REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN DURBAN

JUDGMENT

Case no: D 28/11

In the matter between:

KELLY GROUP LTD **Applicant**

and

BUSISIWE MOIRA KHANYILE **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

A B NGCOBO (*N.O.*) **Third Respondent**

Heard: **16 August 2012**

Delivered: **23 January 2013**

Summary: (Review-dismissal for taking unauthorised leave- formalism in internal enquiries unnecessary-investigative purpose of enquiry permits chairperson to intervene-disciplinary context in which enquiry occurs permits chairperson to comment on reasons for rules in the course of enquiry-considerations affecting compensation not justified –compensation reduced).

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter, Kelly Group Ltd, dismissed the first respondent, Ms B Khanyile ('Khanyile') on 21 July 2010 after she was found guilty of failing to follow company leave application procedures, and for 10 days unauthorised absence from work from 5 to 16 July 2010.

[2] The arbitrator agreed that Khanyile, an account executive, was guilty of absenting herself without authorisation. However, the arbitrator felt that the sanction was too harsh. Ultimately he found that the dismissal was both substantively and procedurally unfair, but declined to reinstate Khanyile because the relationship between Khanyile and her immediate superior, Ms S Alcock ('Alcock'), had broken down even though the trust element of the relationship had not been damaged. The arbitrator awarded Khanyile six months' salary as compensation and justified this amount on the basis of the discomfort he felt about the way that the chairperson of the disciplinary enquiry, Mr B Nash, had conducted himself.

[3] The applicant seeks to set aside the award on review and asks the court to substitute the arbitrator's findings with a finding that the dismissal was substantively and procedurally fair.

The material facts

[4] According to the company leave policy, the applicant was entitled to 18 days leave a year. The policy further stated:

> *"As per the Basic Conditions of Employment Act, both the employer and employee should agree to the timing of the considering operational requirements."*

[5] The leave policy also contained the following provision:

> *"**2. Leave Applications***
>
> *Applications for leave should be made at least one month in advance except in cases of emergency or unforeseen circumstances.*

> *No employee may proceed on leave until he/she has had the leave application form authorised by an authorised senior manager.*
>
> *..."*

(emphasis added)

[6] Clause 9.1.3 of the contract of employment stated:

> *"Leave must be applied for on the official leave application form. Leave will be granted at the sole discretion of your Manager, considering operational requirements."*

(emphasis added)

[7] The firm's code of conduct provided that an employee could be dismissed for unauthorised absenteeism or absence without notice.

[8] Late on Friday 2 July 2010, Khanyile completed a leave application form and at 17:17 the human resources department sent an e-mail to Alcock confirming receipt of the application. Khanyile also sent an e-mail to Alcock at 17h30 the same day stating:

> *"Good afternoon Boss*
>
> *I will be giving you a call to discuss this further, but Umesh has to leave now so he can lock the office .*
>
> *I was accepted for a two week training program for HIV and AIDS Counselling. They confirm today that the training is starting next week.*
>
> *I need to do this and have applied for leave. If I don't get the chance to do it now, I don't know when they will give the opportunity again.*
>
> *I had my out of office on and have signed the leave form."*

[9] Khanyile agreed that she did not make any proper handover arrangements before she attended the course. Her view was that the leave application was made in an emergency situation that justified her non-compliance with

the requirements of the leave policy in terms of which the application should have been made a month beforehand. In fact she had applied to attend the course as early as February, but did not apply for leave because she was unsure if and when she would be accepted on the course.

[10] Alcock testified that she only received the application form on 5 July 2010 when she found it on her desk where Khanyile had left it the previous Friday. When she received Khanyile's e-mail at home that Friday she had sent her an SMS message that evening informing her that her leave was not approved. Khanyile did not respond until 06h35 hours on Monday 5 July. Alcock was in the shower at the time and when she returned Khanyile's call, Khanyile's phone was switched off. She left a message confirming her previous advice that the leave had not been approved.

[11] On Tuesday, 6 July, Alcock sent a telegram to Khanyile once again confirming that the leave had not been approved and a further telegram on 9 July giving Khanyile an ultimatum to return to work by the end of the day. Khanyile conceded that she saw the first telegram on 12 July. On 16 July, Alcock notified Khanyile by registered mail of a disciplinary enquiry. Khanyile did visit the office on both Fridays during her 10 day absence but on each occasion Alcock was not at the office. Khanyile made no further attempt to contact Alcock telephonically after 5 July even when she visited the office on the two occasions mentioned. Khanyile also agreed that Alcock had phoned her and advised her that unauthorised absenteeism was a dismissible offence. It appears she adopted the attitude that her dismissal was a foregone conclusion and completed the course.

The arbitrator's award

[12] As mentioned, the arbitrator found that the applicant was justified in deciding that Khanyile was absent without authority.

[13] In turning his attention to whether dismissal was an appropriate sanction, the arbitrator found that Khanyile was "perhaps justified in her view that no matter what she did, or did not do, she would most likely be dismissed", because Alcock had conveyed to her that her conduct amounted to a

dismissible offence. He also found it significant that Khanyile tried to attend the course in her own time and that is why she took leave. The arbitrator then focused on the failure of the chairperson of the enquiry to consider alternatives to dismissal. He noted that Khanyile did not have a history of infringing company policy and that there was not a complete breakdown of trust contrary to what the chairperson concluded. In arriving at this conclusion, the arbitrator was satisfied that there was no dishonesty on the part of Khanyile.

[14] In the arbitrator's opinion an appropriate alternative to dismissal would have been to treat Khanyile's absenteeism as unpaid leave and to withdraw support which the company had been providing to her to study a B Com degree. Although he identified these alternative penalties he did not mention whether a warning of any sort should also be imposed.

[15] Despite his views that the dismissal was substantively unfair, he declined to reinstate Khanyile because he recognised that the relationship between Khanyile and Alcock could not be restored, even though dishonesty on Khanyile was not a consideration in reaching this conclusion. It seems his conclusion that the relationship had broken down was most probably based on his observation that Alcock's pain and anger at having been undermined by Khanyile was palpable.

[16] In deciding on a payment of six months' compensation as a suitable alternative remedy, it is obvious that the arbitrator was overwhelmingly influenced by his conclusion that the chairperson had not conducted the internal disciplinary hearing with sufficient detachment and had shown himself to be biased in favour of the employer. The arbitrator concluded his analysis with the following statement:

> *"I deem fit to express my extreme discomfort at the matter in which Mr Nash conducted himself by ordering compensation equivalent to 6 months wages."*
>
> *(sic)*

[17] The arbitrator's discomfort appears to have stemmed from a number of factors he identified. Alluding to *De Beers Consolidated Mines Ltd v Commission for Conciliation*, *Mediation & Arbitration & others* (2000) 21

ILJ 1051 (LAC), he concluded that the dismissal was an expression of the chairperson's moral outrage rather than a sensible operational response to managing risk. The arbitrator also accepted, without explanation, that Khanyile correctly surmised that her dismissal was a foregone conclusion. He further found that it was not sufficient for Nash to have simply asked Khanyile if she objected to him as the chairperson. The arbitrator held that this seemingly straightforward question was ambiguous because it could have referred to him as an individual or in his capacity as chairperson. He accepted also that since Nash spent an hour in the boardroom between his arrival and the commencement of the hearing that he probably spoke to the complainant, Alcock, during this time. He found the frequent interventions by Nash and the relatively few statements by Alcock as indicative of that the chairperson had descended "into the arena". He held that the tone of the chairperson's interventions indicated that the chairperson had failed to separate his role as chairperson from his role as management, such as when he explained to Khanyile how business operates. Lastly, he criticises the chairperson for phoning the providers of the course which the applicant attended without the parties being present and without advising them that he intended to do so. The arbitrator found that Nash had failed to provide Khanyile with an opportunity to present mitigating evidence before he dismissed her. Lastly, the arbitrator found Nash's instruction to Khanyile to hand over her laptop as indicative of his management sympathies.

Consideration of grounds of review

[18] The applicant attacks the arbitrator's reasoning which led him to conclude that Khanyile's dismissal was substantively and procedurally unfair and claims that his award of six months' compensation amounted to a misdirection.

[19] On the question of the substantive fairness of the dismissal, the applicant essentially complains that the arbitrator failed to consider that Khanyile's unauthorised absence was compounded by her flagrant disregard for Alcock's instruction that she must return to work and he should have taken a more serious view of her misconduct. It has already been mentioned that

the arbitrator was sympathetic to Khanyile's view that when she was told halfway through her absence that her conduct amounted to a dismissible offence, she felt entitled to assume that it was a foregone conclusion that she would be dismissed. It is noteworthy that nowhere in his evaluation of the appropriateness of the sanction does the arbitrator discuss the significance to be attached to Khanyile's decision to continue with the course and to ignore the direct and unequivocal instruction to return to work.

[20] This was a material factor in considering the seriousness of her misconduct, but he failed to deal with it, whereas he placed significant value on the fact that the applicant had applied for leave in order to attend the course in her own time. In giving weight to the latter consideration the arbitrator appears to have accepted Khanyile's version that the course would have helped her in the performance of their duties despite evidence that counselling of employees on HIV and AIDS was not part of her functions and was normally conducted under the auspices of the firm's Wellness Program. No reasons are provided by the arbitrator why he simply accepted the relevance attached to the course by Khanyile rather than relevance attached to it by the company.

[21] I am satisfied that had the arbitrator considered Khanyile's behaviour after being told to return to work ,he could not have found that dismissal was an inappropriate sanction. Accordingly, his finding of substantive unfairness must be set aside.

[22] In attacking the arbitrator's assessment of the procedural unfairness of the internal hearing, the applicant rightly criticises the formalistic approach adopted by him in certain respects. Thus, item 4 (1) of schedule 8 to the Labour Relations Act 66 of 1995 ('the LRA') specifies that the employer ought to conduct an investigation to determine if there are grounds for dismissal, which does not have to be a formal enquiry. It is some years since this court set out the less stringent procedural requirements envisaged for fair internal enquiries in ***Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*** **(2006) 27** ***ILJ*** **1644 (LC)** at 1653, viz:

“It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.

This approach represents a significant and fundamental departure from what might be termed the "criminal justice" model that was developed by the Industrial Court and applied under the unfair labour practice jurisdiction that evolved under the 1956 Labour Relations Act. That model likened a workplace disciplinary enquiry to a criminal trial, and developed rules and procedures, including rules relating to bias and any apprehension of bias, that were appropriate in that context.

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognize that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions are found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgment that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

...

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex '

"charge-sheets"', requests for particulars, the application of the rules of evidence, legal arguments, and the like."

[23] In this instance, the arbitrator does not appear to have considered the standard of procedural fairness required by the LRA in criticising some of the chairperson's conduct. For example, the investigative character of an internal enquiry does not require a chairperson to assume an aloof stance during the elicitation of evidence. There is nothing in principle untoward about a chairperson probing statements made by witnesses or pursuing a line of enquiry with a witness in an attempt to get to the bottom of a relevant factual issue. Similarly, if the chairperson is of the view that it would assist in the investigation to obtain additional evidence, there is nothing inherently unfair about the chairperson taking steps to obtain that evidence, provided the accused employee is given an adequate opportunity to deal with the same.

[24] In this enquiry the information from the training provider was obtained during a break in the enquiry and the chairperson advised Alcock and Khanyile of what he had found out in their absence when the enquiry resumed. He had not indicated when the hearing adjourned that he was going to make this enquiry during the break. The enquiry was made telephonically and there is no reason why this could not have been done while the hearing was in session to give Khanyile an opportunity to hear first-hand what the training provider's spokesperson said and to pose her own questions if she wished. Thus, even though the chairperson's enquiries might have been justified as a legitimate issues for investigation, there was no justification for doing it in the absence of Khanyile thereby depriving her of an opportunity to deal with it on an equal footing with the employer.

[25] It is also necessary to remember that the enquiry takes place as part of the employer's disciplinary process, which is a tool for correcting misconduct where possible. This is expressed in the concept of progressive discipline described in item 3(2) of Schedule 8 of the LRA:

"The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of

discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings."

[26] Landman, J (as he then was) in ***Country Fair v Commission For Conciliation, Mediation & Arbitration & Others*** **(1998) 19 *ILJ* 815 (LC)** described a key attribute of progressive discipline in the following terms:

"Progressive discipline acknowledges that the goal of discipline in the workplace is primarily, but not exclusively, geared to the reform or the rehabilitation of the offending employee."

[27] After Khanyile had explained that she believed the opening to attend the course was an unforeseen opportunity and she might not be able to attend the program again and after she had defended her failure to hand over her duties properly on the basis that staff had previously gone off without prior authorisation, the chairperson addressed her as follows:

"You are missing the whole business point here. We're talking about business on how to run a business. The most important thing the one that Friday was not going on the course. It was to look after the interest of the company. To speak to your manager and wait for her to give the green light to go on leave. Then to hand over. Because going on that course, until Alcock give the green light you're not going. That is how it works. First thing would have been speaking to Alcock. Second thing would be to sort out your clients and third thing would have been to hand over to your colleagues and then start thinking about the course..."

(*sic*).

[28] It appears that the chairperson was trying to explain to Khanyile why she could not simply follow the dictates of her personal priorities and why that could not justify her taking leave without giving proper notice to the employer. This intervention by the chairperson was not out of keeping in the context of a disciplinary enquiry.

[29] The arbitrator concluded that Nash had probably discussed the case with Alcock in the boardroom before the hearing commenced. Nash was the only witness who gave evidence on what transpired. He said that Alcock had come to boardroom to meet him and they exchanged greetings, chatted about business and their respective offices. He denied discussing the hearing with her.

[30] While their presence alone together in the boardroom could have given rise to a reasonable suspicion that they might have discussed the matter, the difficulty I have is that this proposition was not put to Nash or Alcock either directly or indirectly, and Khanyile did not even testify on this. Before the arbitrator reached the firm conclusion that Nash had acted improperly it should at least have been an issue that Alcock and Nash were tested on and Khanyile ought to have given evidence of why she formed her suspicion. In the circumstances, there was insufficient evidence for the arbitrator to make an adverse finding on this question.

[31] On the question of whether or not Khanyile had an opportunity to present mitigating evidence before a sanction was pronounced, it is clear that the chairperson did say after pronouncing that he found Khanyile guilty on both charges, that both parties should bring anything to the table that they felt was important before he made a decision on the penalty. Even though he might have expanded on what he meant, it is apparent from Khanyile's response to that invitation that she understood him to be inviting her to mitigate her misconduct, because she then proceeded to explain why she felt the course was relevant to her work and could be of benefit to the company.

[32] In summary, the arbitrator’s findings on procedural fairness were in part derived from a misdirection on his part on the appropriate standard of procedural fairness to apply and partly from plainly ignoring the evidence. The only material finding of procedural unfairness was soliciting evidence from the training provider in the absence of Khanyile when there was no good reason for doing so. Thus even though this indicated an element of procedural unfairness, the gravity of the unfairness was much less serious

than the arbitrator believed, and the evidence cannot reasonably support his strong conclusions in this regard.

[33] This has a direct bearing on the reasonableness of the relief he awarded Khanyile in the form of half a year's salary.

Substitution of remedy

[34] It is clear that the extreme discomfort felt by the arbitrator over the conduct of the enquiry was not justified, and that the enquiry was not conducted in an unfair manner, apart from the exclusion of Khanyile from the enquiries made of the course provider. Consequently, the award of compensation which was significantly affected by his view on the gravity of the procedural unfairness cannot be considered reasonable and needs to be adjusted.

[35] Having regard to the more limited extent of the procedural unfairness of the enquiry and the fact that the finding of the substantive fairness of the dismissal must be set aside, the award of compensation is reduced to one and a half month's compensation.

Order

[36] The finding of the third respondent in his award dated 18 November 2010, issued under CCMA case number KNPM 2817-10, that the first respondent's dismissal was substantively unfair is set aside and substituted with a finding that her dismissal was substantively fair.

[37] The third respondent's award of compensation of six months' remuneration is set aside and substituted with an order that the applicant must pay the first respondent an amount of one and a half month's remuneration, equivalent to eighteen thousand rands (R 18,000-00) within 30 days of the date of this judgment.

[38] No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: A J Hamilton of Hamilton attorneys

FIRST RESPONDENT: J T Dladla of S.F Mkhwanazi & Associates