(NOT REPORTABLE)

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C502/2009

In the matter between:

SEARDEL GROUP TRADING (PTY) LTD	
T/A ROMATEX HOME TEXTILES	**Applicant**
and	
SHANE PETERSEN	**First respondent**
SACTWU	**Second respondent**
COMMISSIONER L MARTIN N.O.	**Third respondent**
CCMA	**Fourth respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

1] This is an unopposed application for the review of an award by the commissioner (the third respondent) of the CCMA (the fourth respondent) made on 2 July 2009.

2] The crux of the review application is that the commissioner misdirected himself in equating “annual leave” as contemplated in the Basic Conditions of Employment Act 75 of 1997 (“the BCEA”) and in the Main Collective Agreement for the National Textile bargaining Council (“the Main Agreement”) with the applicant’s annual shutdown period.

ABSENCE OF OPPOSITION

3] I was concerned that this matter was unopposed, given the effect of a successful review on Mr Petersen, the first respondent. He had been represented at arbitration by SACTWU, the second respondent.

4] I am satisfied that the review application, the record of the CCMA proceedings and the applicant’s notice in terms of rule 7A(8) have been served on SACTWU. This appears from the service affidavit filed by Mr Cronjé, the applicant’s attorney, and from SACTWU’s own stamp acknowledging receipt by its head office on 22 September 2009. Furhermore, the registrar notified SACTWU of today’s hearing by telefax on 26 August 2010. The union has not entered an appearance. Mr Petersen was at court for the hearing but did not oppose the application.

BACKGROUND

5] The applicant dismissed Petersen for refusing to obey a lawful instruction. The dismissal became final after an internal appeal. The parties were in agreement at arbitration that the dismissal was procedurally fair. The only issue in dispute was its substantive fairness.

6] The reason for the dismissal was that Petersen, a maintenance fitter, refused to perform maintenance duties at his normal rate during the applicant’s annual shutdown period in December 2008 and January 2009. Petersen was prepared to work at a higher rate, but not at his normal rate.

7] It is common cause that most of the applicant’s employees take their annual

leave during the shutdown period. However, this is not the case for maintenance workers, as they have to perform maintenance work during the shutdown period while production is not ongoing. Those employees who do not take annual leave during the shutdown period can, of course, do so during other times of the year.

THE AWARD

8] The commissioner accepted the common cause evidence that Petersen normally worked during the shutdown period. However, in December 2008 he was only prepared to do so if he was paid at a higher rate.

9] The commissioner came to the conclusion that "Petersen's willingness to work at a different rate constitutes a refusal to work…"

10] However, the commissioner than found that work during the shutdown period was "illegal" in terms of the BCEA and the Main Agreement. On that basis, he found the dismissal to be substantively unfair and ordered the applicant to reinstate him retrospectively to the date of dismissal.

REVIEW

11] Section 20(9) of the BCEA provides: "An employer may not require or permit an employee to work for the employer during any period of annual leave" (my underlining). Clause 21.9 of the Main Agreement repeats this section *verbatim*. The Main Agreement is silent on the interplay, if any, between the annual shutdown and the time when employees may or should take annual leave.

12] Petersen's contract of employment states that he is entitled to 20 working days' annual leave after the completion of five years' service. (He had ten years' service at the time of dismissal). There is no provision that annual leave must be taken at the time of the annual shutdown or that the two overlap.

13] This court has held that:

"The commissioner's exercise of discretion will be upset on review if the applicant shows, inter alia, that the commissioner committed a misdirection or irregularity, or that he/she acted capriciously, or on wrong principle, or in bad faith, or unfairly, or that in exercising the discretion the commissioner reached a decision that a reasonable decision-maker could not reach."[1]

[14] In this case, the commissioner has misdirected himself in equating the applicant's annual shutdown period with the period of annual leave.

[15] The prohibition on an employer requiring an employee to work during "any period of annual leave" contained in the BCEA and the Main Agreement is wholly irrelevant to the period of the applicant's annual shutdown. There was no evidence before the commissioner to suggest that employees are required to take their annual leave during the period of the annual shutdown, or that Petersen had taken his annual leave during that period. In fact, the evidence was to the contrary, ie that Petersen customarily performed maintenance work during the annual shutdown period. And in his evidence at arbitration, Petersen agreed with the statement by his trade union representative that, "[i]n working at the company [it] has been the norm that there is work for maintenance during the shutdown period".

[16] The commissioner's misdirection goes to the heart of his award. It is so unreasonable that no reasonable commissioner could have come to the same conclusion. It must be reviewed and set aside.

[17] That brings me to the question of sanction. Mr Cronje submitted that I should substitute my own finding for that of the commissioner. Sanction, he said, was not addressed by either party at the arbitration: The question was simply whether the dismissal was substantively fair. If the reason was fair, it followed that the sanction of dismissal was fair.

[18] In the absence of any argument to the contrary, it appears to me that, once it is found that Petersen had committed the offence complained of, dismissal was indeed a fair sanction.

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1 *Cowley v Anglo Platinum* (unreported, JR 2219/2007, dated 18/11/2008, per Musi AJ), coted with approval by Van Niekerk J in *George v National Bargaining Council for the Chemical Industry* (unreported, Petersen 97/2010, 25 August 2010).

Costs

[19] The application was not opposed. I see no reason in law or fairness to saddle any of the respondents with a costs order.

CONCLUSION

[20.1] The arbitration award under case number WE 2710-09 is reviewed and set aside.

[20.2] The award is substituted with the following award: “The dismissal of the employee (Petersen) by the employer (Romatex Home Textiles) was fair”.

[20.3] There is no order as to costs.

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ANTON STEENKAMP

Judge of the Labour Court

Date of hearing: 1 September 2010

Date of judgment: 2 September 2010

For the applicants: Mr F Cronjé, Cronjé's Inc