IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR948/07

In the matter between:

ITT FLYGT (PTY) LTD	APPLICANT
AND	
VAUGHAN ANTHONY ODGERS	1ST RESPONDENT
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	2ND RESPONDENT
BONISWA MBOVANE N.O.	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the third respondent acting in her capacity as commissioner of the CCMA, under case number GAJB 7269-06. In terms of the award the commissioner found that the dismissal of the first respondent (the employee), was both procedurally and substantively unfair and ordered that the applicant to compensate him for the unfairness of the dismissal.

Background facts

[2] At the time of his dismissal the employee was employed by the applicant as a sales representative. The employee was dismissed subsequent to a disciplinary enquiry which was held on 3rd March 2006. The charges which the applicant proffered against the employee which also led to his dismissal were as follows:

> *"Dishonesty and breach of the trust relationship in that you:*
>
> 1. *falsified your call report schedule when you visited Witbank on 23 and 24 January 2006;*
>
> 2. *on that same day, 24 January 2006, when your call report schedule showed you as visiting clients in Witbank, you were in fact during working hours at the home of Chris Munnick, an ex-employee who is currently in dispute with the Company and whom the Company has reason to believe is maliciously interfering with its business;*
>
> 3. *during an interview when the Company was seeking to establish whether or not the said Munnick was in contact with employees, you denied that there had been any contact with him during working hours."*

[3] The employee was found guilty of all but one of the charges. In the notice of dismissal the applicant noted that the employee pleaded guilty to one of the charges which were proffered against him, namely that he falsified his activity

report by indicating that he visited one of the applicant's clients, Sky Enterprises on a particular day when he did not.

[4] Following his dismissal the employee referred an alleged unfair dismissal dispute for conciliation to the CCMA and upon failure thereof referred the matter to arbitration. As indicated above the commissioner found the dismissal to have been both substantively and procedurally unfair and ordered the applicant to compensate the employee in the sum of R88 500-00, being the equivalent of five month's salary, calculated at the rate of R17 700-00 per month.

[5] It is common cause that the employee was informed of the additional charges concerning falsification of his report about what he did on 24th January 2006 at the disciplinary hearing. The charge in this respect concerned the allegation that the employee attended at Mr Munnick's house during working hours and failed to report this fact on his call report schedule. The employee was accused of having been at the house of Mr Munnick between the hours 15h53 and 16h10 on the 24th January 2006 and he had also contacted Mr Munnick on his cell phone during working hours.

[6] The case of the applicant during the arbitration hearing was that contrary to the recordal of the employee that he had done a full day's work on the 23rd January 2006, he had in fact done less than that. According to the applicant the employee had a 10 (ten) minutes meeting at 08h00 with Mr Pelser and thereafter

proceeded to Witbank where he attended another 10 (ten) minutes meeting when he delivered spare parts and that was the end of his working day.

[7] As concerning the accusation about the 24th January 2006, the case of the applicant was that the employee had falsified his report by recording that he attended at Witbank Municipality and spoke to Mr Ngumbu of the municipality about time frames for a representation. It was also alleged that the employee had claimed to have attended on the same day at Sky Enterprise and discussed with a certain Kay what was happening with the quotes that had been sent to the power stations. Mr Pelser who testified for the applicant indicated that he had visited the Witbank Municipality during February and was told that Mr Ngubu was on leave during the period that the employee claimed to have visited the municipality and therefore he could not have had any discussion with him on that day.

[8] The third charge against the employee was that he breached a rule prohibiting employees from contacting Mr Munich, a former employee of the applicant. The rule was introduced and communicated verbally to all the employees by Mr Tring, the managing director of the applicant. Mr Munich was prior to his dismissal the supervisor of the employee and a personal friend. The employee was accused of having contacted Mr Munich during working hours through either visiting him at his house or through the phone or cell phone sms messages.

[9] In challenging his dismissal during the arbitration hearing the employee contended that his dismissal was procedurally unfair because he was not afforded an opportunity to have a representative during the proceedings. He complaint that the chairperson of the disciplinary hearing denied him a postponement when he requested one after being told that he could not have a representative from Port Elizabeth because the applicant was not prepared to pay the traveling costs of the representative. He testified that when he was told he could not have the representative from Port Elizabeth he requested a postponement so that he could find some one in Johannesburg to represent him. The matter proceeded on the 3rd March 2006, and when he was asked whether he had a representative he indicated that he did not and again requested a postponement to afford him the opportunity to look for one. The matter was adjourned for an hour for him to look for a representative but could not find one as those he approached declined for various reasons. He further indicated that he requested another postponement to afford him an opportunity to find a representation but was denied.

[10] The second complaint of the employee is that the charges were amended on the day of the hearing without affording him an opportunity to prepare for the newly introduced charge. He testified in this respect that the second charge was added on the 7th March 2006, and when that happened he requested a postponement as he needed more time to prepare.

[11] The third complaint of the employee is that he was denied the right to appeal against the outcome of the disciplinary hearing. This complaint is based on the

fact that the applicant or the chairperson of the disciplinary hearing did not at the end of the hearing advice him of the right to appeal against his dismissal.

Grounds for review and the arbitration award

[12] The applicant in its founding affidavit contends that the commissioner committed a gross irregularity in that *"she made a material finding which cannot be substantiated by the evidence presented before her . . ."* The applicant further contends that the commissioner made a mistake of law, and/or her award is not rational or justifiable. The applicant contends that the commissioner made a mistake of law or her award is unjustifiable because the evidence presented during the arbitration hearing does not support the commissioner's conclusion that the employee had been informed of the right to representation during his disciplinary enquiry but had not been afforded the opportunity to utilize this right. In support of this argument the applicant argued that the employee had initially requested that a fellow sales representative from Port Elizabeth represent him during at the disciplinary enquiry but this failed because the employee expected the applicant to pay the travelling costs of the representative. The disciplinary hearing was held in Johannesburg.

[13] As concerning the refusal for the postponement of the hearing to afford the employee an opportunity to prepare for the newly introduced charge the applicant contended that the conclusion of the commissioner in respect of this issue was irrational because the employee had pleaded guilty to the charge when it was introduced. The charge was that he falsified his call report for 24 January

2006. In this respect the applicant contended that the employee did not dispute having visited the home of Mr Munnick on 24 January 2006. During argument the legal representative of the applicant argued that there was no change in the essence no new charge was added but what was added was the date when the offence took place.

[14] The applicant argued that the conclusion of the commissioner that the employee was not informed of his right to appeal was not supported by evidence which was led during the arbitration hearing. In this respect the applicant relied on the evidence of the Ms Scheepers, the then applicant's human resource manager, who testified that immediately after the disciplinary enquiry, she had accompanied the employee to his car and had advised him that he was entitled to appeal against the outcome of the disciplinary enquiry. It was submitted during argument that the employee was not prejudiced by not being advised of the right to appeal because he was informed in the notice of termination of his employment that he had a right to refer the matter to the CCMA if he was unhappy.

[15] The commissioner in her analysis of the evidence which had been presented before her by the parties commences by identifying the issues before her as concerning both the procedural and substantive fairness of the dismissal of the employee. She also confirms that the burden to show that the dismissal was fair in terms of section 192 (2) of the Labour Relations Act 66 of 1995, rested with the applicant.

[16] As concerning procedural fairness the commissioner accepted that the employee was informed about his right to representation but found that he was not afforded the opportunity to exercise the right in that the employee's request that he be represented by some one from Port Elizabeth but was denied without establishing who would be responsible to paying the travelling costs.

[17] The commissioner further found the dismissal to be procedurally unfair in that the applicant failed to inform the employee about his right to appeal against the outcome of the disciplinary hearing. The commissioner reasoned in this respect that it was the duty of the chairperson of the disciplinary hearing or person who was issuing the letter to inform the employee about the right to appeal.

[18] Turning to substantive fairness the commissioner considered the facts concerning the employee's reports of both the 23rd and 24th January 2006. As concerning the 23rd January, the commissioner found that the employee visited one of the applicant's clients, Lectro Power.

[19] Whilst accepting that the correspondence from the client indicated that the employee spent only 10 (ten) minutes, at their premises, the commissioner took into account the fact that the employee would have spent the other part of the day traveling between Johannesburg and Witbank. With regard to the 24th January, the commissioner found that whilst the applicant's version was that the correspondence confirming the visit to Sky Enterprise was not signed by Mr Govinder, it was not denied that it was however signed by someone on his behalf.

[20] The commissioner found that it was common cause that the applicant had given its employees instruction not to visit Mr Munich its former employee. However, the commissioner states that the applicant failed to prove that the employee visited Mr Munich during working hours. The commissioner also found in this respect that the employee was not office bound and that it could therefore not be said that he worked normal working hours.

[21] In considering the relief the commissioner found that the trust relationship between the parties had broken down because of the relationship between the employee and Mr Munich. The commissioner also took into account the fact that the employee had been in the employ of the applicant just over a year. It was for these reasons that the commissioner awarded compensation equivalent to five months salary.

Evaluation

[22] The Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC),* held that the provisions of section 145 of the Labour Relations Act was suffused by the constitutional standard of reasonableness. The standard of reasonableness is determined by answering the question which was formulated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004(7) BLLR 687(CC)* as follows; "*Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"*

[23] Ngcobo J summarised in *Sidumo (at page 1178-F)* the test for gross irregularity as was articulated in *Gold Fields Investment Ltd & another v City of Johannesburg & another 1938 TPD 551* as follows:

> *"... "patent irregularities," that is irregularities tat takes place openly as part of the proceedings, on the one hand, and "patent irregularities, that is irregularities that take place inside the mind of the judicial officer which are ascertainable from the reasons given by the decision maker."*

[24] The crucial enquiry in determining the existence of gross irregularity in terms of *Sidumo* is whether the conduct of the decision maker complained of prevented a fair trial of the issues. This inquiry focuses on the method or conduct of the decision-maker and does not concern itself with the correctness of the decision reached by the decision-marker. It is not every irregularity that would constitute gross-irregularity. It has however been found in a number of cases that a commissioner commits gross irregularity if he or she fails to apply his or her mind to a matter material to the fairness of the sanction. See *Sidumo at* 1179 A-C and 1180 A-C).

[25] The employee's case in as far as procedural fairness is concerned is that he was denied the opportunity to have a representative to represent him during the disciplinary proceedings. He contended that he was denied that right arising from the refusal to postpone the matter to afford him the opportunity to find another representative after the respondent's refusal to carry the travelling cost of the representation he had chosen.

[26] The purpose of representation during the disciplinary hearing was set out in the case of *National Union of Mineworkers and Another v Blinkpan Colliers Ltd (1986) 7 ILJ 579 (IC),* as firstly giving the affected employee moral support and helps balance the scales. The second purpose is to ensure that justice is seen to be done. The third purpose is to ensure that the playing field between the employer and the employee is leveled in particular where the one party is more knowledgeable than the other. The Court further held that denial of the right to representation would invariably lead to the conclusion that the procedure is unfair.

[27] In *Malope v Commissioner Mbha & Others (2005) 26 ILJ 283 (LC),* the employee who was charged with misconduct, secured the services of a regional manager to represent her at the disciplinary hearing. However, the manager withdrew from representing the employee a night before the hearing. The employee then contacted one of the employer's representative and informed him about the withdrawal of her representative. The employer representative advised him to raise the issue the following morning at the hearing and request a postponement. At the disciplinary hearing the following day the chairperson refused to grant the employee a postponement. The chairperson of the disciplinary hearing seems to have denied the postponement because according to him the employee did not in her application indicate that the representative withdrew the day before the hearing.

[28] The court in *Malope* held that (page 291) it is clear that one of the requirements of a procedurally fair and just hearing embraces the entitlement of an employee

to be represented by a co-employee or a trade union official. The Court further held that representation is not a matter of discretion, nor is it tied to the exercise of a prerogative or an indulgence.

[29] In my view the right to representation is so fundamental and critical to a fair hearing that an employer is required to seriously consider all the facts and circumstances of the matter before denying an employee the right to representation at the disciplinary hearing. The fact that an employee has failed to timeously arrange for a representation is a factor to take into account in denying an employee a postponement to afford him or her the opportunity to find a representation. It is however, not the determining factor in the consideration whether or not to grant a postponement to afford the employee the opportunity to secure a representative. I accept that postponement occasioned by the delay in the employee choosing his or her representative is likely to have an impact on the speedy finalization of the disciplinary hearing. However, a balance has to be struck between the interest of speedy finalization of the disciplinary hearing and right to representation. The right to representation is so fundamental to the process of a fair hearing that failure to accord it the necessary weight in balancing it against the speedy finalization of the hearing and the costs associated with a postponement will invariably have a bearing on the fairness of the procedure of the hearing. In my view where in considering postponement a conflict arise between the two; the speedy finalization of the hearing must give way to the right to representation because representation is core to the principle of fairness.

[30] Turning to the facts of the present case, it is common cause that on the first day of the hearing the employee applied for a postponement in order for him to find a representative in Johannesburg, the appointment of the one in Port Elizabeth having apparently failed because of the travelling costs issue. When the matter resumed again he was given an hour to find another representative and as indicated earlier all the people he approached declined to assist him for various reasons. It seems to me that the reasonable inference to draw is that the chairperson adjourned the matter for an hour only because he wanted to finalize the matter as speedily as possible. This analysis suggest that the chairperson gave more weight to the seedy finalization of the hearing over the right to representation. The chairperson adopted this approach despite the fact that the respondent had added another charge at the hearing. In my view the chairperson failed to appreciate the importance of the right to representation during a disciplinary hearing and as result failed to apply his mind as to the need to grant a postponement to afford the employee to find another representative.

[31] Turning to the issue of the additional charge introduced at the hearing, it is common cause that the respondent introduced the charge relating to the 24th January 2006, at the hearing. The employee was refused a postponement to afford him the opportunity to prepare for that charge. In my view the unfairness did not arise from the introduction of the charge but from the refusal to grant a postponement to afford the employee the opportunity to prepare his defense against that charge. It would again appear that the chairperson placed more value

on the speedy finalization of the hearing over the right to prepare, an approach which in the circumstances of this case was unreasonable.

[32] Thus the conclusion the commissioner reached that the dismissal was procedurally unfair is not only reasonable but also correct. The conclusion was reasonable because the employee was denied the right to representation when he was refused a postponement in the circumstances where he had to approach other employees after the respondent failed to pay the travelling expenses of his first representative. The employee required more time to seek a representative after some of the employees he approached for assistance in a space of an hour indicated that they were for various reasons not available. Fairness in the circumstances of this case required the chairperson to postpone the hearing. The chairperson could have addressed the issue bringing the matter speedily to finality by stipulating a time frame within which the employee was to secure a representative. It needs to be emphasized that, it would appear, the focus of the chairperson was more on speedily finalizing the hearing and failed to apply his mind to impact that that would have on the fairness of the procedure.

[33] The commissioner was further correct in concluding that the dismissal was substantively unfair. In this respect I am in agreement with the commissioner's reasoning, particularly regard being had to how the rule was introduced by the respondent. The respondent unilaterally introduced the rule prohibiting contact with Mr Munich. The rule was in this regard implemented without having regard to the fact that the employee and Mr Munich were not only co-workers but were also close friends. In fact one of the incident that the respondent relied on related

to the time the employee visited Mr Munich to deliver his house key after he had looked after his house whilst he was away on leave.

[34] The commissioner reasoned with regard to the substantive fairness of the dismissal firstly, as concerning the allegation that the employee had falsified the reports that there was no substance to those allegations. As concerning the ten minutes reflected on the report which the respondent relied on in showing that the employee did not work a full day, the commissioner found that the other part of the day was spent traveling between Johannesburg and Witbank. I find nothing unreasonable with this reasoning. In relation to the incident of the 24th the commissioner rejected the version of the applicant that the employee did not visit Sky Enterprise. The commissioner reasoned that even though the correspondence from Sky Enterprise was signed by Mr Govinder it was signed someone from his office.

[35] The reasoning of the commissioner with regard to the instruction that the employee was not to visit Mr Munich cannot in my view be faulted for unreasonable. She applied her mind to the evidence which was before her and took into account the circumstances surrounding the instruction. She stated that there was no time limit for the instruction and further the applicant failed to prove that the employee visited Mr Munich during working hours.

[36] The award of compensation is also based on sound reasoning and can therefore not be regarded as unreasonable or as gross irregular. Accordingly the applicant's application to have the award of the commissioner reviewed and set

aside stand to be dismissed. There is also no reason why in law and fairness the costs should not follow the results.

[37] In the premises the applicant's application to have the award issued under the auspices of the CCMA and under case number GAJB 7269-06, is dismissed with costs.

Molahlehi J

Date of Hearing : 25th February 2009

Date of Judgment : 30th July 2009

Appearances

For the Applicant : Adv C B Garvey

Instructed by : Matjila, Hertzberg & Dewey Attorneys

For the Respondent: Adv A Dukhi

Instructed by : Mchunu Koikanyang Incorporated