

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN**

**Case No: D441/98**

In the matter between:

**MONDI LTD**

Applicant

and

**PPAWU, CCMA & OTHERS**

Respondents

**PRESIDING JUDGE:**

LANDMAN J

**ON BEHALF OF APPLICANT:**

Advocate Winchester *instructed by* **Shepstone & Wylie**  
**Attorneys**

**ON BEHALF OF RESPONDENTS:**

Mr P Khathi *from* **PPAWU**

**DATE OF HEARING:**

20 AUGUST 1998

**PLACE OF PROCEEDINGS:**

DURBAN

TRANSCRIBER  
SECRETARIAL SERVICES

1/560

/ JUDGMENT

1/1136

J U D G M E N T

LANDMAN J:

1. In the present matter Mondi Limited seeks the review of an arbitration award which was handed down by Mr Ngcobo, a Commissioner of the CCMA, in the matter between Mondi Limited and Paulus Khathi, a former employee of Mondi. The applicant seeks to review the award on the basis of section 145, alternatively section 158(1)(g) of the Labour Relations Act 66 of 1995.

2. In my opinion, this matter can be disposed of on a narrow basis.

3. The Commissioner accepted that the employee was drunk on duty on the day in question and that for a second time he had refused to take a breathalyser test which would have proven conclusively whether he was or was not under the influence of liquor on the day in question.

4. Notwithstanding the fact that the Commissioner found the employee to be guilty of the offence and that the employer had acted fairly in coming to that conclusion, the Commissioner found:

"The code of Good Practice requires the employer to consider counselling and rehabilitation in case of alcoholism and drug abuse. The employer must initiate and not expect the employee to initiate counselling unassisted.

Although I found above that Mr Khathi was under the influence of liquor and that he refused to take a breathalyser test, I believe that the respondent's failure to assist Mr Khathi through counselling and rehabilitation, tips the scales against the respondent. The failure to assist the applicant as stated above, nullifies the respondent's case.

Finally, it is my finding that the dismissal of Mr Khathi was procedurally fair but substantively unfair."

5. In consequence the Commissioner found that the dismissal of the applicant was unfair and reinstated

him in his employment with the employer.

6. In my opinion, although prima facie the Commissioner realised that the Code of Good Practice requires counselling and rehabilitation in the case of alcoholism and drug abuse to be appropriate, the Commissioner failed to consider properly the application of the Code. Firstly, the Code of Good Practice is indeed merely a code and a guideline to employers and employees and not a binding document. Secondly, the Commissioner appears to have placed more emphasis, and indeed the wrong emphasis, on paragraph 10(3).

7. Paragraph 10(3) of the Code reads:

"Degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider."

8. In this particular instance the employee was in fact not dismissed merely because of alcoholism. It was alcoholism coupled with misconduct. Part of the

misconduct relates to the fact that he consumed alcohol when he reported for duty and, secondly, that he refused to comply with the company procedure to submit himself to a breathalyser test.

9. However, even if I were to assume that this was a case of dismissal for incapacity, it is clear that the Commissioner has overstated the case. He has overstated paragraph 10(3) - and therefore this means that his decision is not justifiable in terms of the reasons which were supplied by him. I leave aside the question whether the Commissioner was at all correct in finding that the employer did not institute counselling procedures. This is extremely doubtful but I do not find it necessary to comment on it.

10. In the circumstances, I am of the opinion that the Commissioner misdirected himself and that, in the circumstances, the award stands to be reviewed and set aside.

1/1332

O R D E R

LANDMAN J:

11. Consequently, I make an Order that the award of the third respondent in the case number KN 9288 dated 18 May 1998 is hereby reviewed and set aside and replaced

with an award that the dismissal of Paulus Khathi was fair.

12. I, however, make no order as regards costs.

**SIGNED AND DATED AT CAPE TOWN ON THIS 23<sup>RD</sup> DAY OF  
SEPTEMBER 1998**

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**JUDGE A A LANDMAN**

/ TRANSCRIBER'S