

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

2004-11-24

CASE NO P402 /03

In the matter between

SIMPHIWE TOM

Applicant

and

CACADU DISTRICT MUNICIPALITY
 SOUTH AFRICAN LOCAL MUNICIPALITY

First Respondent

BARGAINING COUNCIL

Second Respondent

MARION FOUCHE

Third Respondent

JUDGMENT

REVELAS, J:

[1] This is a review application in terms of section 145 of the Labour_Relations Act 66 of 1999 as amended.

[2] The applicant seeks to set aside an award in terms of which the dismissal of the applicant was to be found both procedurally and substantively fair.

[3] The applicant was dismissed by the second respondent as a result of repeated absences during the period May to June 2002. In total he was absent from work as from 27 May 2002 to 19 June 2002. Three different persons, two medical doctors and one herbalist, gave medical or so-call sick leave certificates in respect of these absences. The applicant was then dismissed on 20 June 2002 following a disciplinary inquiry which was conducted in his absence.

[4] The applicant was only employed during February of the same year. He therefore was employed for a period of little less than 4 months before he absented himself. The applicant's main attack on the award was that the third respondent, the arbitrator, approached the award on the erroneous assumption that the applicant had to have both a valid reason to be absent and was required to have prior leave of absence. The arbitrator found that the applicant had a valid reason to be absent from work, namely his illness, but that he should be dismissed for his failure to report his whereabouts, and the reason or his absence, to the first respondent.

[5] The first respondent conceded that the award ought to be set aside as it was of the view that the arbitrator did not apply her mind to the question whether or not the applicant's failure to communicate with the employer was deserving of dismissal and wrongly relying on the judgment in COUNTY FAIR FOODS (PTY) LTD v CCMA & OTHERS (1999) 20 ILJ 1701 (LAC) and placed reliance on the obsolete reasonable employer test. Both parties were of the view that the award should be set aside.

[6] The first respondent contended that the matter ought to be remitted to the second respondent and arbitrated afresh. The applicant, however, believes that the arbitrator's award should be substituted for the finding that the dismissal was unfair and order the reinstatement of the applicant.

[7] The first respondent had, prior to this applicant being heard, withdrawn its opposition to the review application and tendered the applicant's costs arising from its opposition to the application for review. The applicant was also notified that since he has elected to pursue the application for review and to seek relief on the basis that the labour court determine the matter, the first respondent will only oppose that aspect of the relief and seek the costs. The applicant persisted that I determine the merits.

[8] In my view, the fact that the arbitrator's reasoning was flawed to the extent that both parties were in agreement on that, does not necessarily render the dismissal unfair. This was not an award where the flawed reasoning and the findings of facts

in favour of the applicant, are capable of separation and selection only insofar as to favour the applicant's wishes.

[9] The applicant, who was only employed for a period little less than four months by the first respondent, now seeks to be reinstated more than two years later. The fact remains that the applicant was absent for a very long period in relation to the relatively very short period of employment.

[10] The evidence before the arbitrator also does not as a whole support a case for the reinstatement of the applicant. He was absent for a long period and perhaps not for a reason as valid as the arbitrator had found. Of course the applicant regards this finding in his favour as a lucid moment in the arbitrator's otherwise flawed reasoning. The arbitrator appears to have had misgivings about the testimony of the herbalist who also provided the excuse or alibi for the period 3 June to 7 June 2002. These misgivings the applicant no doubt would want to shelve along with the flawed reasoning. The evidence rather suggests that this was a deserving case for dismissal.

[11] In the circumstances the matter should be remitted to the second respondent to be arbitrated by a commissioner other than the third respondent. The applicant could have avoided incurring yesterday's costs but chose not to. In the circumstances he should pay the first respondent's costs.

[12] I make the following order:

1. The award of the third respondent under Case No. T/cedu/2/2003 is hereby set aside.
2. The matter is referred back to the second respondent and back to the CCMA to be arbitrated before a different arbitrator.
3. The applicant is to pay the first respondent's costs of the opposed application on 23 November 2004.

E REVELAS
JUDGE OF THE LABOUR COURT