IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

Case No: J118/98

In the matter between:

COMPUTICKET Applicant

and

MARCUS, M H, NO AND OTHERS Respondents

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REASONS FOR JUDGMENT

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Date of Hearing:

Date of Judgment: 11 August 1998

On behalf of Applicant:

Mr S Snyman

Instructed by: Snyman Van der Heever
Heyns

On behalf of Respondent:

Mr P Kirstein

Instructed by Nieman & ?

BRASSEY, AJ:

[1] This is an application to review and set aside the award of the first respondent under Case No. GA 8012 dated 14 October 1997 in the arbitration proceedings between the applicant and the third respondent in accordance with the provisions of section 158(1)(g).

[2] The basis of the application is that in essence that the commissioner misdirected himself both in his treatment of the merits and in the manner in which he approached the question of the reinstatement or compensation .

[3] The first issue that was argued before me was whether it was competent to entertain this application. The objection was taken on the basis that this application should have been brought in terms of section 145 of the statute, that is the Labour Relations Act, 66 of 1995 and that that section prescribes a time limit of six weeks for the bringing of the application.

[4] The counter to that point was that this application properly falls within the purview of section 158 of the statute and, on the assumption that this is so, is competently brought within the time within which it was brought.

[5] In the view I take of the merits of the application, it is unnecessary for me to consider this point. I shall assume that the application is properly

before me and I shall proceed to consider the merits of the application on that basis.

[6] The award that is the subject of the attack was given by Commissioner Marcus. In it he sets out the facts giving rise to the dispute over which he is presiding. He states as follows:

"Her dismissal [that is the dismissal of the applicant] arose out of an incident on Thursday, the 27th March 1997 when the employee, admittedly contrary to the rules of the company (although she maintains in accordance with an existing practice to that effect) issued tickets for a friend to attend the Steve Hofmeyr concert on credit as it were, that is without immediately receiving the cash therefor."

[7] It would seem from the minutes of the disciplinary hearing, which are not in dispute, that this was done by the employee because of the rapid sale of tickets and after she had initially refused her friend's telephonic request to charge the tickets to her credit card account on the telephone, such refusal being in accordance with the company policy.

[8] The commissioner goes on to consider the reasons why the employee was dismissed by the company, that is Computicket. The charge against her which he recites was the following, namely -

"(a) Issuing tickets to a customer without receiving immediate payment therefor; and

(b) the employee's failure, whilst aware of her cash shortage created by the issue of the tickets, to notify her area manageress Marcelle Coker who was at Menlin Park on 2nd and 3rd April 1997 of the fact of the shortage created by the tickets/"

[9] In the course of the proceedings the employee explained that she had issued the tickets in order to do a favour to a friend. She had anticipated that the tickets would be paid for by the friend but that if the friend defaulted she would make good the shortfall out of her salary which was to be paid within a day or two of the issue. Given the circumstances she did not anticipate that the company would suffer any loss by her conduct. She remained in possession of the tickets throughout the period of her defalcation and but for the fact that she felt sick and was thus absent from work for longer than the long weekend that intervened before the end of the month, she would have been able to make good the shortfall and escape detection. Her case was that the company had suffered no prejudice by her conduct, though she conceded that what she had done was wrong and in contravention of company policy.

[10] In dealing with the facts of the case, the arbitrator summed up as

follows:

"The misconduct alleged is really not an issue in these proceedings. Although she says there was a practice allowing her to do so, the employee admits that it was wrong and not allowed for her to issue tickets without receiving immediate payment therefor and that she should have notified Mrs Coker immediately of the shortage when the latter came to Menlin Park on the 1st April 1997. That she breached company rules in so doing is not in dispute. The question is whether her conduct in so doing is sufficiently serious to have justified a sanction of dismissal."

In dealing with this issue the arbitrator made the following remarks:

"Firstly, her issuing of the tickets without receiving payment in the first place was clearly against the rules of the company. Indeed, having refused her friend's request to accept her credit card payment on the telephone as per company rules, she then went and issued the tickets without any payment at all. She did not, however, believe that any problems would arise from this since she had the money from her salary account to pay in if necessary. Alternatively, the unpaid tickets could simply have been cancelled. Indeed had her injuries not intervenes she would have paid in the money which was by then received on 3 April and that would be that. Although she was still wrong in issuing the tickets without payment, I tend to agree with Mr Kirstein that the degree of this wrong and the potential harm or loss to the respondent occasioned

thereby was not so great as to warrant summary dismissal. I had occasion to mention in a previous arbitration award which I issued that in my opinion a proper interpretation of the code of good practice in Schedule 8 to the Act requires that for a dismissal to be substantively fair an employee should not only be found to be actually or reasonable aware of the existence of the company rule which has been broken, but that such awareness or reasonable awareness ought to extend also to the consequences of breaking such a rule, in this case summary dismissal.

[11] While I would have no hesitation in presuming such an awareness of an act of dishonesty in the form of intended theft or fraud, I am by no means convinced that this argument can be extended to an employee issuing tickets for a friend without immediate payment, as in the present case, something which she has done before on instructions from head office. Whilst she knew that it was wrong, I am not satisfied that she was aware that such conduct would attract summary dismissal in the absence of any prior warnings of corrective actions. I agree with Mr Kirstein this was not an appropriate sanction for the breach of this rule.

[12] I believe that the most serious form of misconduct by the employee in the present case arises out of her failure to have arranged for Mrs Coker to be notified on the 3rd April 1997, whether by hospital or some other

person, that she had the monies for the tickets in her possession to be collected by Mrs Coker. She should not have delayed this notification for a further four days until the 7th April 1997, as she did. Her explanation for not having had a telephone available and that she did not want to ask the nurses to make the call is not entirely satisfactory. Perhaps a more plausible explanation is that she did not want to inform Mrs Coker at that stage in the hope that she would be able to return the work and pay in the money before the shortage was discovered. This is mere speculation. Her failure to notify Mrs Coker of the circumstances after she took ill on 3 April and of the fact that the money was now available to be collected was no doubt a breach of the rules and arguable, as Mrs Riekert contends, a breach of a duty of good faith towards the company. In my opinion, however, it was not a breach of such a nature that warranted summary dismissal".

[13] It should be evident from the passages that I have quoted that the arbitrator gave serious, careful and comprehensive consideration to the facts that were placed before him.

[14] I should say that were I sitting in the arbitration, I would not have come to the conclusion that he did. I do not think it was correct to put the matter, as he did, on the basis of whether the employee was actually

aware that her conduct would attract summary dismissal in the absence of any prior warnings or corrective actions. The proper test, as he indicates earlier, is whether either she knew or could reasonably have known that her conduct might attract the sanction of summary dismissal. In my view she could reasonably have anticipated that that would be the sanction appropriate for her misconduct and I would so have found in the circumstances had this issue been argued before me.

[15] Nor do I agree that the more serious conduct of the employee was her failure to notify her superior that she had tickets in her possession for which payment had not been received. It seems to me, though I must concede without the benefit of having heard the evidence, that the explanation which the arbitrator dismisses as mere speculation is in fact the most likely explanation in the circumstances, to wit that she failed to inform Mrs Coker of the position because she sought to escape detection and punishment for it. Be that as it may, it appears to me, were I sitting in the matter, that that was the lesser form of misconduct, the greater being her issuing of the tickets without receiving payment in circumstances where she knew that her conduct was contrary to company policy. Be that as it may, it is not I who was presiding over the proceedings but Mr Marcus and, as I say, he gave his careful, thoughtful and thorough attention to the facts before him. He came to the conclusions that there was not sufficient

in the facts to justify dismissal and the question that I have to decide is not whether that conclusion was wrong but whether at best for the applicant in these proceedings it was unjustifiable and unreasonable.

[16] In approaching this question I must ask myself whether a reasonable person sitting in the position of the first respondent might have come to the conclusion that he did. In my view I consider that he could have come to such a conclusion as a reasonable person.

[17] The question of sanction for misconduct is one on which reasonable people can readily differ. One person may consider that dismissal is the appropriate sanction for an offence, another that something less, such as a warning, would be appropriate. There are obviously circumstances in which a reasonable person would naturally conclude that dismissal was the appropriate sanction, for example if there had been theft of a significant amount of money, fraud or other untrustworthy conduct on the part of the third respondent. The examples can be multiplied but there is no purpose in doing so here. There are obviously circumstances in which dismissal would not be warranted. I take for instance the circumstance of an employee who is five minutes late for work in circumstances in which such misconduct has no prejudicial consequences for the employee. Between those two poles there is a range of possible circumstances in

which one person might take a view different from another without either of them properly being castigated as unreasonable.

[18] This is precisely such a case, in my view. The employee acted contrary to the rules of the company. Those rules are in place for a very good reason, namely to ensure that the work of the company is done efficaciously and to minimise the opportunity for fraud and other forms of defalcation. In the circumstances, however, as the arbitrator accepted and he cannot be faulted for doing so, that the employee did not intend to defraud the company but acted, albeit wrongly, with altruistic motives in circumstances where there was no real prospect of material prejudice to the company. That conclusion, it seems to me, is one that the arbitrator could competently have arrived at.

[19] The case of Scaw Metals v Vermeulen (1993) 14 ILJ 672 (LAC) at 675A-B was cited before me by Mr Snyman who appeared on behalf of the applicant. The passage in question reads as follows"

"The employer is entitled to determine the standard of conduct it demands from its employees and a court can only intervene if that standard results in unfairness in a specific situation."

It is at least arguably true that the employer is indeed entitled to determine the standard of conduct that it demands from its employees. An employer

can, for instance, if it sees the necessity for doing so, prescribe a set of rules that might be more exacting and be visited by harsher consequences than might be applicable in another workplace. That, however was not what happened. What happened here is that a set of rules was prescribed but so far as sanction was concerned, that was left to be regulated by the residual rules governing fairness. In my view, as I say, it would have been fair to dismiss the employee in the circumstances but I cannot conclude that the first respondent acted irregularly in coming to the opposite conclusion.

[20] In the circumstances I hold that his finding so far as the merits of the case are concerned is unreviewable.

[21] Mr Snyman also attacked the award on the basis that there was no evidence to support it. In this case the arbitrator considered that the appropriate compensation would be R11 500,00 which is equivalent to five months' wages at the date of her dismissal. He reasoned as follows:

"Having regard to the above and the fact that she breached the rules of the company in acting as she did to its potential prejudice, and to the fact that she failed to enlighten her area manager that the cash was short to the tune of some R1 000,00, which monies were in her possession to be collected as from 3 April to 8 April 1997, it seems to me that this is not a

case where the maximum compensation of 12 months should be awarded."

He then reviews the submissions and comes to the conclusion that I have referred to. Mr Snyman said that he failed to take into account that there was no evidence that the employee had sought to mitigate the loss that she had suffered. The issue, however, is whether this was the appropriate compensation for her in the circumstances. In considering that question issues of mitigation might be taken into account but there is no obligation to do so. What the arbitrator must do in the circumstances is to reach out and discover what would be the appropriate compensatory award. The first respondent did precisely that and I can find no reason to quarrel with his conclusions.

[22] In the circumstances I make the following order, that the application for the review and setting aside of the order of the first respondent dated 14 October 1997 in the arbitration proceedings between the applicant and the third respondent under Case No. GA 8012 is dismissed with costs. And as requested, I make the award an order of this court pursuant to the Act.

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ACTING JUDGE BRASSEY

LABOUR COURT OF SOUTH AFRICA