IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 2853/07

In the matter between:

EDGARS CONSOLIDATED STORES LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

First Respondent

R MUDAU N.O.

Second Respondent

ESROM MANAMELA

Third Respondent

RETAIL AND ALLIED WORKERS UNION

Fourth Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award made by the second respondent (the commissioner) in terms of which the commissioner had found that the third respondent had been unfairly dismissed by the applicant. The applicant was ordered to reinstate the third respondent on the terms and conditions that existed

before his dismissal and twelve months salary amounting to R36 000.00.

2. The review application was opposed by the third and fourth respondents.

The background facts

3. The third respondent was employed by the applicant as a service centre operator. He commenced employment as a casual at Edgars Menlyn in 1994 and was given an FPT contract in 1997. The applicant was at the time of his dismissal earning R3 000.00 per month. In August 2002 the applicant was charged with failure to abide with the rules about the security of cash. The third respondent had signed the applicant's key risk factors which stipulated security measures for cash that a service operator, "always lock the cash till, drawer and cupboard when not in use and when you are away, then remove the key." He had on 29 July 2002 at Edgars, Centurion failed to secure the keys to the padlock in an unlocked service centre drawer, which resulted in a loss of R1 219.25 cash. He appeared at a disciplinary enquiry. The chairperson of the disciplinary hearing found him guilty of gross negligence and dismissed him on 13 August 2002.

4. The third respondent was dissatisfied with the outcome of the disciplinary enquiry and appealed on 6 September 2002. The finding of guilt and the sanction of dismissal was upheld.

5. The third respondent referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA). Commissioner

Louw found that the third respondent had been grossly negligent in leaving the key in an unlocked drawer and that dismissal was an appropriate sanction because the third respondent had been employed as a service centre operator to safeguard money, and he had failed to do this.

6. This Court reviewed and set aside the award of commissioner Louw and ordered that the matter be referred to the CCMA for arbitration before another commissioner. The arbitration was initially set down for 10 November 2004, but the applicant did not appear and a default award was made in favour of the third respondent. The applicant subsequently applied for rescission of the default award, which was granted. The arbitration was then set down for hearing on 5 September 2005 before the commissioner.

The arbitration award

7. The commissioner stated in his award that the circumstances surrounding the case was not in dispute, but what was in dispute was whether or not dismissal was an appropriate sanction and whether the applicant was inconsistent in dismissing the third respondent whereas another employee was given a final written warning after committing the same offence. The other question was whether the type of offence committed by the third respondent could not be dealt with in terms of progressive discipline.

8. The commissioner made the following findings about guilt and sanction:

8.1 that the real issue was that the third respondent after locking the till, did put the key in an unlocked drawer that led to R1 219.95 disappearing.

8.2 that the type of behaviour that the third respondent was found guilty of was undesirable, it led to the company losing money. However, having regard to his record a more appropriate sanction to dismissal was a final written warning

coupled with an order that he had to repay the money.

9. The commissioner concluded that the dismissal was too harsh, and held that the third respondent should be reinstated and receive back pay of 12 months amounting to R36 000.00.

10. The applicant was unhappy with the arbitration award and brought an application to review and set it aside.

The grounds of review

11. The applicant submitted that the commissioner misdirected himself in coming to an unreasonable conclusion having regard to the evidence placed before him at the arbitration in that:

11.1 he failed to defer to the employer's decision on the appropriateness of the sanction in circumstances where it was unnecessary to interfere with the sanction of dismissal imposed by the applicant, having regard to the nature of the offence that the third respondent was charged with and the fact that the applicant's disciplinary code and procedure provide for a sanction of dismissal in respect of a first offence.

11.2 he misdirected himself in law by finding that progressive discipline was a more appropriate remedy when the nature of the applicant's business and the circumstances of the case and the evidence adduced at the arbitration clearly

showed that the sanction of dismissal was appropriate.

Analysis of the facts and arguments raised

12. It is trite that the reasonable employer test is no longer part of our law. A commissioner who is called upon to decide whether a sanction is fair in a particular case must not apply the reasonable employer test and must not in any way defer to the employer. The commissioner must decide that issue on the basis of his or her own sense of fairness. The arbitration award must be lawful, reasonable and procedurally fair. If it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside. In this regard see *Sidumo and Another v Rustenburg Mines Ltd and others* (2007) 28 ILJ 2405 (CC).

13. There are not a *numerus clausus* of factors that a commissioner must take into account in considering the sanction. The commissioner must take into account all the circumstances; consider the importance of the rule breached; consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal; consider the harm caused by the employee's conduct; consider whether additional training and instruction may result in the employee not repeating the misconduct, consider the effect of dismissal on the employee and consider the employee's service record. In this regard see *Sidumo and Another (supra).*

14. Mr Van As who appeared for the applicant stated that the applicant was no longer relying on the first ground of review that is the reasonable employer test. The

applicant was only replying on the second ground of review.

15. In the first ground of review it is stated that the applicant's disciplinary code and procedure provide for a sanction of dismissal in respect of a first offence. This is not true. The applicant's disciplinary code and procedure indicate what penalties are to be imposed for various transgressions. Where an employee is charged with "*Failure to store 'valuable' equipment (as defined in your store/business site) in a safe place which conduct resulted in a loss to the Company or could have resulted in a loss to the Company"* the penalty to be imposed for a first offence is a final written warning and for a second offence a dismissal. It is common cause that the third respondent had at the time of his dismissal been working for the applicant for eight years with a clean work record. The third respondent should have been issued with a final written warning in terms of the applicant's disciplinary code and procedure.

16. In the second ground of review it is stated that the evidence adduced at the arbitration clearly showed that the sanction of dismissal was appropriate. Again this is not borne out from the evidence led at the arbitration proceedings. It is not clear what evidence was adduced at the arbitration that showed that the sanction of dismissal was appropriate. The evidence to the contrary shows that the sanction of dismissal was inappropriate. It was the third respondent's case that the applicant was not consistent in that a final written warning was imposed on a fellow employee for the same type of transgression. The commissioner referred to this in his arbitration award but did not make a finding on the issue of consistency. What this however shows is that the applicant's disciplinary code and procedure provide for a final written warning for the

type of offence that the third respondent was charged with.

17. It is clear from the evidence led at the arbitration proceedings that the applicant overlooked its own disciplinary code and procedure when it imposed a dismissal instead of a final written warning bearing in mind that this was a first offence. It breached its own disciplinary code and procedure. No cogent reasons were given why the applicant had failed to follow its own disciplinary code and procedure.

18. It was further contended by the applicant that the commissioner did not take into account before determining that dismissal was an inappropriate sanction the totality of the circumstances, the reason that the applicant imposed the sanction of dismissal and whether additional training and instruction would result in the third respondent not repeating the misconduct. There is no substance in the applicant's contention. The fact that the third respondent was aware about the procedure that he had to follow to safeguard the monies under his control and that he had received proper training, does not follow that he should be dismissed. A commissioner must still decide the issue based on his or her own sense of fairness. The requirement of additional training relates to where the employee had previously been found guilty of the said offence and not whether the employee had been trained about what procedures he had to follow in safe guarding the money. The training should be earmarked to prevent the employee from repeating the same misconduct.

19. I am satisfied that the commissioner did not misdirect himself when he issued the arbitration award that he had issued. The arbitration award made by the

commissioner is one that a reasonable decision maker could have reached, and is as such reasonable.

20. The application stands to be dismissed.

21. There is no reason why costs should not follow the results.

22. In the circumstances I make the following order

22.1 The review application is dismissed with costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	M VAN AS INSTRUCTED BY DENEYS REITZ - SANDTON
FOR THE THIRD AND FOURTH RESPONDENTS	:	W KHOZA - UNION OFFICIAL
DATE OF HEARING	:	18 APRIL 2008
DATE OF JUDGEMENT	:	25 APRIL 2008