IN THE LABOUR COURT OF SOUTH AFRICA **REPORTABLE**

HELD AT CAPE TOWN

CASE NO: C274/2003

In the matter between:

ORANJEVIS (PTY) LTD Applicant

And

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION 1st Respondent

COMMISSIONER DAVID FRED MIAS 2nd Respondent

GARY NOBLE 3rd Respondent

JUDGEMENT

MURPHY, AJ

1. This is an application to review and set aside the arbitration award issued by the second respondent on 16 April 2003 in terms of which he found the dismissal of the third respondent to have been substantively unfair and ordered the payment of compensation in the amount of R91,355.90.

2. The third respondent commenced employment with the applicant as a seamer mechanic at its factory in St Helena Bay on 1 November 2000. The applicant operates as a fishing company.

3. Subsequent to his employment the third respondent began to raise concerns about the fact that according to the applicant he was required in terms of his contract of employment to work night shifts. The applicant contends that it is normal to require certain of its personnel to work night shifts every second week on a rotation basis because it operates around the clock in

accordance with the practice throughout the fishing industry.

4. Although the third respondent was aggrieved by this requirement, he complied with the obligation from the commencement of his employment and worked night shifts as required. He however claims that it was unequivocally stated to him during his recruitment interview that overtime was virtually non-existent at the company and that he would not be required to work shifts. Despite this, he appears to have first complained formally about working night shifts towards the end of February 2001. Initially his complaint was limited to the fact that he had not received additional remuneration for working night shifts. This is evident in a letter addressed to him dated 27 February 2001 by the applicant's factory manager, Mr P Rabe which reads:

NAVRAAG OOR OORTYD BETALING EN NAGSKOF TOELAE

Gesprekke tussen u en ondergetekende op 27/02/2001, verwys.

Soos ek reeds aan u verduidelik het, is dit Maatskappy beleid dat personeel wie se bruto salaries bo die neergelegde bedrag, soos gestipuleer in die staatskoerant 19453, gedateer 13/11/1998, nie oortyd vergoeding ontvang nie.

Tydens u indiensneming in November 2000, is die feit dat u nie vir oortydvergoeding kwalifiseer nie, met u gekommunikeer en volgens u dienskontak is u ook so gekontrakteer.

U huidige maandelikse vergoedingspakket bestaan uit die volgende:

- Basiese Salaris R 8 500.00
- Mediese Bydrae deur Maatskappy R 912.50
- Pensioen bydrae deur Maatskappy R 1 138.25
- Behuising verskaf deur Maatskappy R 2 500.00 (markverwant gebaseer)

Totaal **R13 050.85**

Vanweë die aard van die operasionele omstandighede van die industrie, word dit van u verwag om abnormale ure te werk, wat insluit oortyd, sonder enige verdere vergoeding.

Dit is ook aan u gekommunikeer dat daar wel 'n informele reeling tussen u en u direkte toesighouer getref kan word dat u tyd af kan kry, wanneer die operasionele omstandighede dit toelaat. Hierdie reeling sal suiwer en volgens die uitsluitlike diskressie van die toesighouer kan plaasvind. Dit is 'n vergunning en nie 'n reg, waarop u aanspraak kan maak nie.

Hierdie bogenoemde belied is Maatskappy beleid en sal van krag bly tot verdere kennisgeweing. Soos ek aan u genoem het is dit ‘n aangeleentheid wat voor die vergoedingskomitee sal dien, en sodra ek ‘n antwoord in die verband ontvang, sal u daaromtrent ingelig word.

Die Maatskappy het ook die afgelope maand ongeveer R12000.00 aan u opleiding spandeer en het hoë verwagtinge aan u vordering en groei binne die Maatskappy.

Ek hoop en vertrou dat die aangeleentheid tot u bevrediging hanteer word en ek wil graag van die geleentheid gebruik maak om u uit te nooi om enige verdere aangeleenthede van belang met u toesighouer te bespreek en indien dit nie tot u bevrediging hanteer work nie, staan my deur oop om dit met my persoonlike op te neem.

5. During July 2001 the third respondent again raised his dissatisfaction and this time sought to remedy the situation by requesting payment of a shift allowance for working night shifts. This is reflected in another letter addressed to him by the applicant dated 17 July 2001 which reads as follows:

WERKSURE/OORTYD VERGOEDING

Ek verwys na twee vorige gesprekke oor die aftgelope maand oor bogenoemde en bevestig ons gesprek vandag soos volg:

1. Jou ongelukigheid spruit voort oor skofte en oortyd wat jy werk wat volgens jou nie duidelik uitgewys is by aanstelling nie. Jou versoek is dat addisionele vergoeding betaal moet word.

2. Van Bestuur se kant word aangedui dat:

    2.1 Para 4 van jou aanstellingsbrief aandui dat “abnormale ure eie aan die vibedryf” gewerk sal word en dat jy goed verroud is met die visbedryf.

    2.2 Punt 8 van jou dienskontrak aandui dat geen oortyd betaling gedoen sal word nie aangeien jou salarisvlak hoer is as die perk gestel vir insluiting onder the BCEA wetgewing.

    2.3 Dat daar duidelik in die aanlop tot aaanstelling aan jou uitgewys is wat die aard van werksure is, alhoewel jy hierdie stelling ontken.

    2.4 Dat jou salarispakket sowat 25% hoer is as ‘n identiese pos by ‘n aangrensende fabriek.

3. Bestuur he took aangedui dat volgens diskresie van Bestuur daar soms tyd afgegee sal word op

'n ex gratia basis in teenstelling met 'n uur vir uur basis.

4. Dit word ook pertinent gestel dat jy as deel van 'n betrokke skof beskikbaar moet wees soos die res van die skof personeel wanneer benodig, en slegs met toestemming van die Inmaak Tegniese Hoof, Mn T Nel 'n ander reeling kan tref.

Geen ander lid van die Inmaak Bestuur is gemagtig om reëlings met jou te tref nie, en alle kommunikasie sal via Mnr T Nel geskied.

5. Jy aandui dat die werksomstandighede soos aangedui nie aanvaarbaar is nie en deur jou na die CCMA verwys gaan word, alhoewel jy nougeset by die huidige reëlings sal in val tot tyd en wyl 'n uislag vanaf die CCMA verkry word.

6. While this dispute was being negotiated between the parties the third respondent submitted various medical certificates in an attempt to persuade the applicant that he was incapacitated from performing night shift duty. Eventually, in October 2001, third respondent's medical practitioner issued a brief certificate to the effect that the third respondent was permanently unfit to work night shifts. The medical certificate states:

The above currently has sinusitis and requires two days bed rest…his diabetes is uncontrolled at 10mal/l despite therapy and his anxiety state is unresolved, he is I believe for permanent duty without night shift (sic).

7. Following this, the parties engaged in a process of consultation with a view to seeking alternatives. The applicant stuck to its view that its operational requirements were such that it required its seamer mechanics to be able to work night shifts on an intermittent basis. The third respondent ultimately tendered his services on the basis that he would be required only to work day shifts.

8. On 3 November 2001 the third respondent's doctor again issued a medical certificate in the following terms:

I have seen above patient today, his diabetes, hypertension and anxiety remain uncontrolled and unresolved. It therefore remains my opinion that he should not work nights indefinitely. I would recommend if my duty recommendation is not acceptable to you, then you should advise that he sees a specialist endocrinologist/diabetologist, like Dr Hilton Caplin for

further clarity on these disease processes and their control.

9. Because the third respondent was medically unfit to perform his duties, and in view of the fact that the applicant felt unable to accommodate the applicant on operational requirements grounds, the applicant chose to dismiss the third respondent on the grounds of incapacity due to ill-health. On 29 November 2001 the general manager of the applicant addressed a letter to the third respondent terminating his employment. The letter reads as follows:

Diensbeeindiging weens swak gesondheid

Die konsultasie vergadering gehou op 29 Oktober 2001, 8 November 2001, 19 November 2001, 23 November 2001, asook die CCMA konsilliasie wat op 2 November 2001, te Vredenburg plaasgevind het rakende die bogenoemde verwys. Aangeheg vind ook 'n afskrif van die finale vergadering wat op 23 November 2001 plaasgevind het.

Na deeglike oorweging blyk dit dat daar ongelukkig geen alternatiewes tot u ontslag weens u swak gesondheid te wees nie. Ons bevestig ook dat daar nou aan al die verestes voldoen is soos vervat in die Wet op Arbeidsverhoudinge, Skedule 8 Item 10 en 11. Ons bevestig ook dat u op twee geleenthede bevestig het dat u Dokter u permanent ongeskik verklaar om nagskof te werk weens swak gesondheid. Notules van hierdie vergaderings is reeds aan u gegee.

Na annleiding van bogenoemde spyt dit ons dan om u mee te deel dat u dienskontrak hiermee beeindig word in terme van die Wet op Arbeidsverhoudinge, Skedule 8, Item 11 met ingang 1 Desember 2001.

Daar word nie van u verwag om u kennistydperk uit te werk nie en een maand kennis sal aan u uitbetaal word. Al die nodige dokumentasie sal aan u deurgegee word tesame met u finale salarisbetaling. Al u opgehoopte verlof sal ook aan u betaal word. Dit sal voorts waardeer word indien u die nodige reelings met Mnr Rabe sal tref rakende die vereffening van enige skulde verskuldig aan die maatskappy.

U word hiermee kennis gegee om die maatskappy woning wat u tans bewoon, nie later as 31 Desember 2001, te ontruim nie.

Ons bedank u vir u diens en wens u alle beterskap toe vir doe toekoms.

10. The applicant thereafter referred a dispute regarding the substantive fairness of his dismissal to the CCMA, which culminated in the arbitration proceedings and the award of the second respondent that form the subject matter of this application for review.

11. In his arbitration award, the second respondent initially identifies the issue in dispute as being: "whether the dismissal of the employee for incapacity due to ill-health was substantively fair". Notwithstanding this formulation he proceeds in the award to narrow the terms of the dispute as follows:

The basic issue to be determined in this matter is whether there was an agreement between the parties that Mr Noble would be required to do night shifts every second week…In my view therefore it must be found that Mr Noble's dismissal was unfair if the employer does not establish on a balance of probabilities that Mr Noble was expressly required in terms of his contract of employment to perform night shift duty.

12. From there, as appears in the award, the second respondent took the view that the central question for determination was whether at the commencement of the third respondent's employment on 1 November 2000 it was an express term of the contract of employment to work night shifts every second week.

13. The applicant has submitted that the commissioner's appreciation of the issue in dispute, as evidenced by his formulation of it, was fundamentally flawed. In particular, it argued that there was no reason why the commissioner should have required the applicant to prove that the obligation to work night shifts was an *express* term of the employment contract. It was also conceivable (a matter which the commissioner did not consider) that such a term could have been implied or was in fact a tacit term of the contract. Moreover, as the primary question for determination was whether the third respondent was capable of performing his duties on grounds of medical incapacity, it was incumbent upon the second respondent to consider the content of the duties that had arisen within the employment relationship as at the date of dismissal, rather than on the date of commencement of employment. Mr. Leslie, on behalf of the applicant, therefore submitted that the second respondent had misdirected himself by failing to consider the factual and legal position at the date of dismissal and by limiting the enquiry to the position as it stood on 1 November 2000.

14. The applicant's criticisms of the second respondent's reasoning appear to be justified. The second respondent, as stated, saw the central question for determination as being whether at

the outset of the third respondent's employment the obligation to work night shifts was an express term of the contract. He then found that neither the letter of appointment nor the contract made any mention of the obligation to perform night shifts. Although the letter of appointment explicitly stated that the third respondent would be required from time to time to work abnormal hours, he reasoned that this could not be equated to regular fortnightly night shifts. The essence of his conclusions are contained in the following paragraphs:

Clearly the employer compelled night shift duty after commencement of employment and after the relocation, in spite of representations to the contrary at earlier discussions and at the interview…… Mr Noble also did not accept that he was obliged to work shifts just as he did not accept that he was not entitled to payment for overtime worked. He joined a trade union and my finding is that he from the outset in November 2000 attempted to discuss matters with Rabe who had avoided him thereafter.

15. He then continues later:

…I am satisfied that neither the written agreement nor the content of interviews or discussions indicate an agreement that the employee in this matter was to work night shifts every second week. Mr Noble's inability, for health reasons, after 2 August 2001 is therefore not the issue and his dismissal for incapacity is found to be unfair.

16. The applicant's contention is that the material before the commissioner established conclusively that the obligation to work night shifts was indeed an express term of the contract at the commencement date, and that the commissioner's findings to the contrary were for that reason unjustifiable and irrational in relation to the material before him. More specifically, the applicant placed emphasis on the third respondent's letter of appointment, which preceded the formal contract of employment, where it was clearly indicated that the third respondent would be required to work abnormal hours in accordance with the requirements and circumstances of the fishing industry. Further, clause 6.1 of the contract of employment stipulated as follows:

You shall be required to work 45 normal hours weekly (exclusive of meal breaks). Your manager shall communicate your daily working hours to you.

17. Notably, the working times are not specified in Clause 6.1, suggesting that this was a matter for managerial discretion. Hence, the contract fixed the normal number of hours (as opposed to

overtime hours) per week, and provided that the manager had the authority to inform the third respondent when he would be required to work them. Moreover, clause 14 of the contract further provided that the third respondent "shall agree to abide by all the company's work rules, disciplinary rules and health/safety rules, as amended from time to time". It is quite evidently a work rule of the applicant that employees in the category of employees into which the third respondent fell would be expected to work night shifts.

18. Besides this, at the arbitration hearing, the applicant's personal manager testified that during the course of the interviews with the third respondent prior to his recruitment, the third respondent had been informed that he would have to work night shifts in accordance with standard practice in the fishing industry. The third respondent had allegedly replied that he "had no problem" with this and that he was aware of the requirements of the fishing industry. Most of the employees at the factory were required to work night shifts and all similarly situated staff had contracts identical to the one signed by the third respondent.

19. The third respondent challenged the version of the applicant at the arbitration hearing, stating that he had been told at the interview that it was not necessary to work shifts at the company whatsoever and that he had informed the third respondent that he was not interested in working night shifts or overtime.

20. Mr Leslie asserted that given the applicant's continuous practice of running night shifts, before the arbitrator could justifiably have accepted the third respondent's version he had to reach the conclusion that the applicant had somehow duped or tricked the third respondent into working for the company. Such, it was contended, was highly improbable. The applicant had invested considerable time, money and effort in relocating the third respondent and hoped for an enduring relationship with him. There was no plausible reason why the third respondent would intentionally deceive the applicant into entering an employment relationship under the circumstances. To my mind, there is merit in the applicant's submissions and it would seem at best that there may have been a mistake as to the terms of employment.

21. Ms Golden, on behalf of the third respondent, argued that if one had regard to the third

respondent's conduct over the duration of employment it was evident that he had not expected to work night shifts. This submission is somewhat diluted, in my view, by the fact that the initial complaints made during February 2001 focused principally upon the third respondent's dissatisfaction with not receiving extra remuneration or a night shift allowance. It is only when this problem remained unresolved that the third respondent later began to deny that night shift had been a term of his contract originally.

22. While I am persuaded that the probabilities favour the conclusion that night shift was indeed an express term of the contract of employment, I am also of the view that the second respondent misdirected himself by failing to consider whether or not an obligation to work night shifts had become a tacit term arising from the third respondent's conduct subsequent to his commencing employment. The third respondent, as stated, began employment with the applicant on 1 November 2000. Shortly thereafter he was provided with a schedule of shifts and started working in accordance with them. For the first few months he worked the night shifts every second week without formal complaint, or limited his protest to the non-payment of a shift allowance. The allegation that the original terms of his contract did not specify that he was required to work night shifts was made for the first time in mid 2001. His stance in this respect was borne out by the testimony he gave at the arbitration hearing. Thus in his evidence in chief he stated:

I would not have accepted this position on that grounds, knowingly that I would work the shift and the over time *without any compensation for it*. [emphasis supplied]

23. Hence, on the evidence presented, it is apparent that the third respondent at the very least tacitly accepted the obligation to work night shifts by his conduct. It was only at a later stage when he was unable to resolve the issue regarding compensation that he began to profess that he had no obligation to work night shifts in terms of his written contract of employment.

24. Had the third respondent genuinely been mistaken about the terms of the contract, or had the applicant misrepresented the terms, it remained open to the third respondent to resile from the contract and to seek damages for whatever losses he may have incurred as a consequence of any negligent or wilful conduct on the part of the applicant. Similarly, if the applicant's insistence

on night shift work was not contractually ordained and thus constituted a breach of contract, the third respondent always had the right to seek specific performance or damages, or to pursue a claim for an alleged unfair labour practice or perhaps even constructive dismissal. The dispute ultimately referred to arbitration in this suit however was a dismissal at the instance of the employer on grounds of incapacity. Whatever the case, even had other relief been sought, it would still have been incumbent on the second respondent to determine whether the third respondent had by his conduct elected to affirm the contract on the terms as alleged by the applicant. The principles in this regard are well established and were expressed succinctly in *Segal v Mazzur* [1920] CPD 634 at 644 – 645 as follows:

> Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct….As already stated, the question whether a party has elected not to take advantage of a breach is a question of fact to be decided on the evidence, but it may be that he has done an act, which, though not necessarily conclusive proof that he had elected to overlook the breach, is of such a character as to lead the other party to believe that he has elected to condone the breach, and that the other party may have acted on such belief. In such a case an estoppel by conduct arises and the party entitled to elect is not allowed to say that he did not condone the breach.

25. In the final analysis the second respondent's conclusion that in the absence of an express term to work night shifts, the third respondent's "inability for health reasons to work night shift after 2 August 2001 is therefore not the issue" is a failure on his part to properly determine the true nature of the duties owed by the third respondent to the applicant, and as such amounted to a misdirection. Besides concluding mistakenly that there was no express term, the second respondent neglected to consider whether any duty had arisen in terms of a tacit or implied term, or whether the third respondent had elected to abide by the applicant's terms or was estopped by his conduct from denying that he had condoned any breach of contract. It is true that at the arbitration hearing the third respondent did testify that he had indeed objected to working overtime at the very beginning and tried to resolve the issue with Rabe, but to no avail. Yet his testimony goes no further than a statement

that he did object and that he was unhappy with the situation. Why he did not pursue the unfair labour practice remedy is not clear. He stated:

Things went on, I carried on working because there was nothing else I could do, my wife was living at the West Coast, my son was at Varsity studying law and I had three small – and my wife was pregnant she was just about to give birth. What was I supposed to do, I can't keep myself hard case and refuse to work the time, I had to work it because I had to provide for my family.

26. Hence, it would seem, in the final analysis, the second respondent asked the wrong question and when he answered it incorrectly he thereafter failed to apply his mind to the real issue of whether the dismissal of the applicant for incapacity due to ill health was substantively fair. There was no fair trial of the issues at hand. It follows that his findings are unsustainable in light of the evidence before him. For these reasons his decision is unjustifiable and must be set aside. Considering furthermore that the third respondent is unable or unwilling to work night shifts for health reasons, that reasonable alternatives appear to have been considered and rejected, or did not exist, and that the third respondent has made no serious challenge to the procedural fairness of his dismissal, the termination of his employment on incapacity grounds must be considered fair in the circumstances.

27.The third respondent has unquestionably suffered hardship by his relocation from Cape Town to St Helena Bay and his subsequent return to Cape Town. He has become embroiled in this dispute partly as a result of the less than perfect formulation of his contract of employment. Accordingly, this is a matter in which I am inclined to exercise my equitable discretion not to make a costs award. In the premises I make the following order:

27.1The award of the second respondent dated 16 April 2003 under CCMA case number WE8403/01 is hereby reviewed and set aside.

27.2The dismissal of the third respondent is declared to have been substantively fair.

27.3There is no order as to costs.

Dated this day of October 2004.

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Murphy AJ

DATE OF HEARING: 24 June 2004

DATE OF JUDGEMENT: October 2004

APPLICANT'S REPRESENTATIVE: Adv G Leslie instructed by Irish and Ashman

RESPONDENT'S REPRESENTATIVE: Adv T Golden instructed by John Rileys Attorneys