / Alexander were aware that the proceedings were to resume in June 2000, but took no steps to contact the First Respondent to confirm when the matter would resume. I fail to see how a party can be found to be culpable on the grounds of omission when there is neither an obligation nor any apparent reasonable duty for it to enquire of the date of hearing. The Second Respondent's finding that the delay was attributable to the First Respondent cannot be faulted.

[23] In the result, for reasons recorded above, the application is dismissed.

WAGLAY J

Appearances:

Adv MW Janisch instructed by Cliffe Dekker Fuller Moore Inc

No appearances

28 September 2001