IN THE LABOUR COURT OF SOUTH AFRICA

Reportable

CASE NO. C896/2000

in the matter between :

Applicant

And

COMMISSION FOR CONCILIATION , MEDIATION First Respondent

AND ARBITRATION

Second Respondent

Third Respondent

JUDGEMENT

GAMBLE A.J.

INTRODUCTION

1.The Applicant conducts a yatch building business in Cape Town . The Third Respondent ("Abrahams") was , at all material times , employed by the Applicant as a joiner . He was dismissed by the Applicant on 10 December 1999 for leaving his work station without the requisite permission . Abraham was a union shop-steward at the time.

2.After an internal appeal had failed , Abrahams lodged an unfair dismissal dispute with the First Respondent . The Second Respondent (the "Arbitrator") found that the dismissal was procedurally fair but substantively unfair

, and awarded Abrahams compensation in the sum of R 41 481.40 (the equivalent of 10 months' remuneration)

3.The Applicant now seeks to review the Arbitrator's award in terms of section 145 of the Labour Relations Act of 1995("The LRA") , both in respect of the finding of substantive unfairness and the quantum of the award . The application is opposed by Abrahams(duly represented in these proceedings by his trade union , the Nation Union of Metal Workers of South Africa- NUMSA) , while the First and Second Respondents have indicated that they abide the decision of the Court .

4.It is common cause between the parties that the Arbitrator's finding of procedural fairness should not be reviewed .

THE FACTS

5.The relevant facts are , in the main , common cause and I shall accordingly be brief in my summary thereof .

6.The Arbitrator was required to determine the fairness of the dismissal against the background of 3 incidents in which Abrahams absented himself from his work station.

7.The first incident occurred at the commencement of the Easter weekend in 1999 , when Abrahams participated in certain collective action which had the hallmarks of an unprotected strike . A sizeable group of the Applicant's employees left the work early (as they had been permitted to do the previous Easter) to embark on the weekend . In 1999 they had no permission and were subsequently disciplined .

8.After the intercession of NUMSA , an agreement was reached with the Applicant in terms whereof :

8.1 The employees would "sign a written warning for unauthorised absence from work on the 1st April 1999" ;

8.2 "Members who are already on a final written warning should not be prejudiced by signing a written warning";

8.3 "Notice must be made that the warning/ penalty relates to special circumstances"

9.Abrahams accepted such a written warning. He initially thought it would only be valid for 6 months but did not dispute that it in fact stood for 12 months .

10.The second incident occurred on 26 October 1999 when Abrahams left his work-station and went to the office of one Cobus Redelinghuys , the applicant's Human Resource manager. I shall deal with the circumstances of this visit more fully hereunder .

11.On 28 October 1999 Abrahams was given notice of an intended disciplinary enquiry for 2 alleged acts of misconduct :

11.1 "Misleading the workforce" by imparting false information to employees at a meeting on 21 October 1999 ;

11.2 Leaving the workplace without permission on 26 October 1999(i.e. the second incident referred to above).

12.This disciplinary hearing dragged on for some time and culminated in a final written warning being issued on 6 December 1999 for the misconduct referred to in paragraph 11.2 above(Abrahams was given the benefit of the doubt on the other charge).

13.The third incident occurred on 24 November 1999 some time after 17H00 . Abrahams (who was working overtime)was informed by a fellow employee that the Applicant was conducting body-searches on all employees who were going off duty at that time .

14.Abrahams testified that part of the conditions of employment at the Applicant included an acknowledgement by employees that the Applicant had the right to search their bags and other containers . However , nothing was said regarding body-searches . As a shop-steward he was concerned about the fact that workers were being

"patted down" in public and he left his work station to see for himself what was happening at the security gate.

15.At the gate , Applicant confronted certain members of management , including Redelinghuys , about the way in which the search was being conducted . Redelinghuys berated Abraham for being away from his workstation and made a point of telling Abrahams that he too would be searched later that evening . Needless to say that Abrahams subsequently refused to be searched .

16.Abrahams testified that after he had returned to his workstation Redelinghuys confronted his in aggressive tones . He accused Abrahams of humiliating him in front of the workers and said that he would see to it that Abrahams was himself humiliated for as long as he worked for the Applicant . This evidence was not disputed by Redelinghuys who presented the employer's case at the arbitration . I should point out that Redelinghuys did not give evidence at the arbitration and refused to submit himself to cross-examination when Abrahams' union representative requested an opportunity to do so .

17.Earlier on 24 November 1999 , Abrahams had attended the continuation of the disciplinary enquiry arising out of the second incident . At the proceedings he had been cautioned by the Applicant's general manager that the offence was a serious matter . The full extent of the company's disciplinary code was also explained to Abrahams at that time.

18.I should point out that throughout Abrahams maintained that he was not guilty of any misconduct arising out of the second incident .

19.The Applicant lost little time in initiating further disciplinary proceedings against Abrahams . On the morning of 25 November 1999 he was charged with two counts of misconduct arising out of the third incident :

19.1 "Leaving of your workplace without permission" ;

19.2 "Failure / refusal to submit himself to a "pat down" search".

20.The hearing in regard to the third incident took place on 7 December 1999 . It appears, too, that on the same day , Abrahams noted an appeal against the final written warning arising out of the second incident (see paragraph 12 above). Abrahams , while present at the inquiry , refused to participate on the grounds of alleged bias on the part of the chair .

THE ARBITRATOR'S AWARD

21.The arbitrator has dealt with the evidential material before him thoroughly in a well-reasoned manner . I can find no fault in his approach or award . Indeed , his even-handedness towards both the Applicant and Abrahams is quite apparent.

22.For example he finds that the first incident is to be taken into account for purposes of progressive discipline. He could well have decided otherwise .

23.The Arbitrator is critical of Abrahams' conduct in various respects and he observes that Abrahams could well have been the author of his own misfortune

"His refusal to participate in the final hearing (see paragraph 20 above) and his obstructive behaviour therein may well have played a contributory role in his dismissal".

24 Notwithstanding a finding of substantive unfairness , the Arbitrator declined to reinstate Abrahams because of his perception that a continued working relationship had become intolerable .

25 In argument , Mr Steenkamp , for the Applicant , was critical of the award in a number of respects . In the first place he suggested that the Arbitrator had embarked on a frolic of his own when he made the following importing finding :

"3. The timing of the warnings and the dismissal is also a cause for concern . The second offence occurred on

the 26th of October 1999 ; however the final written warning was only issued on 7 December 1999 (the day before the dismissal of Mr Abrahams). Meanwhile the third incident , which gave rise to the dismissal, occurred on 24 November 1999 , that is , before the disciplinary hearing had taken place for the second offence . While Mr Abrahams certainly was aware that disciplinary proceedings were pending , and it may well be that the hearing was delayed due to the company's inability to get the union to attend the hearing, nevertheless Mr Abrahams maintained his innocence , and there was no certainty that a final written warning would be issued . As at the 24th of November , therefore , Mr Abrahams cannot be regarded as having been on notice that that his employment could be terminated for any further instance of leaving the workplace without permission . It should also be noted that the final written warning states that it is "valid and effective for 12 months until 6 December 2000 and is applicable to all future same or similar offences" (my underlining). I do not believe that the third offence can be seen as a future offence in this context".

26 In developing his argument on this point Mr Steenkamp referred to the following clauses of the Applicant's disciplinary code .

"1. **Introduction**

Whilst it is management's right to formulate standards of performance and rules of workplace behaviour and to enforce these standards and rules of workplace behaviour through disciplinary action , such action will be fair . This disciplinary code and procedure is a guide to both management and employees alike as to what standards of performance and behaviour are expected of them and what penalties may be imposed if these standards are not maintained . However, where penalties are imposed , each case will depend on circumstances and it may be necessary to depart from this code in certain circumstances .

Except in cases of serious infringement , disciplinary action will , where- ever possible , consist of instruction and assistance to the employee in order that the required standards of behaviour and performance may be attained and surpassed . The courts have endorsed the concept of corrective or progressive discipline which regards the purpose of discipline as a means for employees to know and understand what standards are required of them".

"2. **Principles**

2.2 The responsibility and authority for the maintenance of discipline is vested in management and will be carried out through a system of warnings , dismissals or other appropriate action which will be administered in such a way as to be as fair and equitable as possible".

"3.1.4 **Dismissal**

If the employee's performance and behaviour continues to be unsatisfactory after a final written warning has been issued or the employee commits a further offence or a offence serious enough to warrant dismissal , a disciplinary enquiry shall be convened ....."

27.It was argued (correctly I consider) that the dismissal provisions of the code contemplate three distinct categories in which dismissal would be the appropriate sanction viz :

27.1 unsatisfactory performance / behaviour after a final written warning ;

27.2 the commission of a further offence ; and

27.3 the commission of a sufficiently serious offence .

28.Mr Steenkamp relied on an allegation in the Applicant's founding affidavit in this application by Redelinghuys that :

"Whether a formal final written warning had yet been issued or not by the company does not detract from the fact that the offence was committed . It is the offence itself that is punishable and the notification does not play a role in the determination of such issue . This extremely relevant distinction appears to have been completely ignored and disregarded by the (Arbitrator) and.....

this constitutes an act of misconduct on his part ....."

29.This contention by Redelinghuys is argumentative rather than factual and really does not take the matter much further . It does however fly in the face of the findings on 8 December 1999 by the chair of the disciplinary

enquiry Phillip Andrews (referred to in the minutes of that enquiry as "PA") as follows :

"PA stated that under the circumstances his finding of guilty would stand and asked the IR manager for the personal file of IA (Abrahams). PA consulted the file and noted that IA had a (sic) current written warning and final written warnings for similar offences as to as (sic) he had been found guilty of in this hearing . On considering these fact (sic) there was no alternative to dismiss IA with immediate effect".

30.It is clear from these minutes (which were part of the evidential material before the Arbitrator) that the dismissal was based on the corrective discipline approach to which the Applicant adhered . (see paragraphs 26.1 and 26.2 above) . Andrews gave evidence, too, at the arbitration and confirmed the correctness of these minutes. Under cross-examination he confirmed the progressive discipline approach

"You've then considered that Ivan is there , the final written warning , the final warning and then you dismissed him , and you are happy with the procedure ?---

-Yes , it's consistent with what we do".

31.The Applicant's case was never presented on the basis of a "further offence" or a "sufficiently serious offence" (see paragraphs 26.2 and 26.3 above) as it now appears to do . It appears to me that this is an after-thought on the part of the Applicant since receiving legal advice . In my opinion ,the Arbitrator's finding referred to in paragraph 24 above is objectively rational and justifiable in relation to the evidential material before him(**Shoprite Checkers (Pty)Ltd v Ramdaw N.O. unreported LAC judgement Case No.DA 12/2000 , 29 June 2001.)** .

32.Mr Steenkamp also argued that it was not necessary for Abrahams formally to have been put on notice by a final written warning to bring a dismissal into operation . It was suggested that the warning from the general manager on the morning of 24 November 1999 was sufficient . I do not agree with this submission . If the Applicant intended availing itself with the progressive discipline approach to effect a dismissal it was required to observe the dictates of its own code .

33.As the Arbitrator found , Abrahams believed in his innocence in regard to the second offence which occurred when he went (albeit without the proper permission of his supervisor)to speak to Redelinhuys about the deduction of certain sick funds contributions of NUMSA members . There was no suggestion that during this meeting that Redelinghuys made any observations or enquiries regarding Abrahams entitlement to be there . Indeed , his abusive response to Abrahams was rather to suggest that the union members should rather go and partake in certain acts of sexual self-gratification.

34.In my view the Arbitrator correctly held that the Applicant's treatment of this offence could have been more lenient .

35.Finally as to the suggestion by the Applicant that the third incident constituted a "further"or "more serious" offence it seems to me that the arbitrator's finding that

"there is no doubt that (Abrahams)was acting in his capacity as shop-steward , in a situation where he could legitimately have felt a need to do so" was also justifiable in the circumstances . While it could be suggested that Abrahams was unnecessarily inquisitive and confrontational during the third incident he was entitled to satisfy himself as to the factual situation . Given the difficult relationship which the union had with the Applicant after the appointment of Redelinghuys , and in the light of the generally depreciating manner which Redelinghuys adopted towards the union (and which was demonstrated in some of the interchanges at the arbitration), there was good reason for Abrahams to observe the events first-hand in order that he could deal more effectively with the company regarding the matter later .

36.In all the circumstances , I am not persuaded that the Applicant has established any basis for for reviewing the finding that the dismissal was not substantively fair.

COMPENSATION

37.The arbitrator awarded the Applicant compensation equivalent to 10 months' remuneration .

38.The evidence establish that Abrahams had been re-employed on a contract basis by another entity during August 2000 . And that his compensation should be limited up to this date .

39.It was also argued that Abrahams had been responsible for delaying the finalisation of the matter because the Form 7.13 requesting arbitration had been faxed to the wrong number . It was suggested that 2 months should be trimmed off any award to take account of this delay .

40.While it is correct that NUMSA were negligent in faxing the Form 7.13 to the wrong number , it was the Applicant which protracted the matter by somewhat pedantically insisting on an application for condonation in this regard .

41.I do not consider that there was any reason for restricting the award for this delay.

42.In terms of section 194(2) of the LRA , compensation payable in case of substantive unfairness is calculated by having regard to :

42.1 fairness ("just and equitable");

42.2 a minimum calculation of remuneration over a period from the date of dismissal(*in casu* 10 December 1999) to the final day of the arbitration hearing (23 October 2000) ;

42.3 a maximum of 12 month's remuneration ; and

42.4 any unreasonable delay caused by the employee in prosecuting the claim .

43.The Arbitrator's award of 10 months remuneration is in accordance with the prescribed minimum referred to in paragraph 42.2 above . There is accordingly no basis for intervention or review in this regard either .

44.As far as costs are concerned , Mr Cartwright the Legal Officer of NUMSA (who appeared for Abrahams) indicated that no costs order was sought in the light of the fact that Abrahams was assisted by the union .

CONCLUSION

45.In the circumstances the following order is made :

45.1 the application is dismissed ;

45.2 there shall be no order as to costs .

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P.A.L. GAMBLE

Acting Judge

APPEARANCES

Adv M. Steenkamp instructed by Hofmeyr , Herbstein &Gihwala Inc of Cape Town

For the Third respondent: Mr D. Cartwright , NUMSA Legal Officer

29 June 2001

12 July 2001