IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J3838/98

In the matter between :-

GLAXO WELCOME SA (PTY) LIMITED Applicant

and

MASHABA, EUDOCIA BONGI First Respondent

G SHAKOANE N.O. Second Respondent

CHAIRPERSON OF THE GOVERNING BODY OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Third Respondent

JUDGMENT

MARCUS AJ

INTRODUCTION

1 In response to an application by the first respondent ("the employee") to have an arbitration award in her favour and issued by the second respondent ("the Commissioner") made an order of Court, the applicant ("the Company") seeks to review the arbitration award in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act").

2 The employee commenced her employment in the position of Assistant Human Resources Officer on 1 May 1995. At the time of her dismissal on 20 June 1997, she was employed as a Human Resources Officer. The employee's duties within the Human Resources Department covered the administration of employee files, loans administration, liaison with brokers regarding employee benefit applications, preparation of employment contracts, administration regarding recently engaged employees, recruitment of shop floor temporary staff and maintenance of records.

3 On 5 June 1997, a disciplinary enquiry was convened by the Company at which the employee faced the following charges:

3.1 The unauthorised and insubordinate distribution of a questionnaire ostensibly to evaluate department performance and calculated to create the false impression that it was undertaken as a segment of a *bona fide* survey whereas it was intended

simply to provide material for her defence at a previous disciplinary enquiry;

3.2 The negligent re-hiring of temporary employees who had previously been dismissed for the offence of “trashing” the factory floor.

3.3 As a member of the Human Resources Department, creating obstacles to the proper running of the disciplinary process by:

3.3.1 insisting on outside representation at an appeal knowing this to be contrary to established policy;

3.3.2 failing to comply with a request that an appeal be supported by written motivation;

3.3.3 relying upon the aforesaid conduct to enter into a dispute with the Company;

3.4 Continuing argumentative and insubordinate conduct towards managers of the Company;

3.5 Compounding the transgression of an employee by facilitating a breach of procedures in relation to the re-hiring of informal workers.

4 The chairperson of the enquiry concluded that due to the continuous and repeated unacceptable performance and work place behaviour of the employee, the trust relationship had been irreparably damaged. The outcome of the disciplinary enquiry was that the employee was dismissed.

5 The dispute was referred to the CCMA. The employee claimed that her dismissal was both substantively and procedurally unfair. The dispute was not resolved by way of conciliation. The matter was referred to arbitration. The Commissioner found that the dismissal of the employee was unfair and ordered her reinstatement with retrospective effect. It is this arbitration award which the Company seeks to have reviewed and set aside.

THE TEST FOR REVIEW

6 The test for review in terms of section 145 of the Act has been authoritatively settled by the Labour Appeal Court in **Carephone (Pty) Ltd v Marcus N.O. & Others (1998) 19 ILJ 1425 (LAC)**. The question to be asked is whether there is "**a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at**" - at 1435 E.

7 Before dealing with the grounds of review advanced in the present case, it is appropriate that certain general observations be made. The Company complains that the Commissioner erred in a number of respects. The attack, however, is essentially couched as a failure by the Commissioner to apply his mind to the evidence before him. The Commissioner, who abides the decision of the Court, has filed an affidavit in which he states, *inter alia*, the following:

"**12.2 I wish to state that my findings are accurate, and were made upon full and proper consideration and assessment of the evidence given by the parties at the hearing. But due to the fact that I am required by the Act to give an award with brief reasons within fourteen days after the hearing is finalised, I could not reproduce and reason on each and every little aspect of the evidence. I have expressly stated, for the parties and readers of my award to be aware that I have fully considered the evidence, in paragraph 7 (seven) of my award, that I have indeed done so but that I would nonetheless briefly refer to the evidence of each party in my award. ....**"

8 In general terms, a Commissioner cannot be expected to reflect every detail of the evidence he or she has heard in an arbitration award. This is not required of courts of law and is manifestly not required in a process which is designed to be expeditious. Thus, as a point of departure, the mere failure by a Commissioner to deal with a particular aspect of evidence in the award is not in itself indicative of a failure to apply the mind. I should add, however, that a statement by a Commissioner, as in the present case, that the findings were "**accurate and made upon full and proper consideration and assessment of the evidence**" is in no way binding upon a court and does not relieve the court of the duty to assess the

justifiability of the award.

9 A further point to be emphasised is that the proceedings before the Commissioner are, in essence, fresh proceedings to determine the issues in dispute. In the present case, the Commissioner was required to determine whether the dismissal of the employee was procedurally and substantively fair. In the process of adjudication, the Commissioner is obviously obliged to have regard to all relevant evidence. In a case such as the present, relevant evidence would include the record of the disciplinary enquiry and the internal appeal. It must be appreciated, however, that the Commissioner will usually hear oral evidence at the arbitration hearing and that evidence will have to be considered in the light of the evidence as a whole, including such documentary evidence as may be tendered. In the process, the Commissioner will often be called upon to make findings of credibility.

10 In the present case, the record of the disciplinary enquiry has been furnished. It does not appear to be a verbatim transcript of everything that occurred. In addition, the record of the arbitration before the Commissioner has been transcribed. The transcription is poor and frequently difficult to follow. It runs to 171 pages. There has been no attempt by the parties to make sense of the many gaps in the transcription. In addition, the Company also furnished the Commissioner with a bundle of documents.

11 It is against this general background, that I propose to consider the individual grounds of review.

THE FAILURE TO CALL WITNESSES

12 The Company contends that a Commissioner is not a mere "**sanguine trier of fact**". In the present case it is argued that it was clear to the Commissioner that the Company failed to call a particular witness, Ms Lynn Roslan. It is argued that the Company's failure ought to have been remedied by the Commissioner exercising his powers of subpoena in terms of section 142 of the Act. This section vests a Commissioner with the power, *inter alia*, to subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute.

13 While it is clear that a Commissioner possesses the power to subpoena witnesses, it is a power which, in my view, ought to be exercised only in appropriate cases lest the wrong impression be created that the Commissioner is not discharging his or her functions impartially. It is incumbent on an applicant for review to demonstrate that the Commissioner abused his discretion or failed to exercise a proper discretion.

14 In the present case, the Commissioner chose to answer the allegation that he ought to have exercised his powers under section 142 of the Act. He states that

the matter was initially set down for hearing on 15 September 1998. Both parties arrived for the hearing and it appeared that they intended using documentary evidence which had not been properly prepared and that they did not propose to adduce oral evidence. The Commissioner then states the following:

"**20.4 I then advised them that they must go prepare and properly compile and paginate their documentary evidence and make enough copies for everybody at the hearing. I informed them to include all relevant documents they wanted to use. Also, I impressed on them that they must bring all the witnesses involved in the case including those not referred to in the documents. Mr. Mnguni was present and represented the applicant on that day. I then postponed the matter to the 30 September 1998. In addition the parties received notice of the hearing from the CCMA case management which is clear and self-explanatory, and had time to determine what evidence they required and what witnesses to call. Indeed, I received no complaint or request from any of the parties that I should subpoena any witness or call for any additional documents from any party who perhaps did not want to release them or otherwise.**" (emphasis added)

15 This passage makes it clear that the Commissioner impressed upon the parties that they must bring all witnesses involved in the case, including those not referred to in the documents. In such circumstances, it seems to me that no criticism can be directed at the Commissioner for failing to exercise his powers of subpoena.

THE QUESTIONNAIRE

16 The employee was subject to two disciplinary enquiries. The first was held on 10 March 1997 ("the first enquiry") and the second on 9 June 1997 ("the

second enquiry").

1

17 After the commencement of the first disciplinary enquiry, the employee distributed what the Company considered to be a misleading and unscientific questionnaire. In my view, the Company's misgivings about the misleading and unscientific nature of this questionnaire were entirely justified The distribution of this questionnaire did not form the subject matter of any charge at the first disciplinary enquiry. This questionnaire did, however, form the subject matter of the first charge at the second enquiry.

18 Although the questionnaire did not form the subject of any charge at the first enquiry, it nevertheless featured at that hearing. It was the subject of evidence given by the Human Resource Manager, Ms Roslan, who stated:

"**I would like to express my concern with this questionnaire going out as an HR document without my knowledge. I object to it strongly. I am concerned about your reason for doing this. I am concerned about the image of the HR Department.**"

19 The chairperson of the first enquiry clearly took the questionnaire into account, at a minimum, in relation to sanction. He stated:

"**An indication of your interpersonal relationships is that survey that you put around. Not one of the people with whom you have had a clash is on that list. It was done in an unprofessional way. <u>I would not have come down so</u>**

hard on you on the interpersonal relations issue if you had not done this survey. It is the number of clashes and this survey. You may have done it in good faith, but you have done it in a way that can be interpreted as undermining." (emphasis added)

20 It will be recalled that it was the distribution of this questionnaire that formed the subject matter of the first charge at the second enquiry. That charge was framed as the unauthorised and insubordinate distribution of a questionnaire ostensibly to evaluate departmental performance and calculated to create the false impression that it was undertaken as a segment of a *bona fide* survey, whereas it was intended simply to provide material for defence at the previous disciplinary enquiry.

21 The Commissioner found that this charge had been "**wrongly put**" to the employee "**on the grounds that it has been dealt with and finalised earlier in the disciplinary enquiry of 10 March 1997**". The Commissioner found that "**this charge was dealt with and adjudicated on or finalised in that hearing**" and that the Company could not "**re-charge the applicant with the same offence**".

22 The Company contends that the Commissioner made a superficial and inaccurate reading of the record of the first enquiry by reason of this conclusion. I do not agree. The distribution of the questionnaire clearly figured in the

sanction imposed by the chairperson in the first enquiry. The employee was punished more severely than would have been the case had she not distributed the questionnaire. The chairperson says this explicitly. It was unfair of the Company to take the questionnaire into account at the first enquiry in circumstances where it did not form the subject of any charge. For this, the employee was unfairly sanctioned. The unfairness was compounded by making the questionnaire the subject of one of the charges at the second enquiry. Although the Commissioner speaks of this charge being "**finalised**" at the first hearing, this somewhat inaccurate description does not detract from the foundation for his conclusion that the employee was effectively subjected to double jeopardy. In my view, therefore, there is no substance in this ground of review.

THE NEGLIGENT RE-HIRING OF TEMPORARY EMPLOYEES

23 The second charge against the employee concerned the allegation that she had negligently re-hired temporary employees who had previously been dismissed. In this regard, the Commissioner made the following finding:

"**I am satisfied that the respondent has failed to prove on a balance of probabilities that the applicant knew or that she could reasonably have been expected to know that the re-hired employees had been dismissed before. This is so because on the evidence of Mr Van Breda there could not have been any records of their dismissals kept. He was just instructed to chase them out of the premises immediately, no hearing was held. Also, the respondent could not produce any evidence of the alleged records.**"

In paragraph 10 of his award, the Commissioner stated further:

"**Mr Van Breda is a security manager and is responsible for all security matters at the respondent. .... His evidence was briefly that the casual employees allegedly re-hired by the applicant were actually chased out of the respondent's premises by him upon the instructions of one Isa Donninger. The said instructions were given by 'a call'. There were no charges laid against them and no disciplinary hearing occurred as 'they were just taken away immediately'**".

24 In this regard, the attack by the Company on the arbitration award alleges that in paragraph 10 "**and following**" evidence that is attributed to Mr Van Breda "**was in fact tendered by the first respondent**". The Commissioner responded to this attack in the following terms:

"**22 I deny that the evidence attributed to Mr Van Breda in paragraph 10 and following paragraphs in my award was in fact tendered by first respondent. I insist that it was given by Mr Van Breda before me as CCMA Commissioner, and is a summary of his evidence both in chief and under cross-examination.**"

25 The Company then filed a supplementary affidavit, as it was entitled to do in terms of Rule 7A of the Rules of the Labour Court. In the supplementary affidavit it is contended that Mr Van Breda never gave evidence that there were no charges laid against the casual employees and that no disciplinary hearing occurred.

26 The Company now seeks to place great weight on what it contends was the misconstruction of the evidence of Van Breda. The allegation in the founding affidavit is couched in broad and general terms. No attempt is made to identify with any degree of specificity what evidence was wrongly attributed to Van Breda. It was to this broad and generalised allegation that the Commissioner responded. It was only thereafter that the Company supplemented its founding affidavit in order to particularise the facts on which it based its contention that the Commissioner wrongly attributed evidence to Van Breda.

27 In my view, the Commissioner's statement to the effect that no charges were laid against the casual employees and that no disciplinary hearing occurred, is a legitimate inference from the undisputed evidence of Van Breda that on the morning in question, he "**escorted them out of the production areas through the security gates and I took in their security cards**". Van Breda agreed that the casual employees were "**dismissed immediately**" (Record, p 55).

28 The attack launched by the Company on this aspect of the award, misses the point. At issue was whether or not the employee was negligent in re-hiring temporary employees who had previously been dismissed. She admitted that she was responsible for recruiting the individuals concerned (Record, p 113). What the Company was required to establish was whether she acted negligently. In

other words, it was for the Company to demonstrate that she ought to have known that the employees in question had previously been dismissed or that she ought to have taken steps to ascertain the correct position. In this regard, her evidence was that after the event in question her manager told her that the casual employees she had hired had previously been dismissed and that they should not have been re-hired. The Record reflects the employee as stating, "**I told her look, I have looked in the file; there was nothing, so there (was) nothing stopping me**" (Record, p 113). The Record also reflects the following evidence given by the employee at the arbitration hearing:

"**So now so when I was called to take this people there was nothing in this file, so that is why I am asking you Mr Nguni about the policy and if there was any documents there, Mr Nguni why didn't you do us the pleasure, for us to bring us a copy, to show me because (indistinct) I did not see it. And you knew even in the correspondence after that is that, that my reference is that there was nothing in this file. You knew that that would come out in this hearing.**"

I have reproduced this passage from the evidence as it appears. Although it is not entirely grammatical, it is clear that the employee insisted that her defence was that she found nothing in the files relating to the dismissal of the casual employees. More importantly, however, Mr Mnguni, who represented the Company at the arbitration proceedings was specifically alerted to this question and yet failed to produce any evidence that there were files reflecting the dismissal of the casual employees. This aspect of the employee's evidence was not subject

to cross-examination and hence stands unchallenged.

29 The Company now contends that it's chief witness, Mr Mnguni, stated at the arbitration hearing that:

"**It was Bongi Mashaba's duty as Human Resources Officer to control and maintain the number of readily available temporary staff in the pool list. It was also imperative on her to review all current existing contracts with departmental heads quarterly each year. This is after three months. This function is clearly outlined in the Company's policy documents ...**".

30 In the supplementary affidavit deposed to by Mr Mnguni he states:

"**35 I was satisfied that this evidence was conclusive on the issue and for that reason did not take steps to produce the files of the employees in question. In this regard the second respondent ignored relevant considerations. I re-examined those files after receiving the determination from which I confirmed that, contrary to the evidence of the first respondent and in support of my evidence, there were indeed letters of dismissal on the relevant files.**"

31 In my view, Mr Mnguni had no right to regard his own evidence on this issue as conclusive in the light of the employee's own uncontested evidence that she looked in the files and found nothing there. It is of no avail for the Company to adduce fresh evidence on review that was never placed before the Commissioner in an endeavour to establish that the Commissioner failed to exercise a proper discretion. In the **Carephone case (supra)**, the Labour Appeal Court was

careful to emphasise that scrutiny of the decision occurs in the light of the material "**properly available**" to the Commissioner. I am prepared to assume, without deciding, that a Court of review may be entitled to entertain new evidence pursuant to its equitable jurisdiction and inherent powers in terms of section 151 of the Act. At a minimum, however, it would be necessary for the party seeking to adduce such evidence to satisfy the long established tests for receiving fresh evidence on appeal. This would entail, *inter alia*, demonstrating that the evidence was not available at the trial. (See **Colman v Dunbar 1933 AD 141**). In the present case, the Company would not be able to satisfy the first requirement for adducing fresh evidence. I am accordingly of the view that the attack on this finding fails.

CREATING OBSTACLES TO THE DISCIPLINARY PROCESS

32 The third charge levelled against the employee is that as a member of the Human Resources Department she created obstacles to the proper running of the disciplinary process. Three instances of such obstruction are specified, namely, insisting on outside representation at an appeal knowing this to be contrary to established policy; failing to comply with the request that an appeal be supported by written motivation and relying upon the aforesaid conduct to enter into a dispute with the Company.

33 With regard to the alleged insistence on outside representation at an appeal, the Commissioner stated the following concerning the employee's evidence:

"**.... she testified that she never insisted on outside representation, the shop steward who represented her at the disciplinary hearing on 7 June 1997, Mr Thwala, has advised and initiated the involvement of a Union official when the matter went on appeal where it was to be chaired by the respondent's CEO. She stated that respondent had also caused the Union official to be involved because they communicated directly with the Union in trying to resolve the issue. She stated that she did provide the particulars relating to the grounds of her appeal (she referred me to the appeal form she lodged) and that in any event the respondent at no stage indicated to her that the particulars she provided were not sufficient motivation for her appeal. She said that it is her Union representatives her advised her on declaring a dispute against the respondent.**"

The Commissioner then concluded as follows:

"**... the respondent has failed to prove on a balance of probabilities that the applicant insisted on outside representation. On the evidence given by Mr Twala, whom I found to be honest and reliable, as well as on the documentary evidence handed in, particularly the correspondence between the respondent and the Union, it is clear that the applicant did not insist on outside representation.**"

With regard to the failure to motivate the appeal, the Commissioner found that "**there is no evidence from the respondent either to prove that there is a rule or standard relating to this type of conduct or at least to prove that the applicant was ever called upon to provide such written motivation on the**

ground that the motivations in her appeal form were insufficient and that she was made aware of the consequences of not complying therewith."

34 In his affidavit filed in response to the review, the Commissioner stated:

"**In addition, when the Union (official) became directly involved with the dispute on behalf of the first respondent it was after and as a result of correspondence emanating from the applicant to the Union officers in respect of the dispute. In the circumstances, therefore, the first respondent could not be said to have in any way 'insisted on outside representation at an appeal knowing this to be contrary to established policy'.**"

35 It is important to appreciate that this charge flows significantly from the employee's status as a member of the Human Resources Department. Indeed, the charge is prefaced by a reference to this status. The Company's disciplinary code and procedure sets out the rights of employees in the following terms:

"**4 EMPLOYEE RIGHTS**

Any employee who is subject to the Disciplinary Procedure shall have the following rights:

4.1 To be informed beforehand what the complaint (clearly formulated and not vague) against him is;

4.2 To be present at the enquiry;
4.3 To have the hearing take place timeously;

4.4 To be given adequate notice prior to the hearing (minimum 24 hours);

4.5 To be represented by a shop steward or another employee of his own choice (if required);

4.6 To be given an opportunity to state his case and to call witnesses;

4.7 To be able to challenge evidence presented against him and to cross-examine witnesses;

4.8 To have an interpreter (if required);

4.9 To a finding and the reasons therefor and to be advised of disciplinary action to be taken;

4.10 To appeal to a higher level of authority against the finding or disciplinary action taken." (emphasis added)

36 The background to this charge flows from the first disciplinary enquiry. At that enquiry, the employee was found guilty. The sanction comprised a written warning. The employee appealed against this finding. The appeal form was signed by the employee and a representative, Mr Tsubela, who was a Union representative, but not a shop steward or employee. The reasons for the appeal are stated in the appeal form as being "**incorrect procedure, inappropriate disciplinary action and new evidence**". Save for this terse description, no further detail was submitted by the employee.

37 On 10 April 1997, Mr Mnguni addressed a memorandum to the employee in which he advised her that the disciplinary code did not provide for outside representation. The memorandum stated:

"**Following your request on 8/4/97 for a written submission regarding the above matter, I wish to state the following:**

1 That, in terms of section 14 of the Company's recognition and procedural agreement which provides that 'the Company's existing grievance and disciplinary code and procedure will form part of this agreement'.

2 That, in terms of section 4.5 of the Code which provides that 'any employee who is subject to the disciplinary procedure shall have the right to be represented by a shop steward or another employee of his/her own choice.'

It is therefore recommended, in this instance and in the spirit and letter of our recognition agreement that your choice of representation be considered among the 550 (approximately) employees presently employed by our Company."

38 There is a further memorandum dated 5 May 1997 from Mr Mnguni to the employee in which he states the following:

"**In response to your memo of 30 April 1997, I wish to clarify the following factors regarding the above matter.**

1 After my meeting with Mr Collier on Wednesday, 26 March 1997, numerous attempts were made by myself to convene a feedback meeting with your initial employee representative - unfortunately these meetings did not materialise.

2 On Friday 28 March I verbally informed you that in accordance with disciplinary regulations, outside representation could not be allowed. You were further informed by myself that a written motivation regarding our appeal should be submitted to Angela (Mr Collier's secretary) to enable Mr Collier to set up a date for your hearing on his return.

3 I have since established that no written motivation has been submitted.

4 I further urge you to submit a written motivation for Mr Collier's

perusal and to enable him to consider your case as soon as possible as you have requested."

39 On 19 May 1997 a meeting was held between the Company and Union representatives regarding the employee's appeal. The minutes reflect, *inter alia*, that Mr Tsubela expressed his concern that the Company was delaying the appeal process by not allowing the employee "**to be represented by a Union official**". The minutes also reflect that Mr Mnguni "**stressed that in compliance with our disciplinary code, Bongi could not be presented by a Union official**". The minutes also reflect that "**it was further stressed that regarding the question of perceived delay by the Union, the Company held the view that Bongi is causing the delay by not motivating her appeal in writing as requested.**"

40 In a letter dated 23 May 1997 from Mr McClintock, the Human Resources Director to Mr Tsubela he states, *inter alia* that "**the reasons stated on her appeal form are simply a re-statement of the very broad categories set out in the disciplinary procedure**". The letter then spells out the reason why motivation is required in the following terms:

1

"**As you will know an appeal will only, in exceptional circumstances require a full re-hearing of the case and to determine what form the appeal should take it is essential that Mrs Mashaba complies with the requirement that she spell out in detail the specific grounds and motivation of her appeal.**"

The letter states further:

"**In my view there is little to be achieved by further debating the reasons for the delay of the appeal. The simple route forward to allow the appeal to be dealt with is for Mrs Mashaba to now furnish her written motivation and thereafter the appeal will be handled without further delay. She and her representatives will be given an opportunity to motivate the appeal in person.**"

41 In an apparent response to this letter, Mr Tsubela faxed Mr McClintock and stated "**we will proceed with our dispute to CCMA because you seem to take the side of your IR unit. .... You can refuse to meet with us now but you will have to come to the CCMA meeting**".

42 In my view the evidence before the Commissioner at least demonstrated the following:

42.1 There was a Company rule prohibiting outside representation.

42.2 The employee was fully aware of that rule.

1.1

42.3 The employee was asked to motivate the reasons for her appeal.

42.4 The employee failed to motivate the reasons for her appeal.

43 In the light of this evidence, I have some difficulty in appreciating the Commissioner's conclusions. Putting the matter at its lowest, it seems absolutely clear that the employee went along with outside representation well knowing that this was not envisaged by the Company's disciplinary code. The Union official, Mr Tsubela, was the employee's representative. The mandate for this representation must have emanated from the employee for otherwise Mr Tsubela would have acted without instructions. This was never suggested. (Record, p 41). Whether it is strictly accurate to say that the employee "**insisted**" on outside representation is not really material. It was within the employee's power to terminate Mr Tsubela's mandate at any time. The reason for the prohibition on outside representation was explained to the Commissioner by Mr Mnguni at the arbitration hearing. (Record, p 15). I am not presently concerned with the wisdom of this policy.

44 The employee denied that she "**insisted**" on outside representation. She stated that it was her representative who said that he did not think that "**he would be able to cope at that level with the CEO chairing the appeal. So he was going to ask someone from his office.**" (Record, pp 94 - 95). This may well explain the employee's thinking on the issue but it does not detract from the fact that she went ahead knowing that outside representation was contrary to Company

policy.

45 In my view, the Commissioner's conclusions on the issue of outside representation are simply not justifiable in the sense in which that term is used in the **Carephone case (supra)**. The Commissioner appears to have placed undue emphasis on the way in which the charge was formulated. In a narrow sense, the employee did not "**insist**" on outside representation. That, as I have indicated, was not the gravamen of the charge. She manifestly went along with outside representation knowing this to be contrary to the Company's policy.

46 I wish to emphasise that although I have found the Commissioner's conclusion on this issue not to be justifiable, I do not wish to be understood as making any finding on the Company's policy precluding outside representation. There is simply not sufficient information before me to reach any conclusions in this regard.

47 With regard to the second limb of the charge of obstructing the disciplinary process concerning the absence of motivation for the appeal it is quite clear that the appeal form is presented in the scantiest of detail. The employee's evidence that she did provide the particulars relating to the grounds of her appeal and that at no stage did the Company indicate to her that the particulars provided were not sufficient is simply not sustainable on the evidence. In this regard, the Company

in its supplementary affidavit stated the following:

"**The second respondent's conclusion that there was no evidence from the respondent to prove that the applicant had been called upon to provide written motivation on the grounds that the motivations in her appeal form were insufficient, is clearly false and indicates a failure to have examined the relevant written documentation submitted adequately or at all.**"

It is clear from the documentary evidence that the employee was repeatedly called upon to motivate her grounds of appeal. The Commissioner's findings in this regard are simply not justified.

48 Lastly, it is quite clear on the evidence that the employee did declare a dispute with the CCMA. On this score, I must emphasise that it is not entirely clear to me what the basis of the disciplinary charge comprises. If the charge amounts to an attempt to discipline the employee for exercising any right under the Act, such would clearly be incompetent. Since I have found that the Commissioner's findings on the first two limbs of this charge are not justifiable, it is not necessary for me to say anything further on this issue. On this charge, the matter will have to be considered afresh by a new Commissioner who will be placed in possession of all the relevant information.

INSUBORDINATE CONDUCT

49 The fourth charge comprised an allegation of continuing argumentative and insubordinate conduct towards managers of the Company. At the arbitration, very little oral evidence was led in support of this charge. In this regard the Commissioner found that -

"**... it is clear on the documentary evidence presented by the parties and on the evidence given by the applicant whom I also found to be an honest and reliable witness, that the charge relates to her communication with her manager and in particular to her querying of the respondent's failure to make the annual review or increase of her salary as provided for in the terms of her employment contract.**"

50 The Company's principal contention relating to this charge is that the Commissioner ignored the fact "**that there is much more to this charge than the first respondent's conduct in relation to her salary demand**". The focus of the attack was on a memorandum from the employee to her manager dated 29 May 1997. It is appropriate that I quote this memorandum in full:

"**MEMORANDUM**

TO: **LYNN ROSLAN**
cc: **P Smith, J McClintock, P Twala**
FROM: **BONGI MASHABA**
DATE; **29 MAY 1997**

1. <u>Apology</u>

I want to apologise regarding the fact that:

. 2 of the 10 people I called in for a 1 day-job on 16/5/97 were dismissed

for bad conduct last year

. I helped Melany the way I did.

2. <u>I have the following problems in regard to your reaction to the above and many others</u>.

2.1 The way you seem to change facts regarding issues to suit whatever purpose you want and the way yo take these as far as you do. Your complaints about me are not based on the true facts of the events but projected to suit what you want them to look like.

You have done this on a number of occasions beside these (see Addendum A), to name a few. In my appraisals (to which I complained in writing): my salary increase; in your disciplinary action against me (some proof of which was submitted); and very recently (HRIS meeting & B. Glynn issue - both I complained in writing).

2.2 Your inconsistency regarding how I should perform my work. Your rules change everything to suit the purpose of that instance,-today they are right, tomorrow they are wrong depending on what impression you want to present about me or the wrong you want seen in my doing.

E.g. You say I should not have helped Melany with documentation but should have told her about the procedure and come to discuss with you.

. I did that regarding informal recruitment documents from I. Twala - you took this to the disciplinary action that I can't communicate policies and procedure I came to you for help.

. I explained procedure to M. Skeen as you say you expect me to. - you took that to the disciplinary action alleging that I was 'extremely difficult'.

. You put in my objectives and emphasised that I must help people because "I am the only person in the department who is not being helpful". - I helped Melany, now I shouldn't have.

. You have emphasised numerously and very strongly to me that you want action not stories. - I acted, and now I should have passed this on to you without doing anything.

. You have told me that we must be flexible with the policies & procedures. This was also supported during the disciplinary hearing. - (to my point about informal recruitment and its implications, re: Michaels's temps) that policies & procedures are not cast in stone they are a guide and an example given about compassionate leave, you further said this is not a bureaucratic company.

2.3 When dealing with issues, mistakes and complains that concern me. - On a number of occasions I find you quick to lashout criticism, hardhanded and very hast to judge, accuse and allege no matter how I try to tell/remind you the real facts of what you said. Only if something reminds you or someone else tells you something then you realise the actual facts and you apologise for being angry, (e.g. J Nelson & see memo to you re: B Glynn).

2.4 I find you do not take into consideration the facts/circumstances involved or even check your understanding of facts and procedures surrounding an issue at hand, some of which are standard procedure, e.g. some of the points you use in your allegation indicate your misunderstanding of the actual facts ad procedures, maybe purposefully to project that I am incapable, e.g:

. Any person who has been called in to do a job for the company must be paid a salary for the work done. Legally if these people did a job for GWSA it remains the company's responsibility to pay them. If Steyn did wrong he should be corrected but we may not withhold <u>their salary</u> because of that otherwise the company may be liable for withholding pay.

. It is also GWSA policy and procedure that salaries must be paid through the Salaries Department whether the employees were recruited formally or informally and for any length of stay. The documents I gave you are in the names of the casuals and not Steyn and therefore would not "get the money paid out to the employee (Steyn)". The arrangement between themselves they can sort it out so, and I can't be involved - my duty is to ensure that people are paid in lieu of the work done and that the correct documents (even though late) are done.

. There is no way that salaries Department can process and pay a salary if there is no documentation and this applies for all employees, - 1-day casuals, temps, permanent, etc. informally or formally recruited. This is legal, procedural and necessary documentation and not an "instruction to payroll to regard informal workers as employees", - they are temporary

employees whiles they work for us, that's what we always do, when the contract is finished they are no more, but payroll records must be justifiable anytime later on.

2.5 The way you deal with problems that involves me seems very subjective, attacking the symptoms and not the causes. e.g. Steyn did wrong and I did wrong, -but you don't do anything about the cause of the fault. There is still a chance that someone else can do what Steyn did and I can be blamed for any of the points under 2.2 - and you will always have a reason to portray something wrong I have done.

What Steyn did and some other problems you blame on me indicate a structural problem, with the communication strategies you use to communicate the company policies and procedures, it does not reach everyone. e.g. We are still receiving and submitting to Payroll after the 10th (even 1 month late), despite the fact that I was disciplined to correct that problem - the departments don't know about payroll-10th problem so this will keep occurring and I am the one who takes these to payroll dept and therefore blamed for late submissions.

2.6 My suggestions: You don't take cognisance or encourage them you just listen or ignore them then later use them to allege that that was an action agreed upon (Addendum A). Sometimes you only take them if someone else suggests them and there are examples of this.

2.7 I find some of your reactions biased - and giving selective treatment - e.g. in view of Addendum A, it does not seem a problem that people who were involved in this issue did not follow procedure to inform me; Angela vs Packing hall staff medical aid service; when someone in your own department refuses point blank and rudely to adhere to procedure and/or to use appropriate forms which you sanctioned should be used, - you say you are not going to be a referee and not going to involve yourself in acts of "catching up" someone, - but if other people don't you want to know from me why they are not using the correct forms.

3. <u>My functional responsibility in the department</u>

3.1 Yes I have the responsibility to advise correctly. Like everyone else I am not 100% perfect and cannot make everyone happy all the time, but I pride myself with the experience, knowledge and the good I have and still contribute to the company. I know that my performance is not as bad as you portray it. Everyday I meet complicated issues which I have to deal

with and advise on. E.g. last week Friday I gave you 4 typical situations of this which I advised and dealt with to the best of my knowledge and ability. You also have come to me for advice, help and explanation on issues of policy and procedure and how to go about it.

3.2 Since I joined the company it has been my job to explain/advise/inform on policy and procedure before anyone else did in this department. I have corrected numerous incorrect applications of policies and procedures within and outside the department for the benefit of the company and I think I have been trying my best for the company. I have never before had any such problems as you portray in this regard. If after all this there is something that I am not doing right in this regard I think management should not only judge but be objective in its approach and attend to the cause of the problem to help me correct my wrongs and improve from them.

4 If I do wrong I have to be reprimanded or subjected to all forms of correctional measures but it should be truthful and based on real and actual facts of the event. I expect respect, leadership, guidance, encouragement and correction that will help me do my job best but so far most of the feedback seems inconsistent and very destructive (see memo HRIS).

5 I don't know why you are doing all this. Maybe there is another side of it which I am missing or misunderstanding, but this is the way I see things and what I feel subjected to. I feel grossly victimised and unfairly treated. I am now beginning to believe that this is a procedural act aimed at removing and replacing me from my position due to the reasons of "not being able to perform my duties correctly, putting the company at risk, incapable to communicate policies, wrong application of policy and procedures, interpersonal relationship, etc.", most of which are not based on real facts and there are more of these examples.

6 This has been going on since last year and every aspect of my life and myself is affected. I can't even begin to tell how much. My worklife is a nightmare in waiting, expecting to be called in for another wrong.

I hope and pray that you take the content of this letter as an unbottling of all the things that disturb and concern me in my daily worklife.

With all due respect

Bongi"

51 This is an angry and aggressive memorandum. It is obviously symptomatic of a breakdown in communication. It bears the hallmarks of an emotional outpouring and a great deal of pent-up frustration. For all its anger and aggression, however, the real question is whether it crosses the threshold of legitimate dissatisfaction to insubordination. The employee states in her answering affidavit that she wrote the memorandum "**to express her feelings and frustrations**" but did not intend to show her manager any disrespect. She states further that she believed "**that as an employee of the company I am entitled to voice whatever frustration I am experiencing in the workplace**". Mr Maserumule, who appeared on behalf of the employee argued that the memorandum must be understood in its context. Part of that context was a memorandum from Lynn Roslan to the employee a week before. In that memorandum, which formed part of the documentation placed before the Commissioner, Ms Roslan raised "**two recent issues which have given me concern**". The details of these issues need not be considered for present purposes. It suffices to say that Ms Roslan mildly rebukes the employee for non-compliance with certain procedures.

52 In the **Carephone case (supra)** the Labour Appeal Court was at pains to emphasise that the distinction between review and appeal must be maintained.

The crucial question for my consideration is whether or not the Commissioner's conclusions relating to this charge are justifiable. Whether or not I hold a different opinion concerning the memorandum of 29 May 1997 is beside the point. Opinions on issues of this sort may legitimately differ. Where, as in a case such as the present, the conclusions reached by the Commissioner are to some extent dependent on findings of credibility and matters of judgment and evaluation; the scope for interference on review is more limited than in the case of findings based on objectively ascertainable facts. Again, however, I do not suggest that in cases involving evaluation and judgment the Court is in any way relieved from the obligation of assessing the justifiabillity of the decision.

53 At common law while it is clear that an official vested with a statutory discretion is obliged to take into account all relevant considerations and to ignore irrelevant considerations it is frequently no easy task to determine what is relevant or irrelevant as the case may be. Milne AJ in **Estate Geekie v Union Government & Ano 1948 (2) SA 494 (N)** postulated the following test at 511:

"**Allowing that is some consideration were taken into account which was so manifestly alien and irrelevant that no reasonable man could regard it as relevant, that might vitiate the decision arrived at as a result of it (depending upon the degree to which the intruding factor influenced the decision). ....**"

54 The position in English law has been summarised thus:

"**When the courts review a decision they are careful not readily to interfere with the balancing of considerations which are relevant to the power that is exercised by an authority. The balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the courts. Courts have, however, been willing to strike down as unreasonable decisions where manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.**" (De Smith, Woolf & Jowell *Judicial Review of Administrative Action* (5th ed) at 557 para 13-015

55 I am alive to the fact that the constitutional standard of justifiability introduces a form of substantive review. My reference to the common law authorities is merely illustrative of the difficulties of interfering on review in matters involving judgment and evaluation. While recognising that there is scope for differing views, I am not persuaded that the Commissioner's conclusions are not justifiable in the specialised sense in which that term is used in the **Carephone case (supra)**. In so finding, I do not wish to be understood as lending any endorsement whatsoever for the tone adopted by the employee in the memorandum of 29 May 1997. My conclusion goes no further than a refusal to interfere with the Commissioner's conclusions in this regard.

FACILITATING A BREACH OF PROCEDURE

56 In relation to the charge of compounding the transgression of an employee by facilitating a breach of procedures in relation to the hiring of informal workers, the Commissioner stated the following:

"**... the respondent has failed to discharge its onus and Mr Msiza's evidence could not assist the respondent in any way. His evidence as already discussed relates to unsubstantiated complaints by unknown third parties and to his own dissatisfactions about the fact that due to the respondent's policies the applicant was not able to give effect to his demand for her uncle to be hired to come and work with him. He did not even raise his dissatisfaction with senior management to see if they could not relax the policy or make an exception. He could not dispute the applicant's version of the facts relating to the charge. Further, in my view the facilitation of the said breach of the procedures originated from the departments who hired their employees when the Human Resources should be doing so in terms of the policy. Furthermore, Lynn Roslan whose signature was required to authorise payment process on the forms also materially facilitated the said breach. The respondent's move to single out the applicant for discipline was not only unfair, but created an inconsistency in the application of the rule or standard. There is not even evidence given, in justification of such differentiation in the treatment of its employees, in this regard.**"

57 The Company contends that the Commissioner erred in finding that Mr Msiza's evidence given at the arbitration hearing related to this charge. While this may well be the case, nothing turns on this error. It is in no way causally connected to the Commissioner's conclusions.

58 The evidence at the arbitration established that the Human Resources Department was in the process of educating and advising departmental heads on the practice of hiring informal workers to do piecework in their various departments. This hiring process by departmental heads could have led to serious and complex legal consequences for the Company. Everybody in the department was committed to terminating this unusual hiring procedure by

departmental heads. However, in April 1997 the employee allegedly advised departmental heads and salaried staff to disregard policy and procedure.

59 It is conceded by Mr Antonie, who appeared on behalf of the Company, that the employee testified that her superior, Lynn Roslan authorised and endorsed the payment process in violation of the policy and procedure. The essence of the argument advanced by Mr Antonie is that this conclusion is cast in doubt by a memorandum of 22 May 1997 from Lynn Roslan to the employee where this issue is discussed.

60 The irregularity relied on by the Company in relation to the finding on this charge turns on a discrepancy between the oral evidence presented to the Commissioner and the contents of the documentary evidence. Thus it is contended that the Commissioner failed to take into account the documentary evidence.

61 In my view there is no merit in this contention. The Commissioner is obviously required to have regard to all the evidence, both oral and documentary. Where, however, there is direct oral evidence which is not inherently improbable and where the discrepancies in the documentary evidence have not been put to the witness, a Commissioner cannot be criticised for basing his award on the oral evidence. That is precisely what has occurred in the present case. I accordingly find that the attack on this finding is without merit.

REMEDY

62 Although the Company launched an attack on the Commissioner's findings concerning the procedural unfairness of the disciplinary process, both Mr Antonie and Mr Maserumule agreed that in the event of me holding that the arbitration award is reviewable on one or more grounds, it was not necessary for me to make a finding in relation to the Commissioner's conclusions concerning procedural fairness. It remains, therefore, to consider the appropriate remedy. In terms of section 145(4) of the Act, where an arbitration award is set aside, the Labour Court may determine the dispute in the manner it considers appropriate or make any order it considers appropriate about the procedures to be followed to determine the dispute. In the present case, I have found that the Commissioner's conclusions on one aspect are not justifiable. The only question that remains unresolved, therefore, is whether the employee was rightly found guilty of creating obstacles to the proper running of the disciplinary process in the manner particularised. That is an issue which ought properly to be referred back to the CCMA for determination before a different Commissioner. In my view it would be inappropriate for this Court to determine that dispute by reason of the fact that I am not satisfied that I am in possession of sufficient facts and evidence to do so.

63 There remains the question of costs. The applicant for review has only been

partially successful. The papers in this review are voluminous. While a substantial amount of the material would have had to be placed before the Court even if the attack had been confined to the Commissioner's findings concerning obstruction of the disciplinary process, in my view it would be inequitable for the Company to claim the costs of the entire proceedings. In my view, an appropriate apportionment of costs would entitle the Company to recover 40% of the costs.

64 I accordingly make the following order:

64.1 That part of the second respondent's arbitration award delivered on 19 October 1998 under Case No. GA10899 ("the arbitration award") dealing with the allegations against the first respondent on the charge of creating obstacles to the proper running of the disciplinary process is reviewed and set aside.

64.2 The matter is referred back to the Commission for Conciliation, Mediation and Arbitration for a different Commissioner to determine the dispute between the parties concerning the charge of creating obstacles to the proper running of the disciplinary process.

64.3 The application to have the arbitration award made an order of Court is postponed *sine die*.

64.4 The applicant is entitled to 40% of the costs of this application.

_____

G J MARCUS
Acting Judge of the Labour Court

Date of Hearing: **10 June 1999**
Date of Judgment: **21 JUNE 1999**

For the applicant: **Advocate M Antonie**
Instructed by: **Webber Wentzel Bowens**

For the second respondent: Mr P Maserumule **of Maserumule and Partners**