IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J3688/98

In the matter between :-

NEL, L Applicant

and

NDABA, H First Respondent

THE DIRECTOR, CCMA Second Respondent

WESTERN BMW Third Respondent

JUDGMENT

MARCUS AJ:

INTRODUCTION

1 On 22 May 1998, the applicant, to whom I shall refer as "the employee" was

dismissed by the third respondent ("the Company"). A dispute concerning the fairness of the dismissal was referred to the CCMA for arbitration. On 17 November 1998, the first respondent ("the Commissioner") handed down an arbitration award in which he held that the dismissal was procedurally unfair but substantively fair. The Commissioner declined to order either compensation or reinstatement. The employee now seeks to have the arbitration award reviewed and set aside in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act").

2 Before his dismissal, the employee worked as the manager of used car sales at Western BMW, a dealership which sold BMW motor vehicles. He was dismissed following a disciplinary enquiry in which he was charged with the "**acceptance of bribes, thereby trading in an unacceptable manner resulting in financial prejudice to Western BMW**".

3 The employee has never denied receiving what he called a "**spotters' commission**". This is described by the employee in his founding affidavit as "**a widely accepted practice in the motor trade which entails that when a potential buyer is referred to a car sales person by a third party and the car sales person sold a car to the so-referred buyer, that car sales person usually pays this type of commission in monetary value to the third party as a gratuity**". The employee candidly admits that on three separate occasions he

received money pursuant to this practice. Three separate dealers were involved and each paid the employee a commission for deals they made on customers referred to them.

4. The employee draws a distinction between a spotter's commission, which he claims to be legitimate and taking a "**chop**" or "**chopping**" which he recognises as impermissible. A chop is described by the employee as a "**kick back**" or underhand payment from dealers for transactions referred to them. He states that this concept connotes a dishonest deal between two persons.

5 The distinction sought to be drawn by the employee between a spotters' commission and a chop is denied by the Company. The Company states that spotters' commission is paid "**to people who have nothing to do with and who are not employed by a motor retailer, for taking the trouble to phone a dealership and give information which leads to the dealership doing the business**". Chopping, on the other hand "**occurs when money is earned from the normal trading activities of a used vehicle salesman as private income thereby enriching himself and not the company which employs him**". The Company alleges that the employee "**engaged in chopping when he referred the 1995 3 Series BMW deal to Sea Point Car Mart and earned money in his private capacity, thereby enriching himself, instead of purchasing the vehicle**

for re-sale for the benefit of (the Company)". To this allegation concerning the referral of the 3 series BMW, there is a bald and unmotivated denial in the replying affidavit. This is not sufficient to create a genuine dispute of fact and on this issue the Company's version must be accepted (see **Da Mata v Otto N.O. 1972 (3) SA 858 (A) at 882 H**). In any event, at the arbitration proceedings, Mr Barry Goodlesser of Sea Point Car Mart testified that on 26 February 1998, the employee referred a potential buyer to him who was looking for a 1991 BMW 325. Goodlesser testified that the car was worth R34 000.00 and was sold for R36 000.00 plus commission. He stated that "**we then drew an ex gratia of R2000 which is spotter's commission and we gave it to Mr Nel**".

6 In his evidence before the Commissioner, the employee vacilated on the distinction he had sought to draw between spotter's commission and chops. At one point he ventured the following explanation:

"**A spotter's commission is a referral to a different dealership which is an non-BMW deal. A spotter's commission is money paid by a dealer to a client or a person involved in the sale. It is not paid to a dealership. A chop is a dealer doing underhand business. This is a bribe.**" (Record, p 145)

Yet, the employee also agreed that when confronted by the Company, he admitted receiving chops because "**my understanding was that chops and spotter's commission were the same**".

7 In my view, the essence of the charge, notwithstanding the use of the word "**bribe**", was that the employee referred potential customers to other dealers for his own gain. That is how the chairperson of the disciplinary enquiry, Ms Smith, understood the charge. It is also how the Commissioner understood the case in question. In this regard, the Commissioner made the following finding:

"**8.5 Mr Gavin Scotts led evidence to the effect that if a client was looking for a car they did not have, they will normally refer him to a dealer within their group. This evidence was not challenged under cross-examination. Advocate Rossouw argued that this version was not put to the employee whilst he was being cross-examined and further that it was mentioned in passing by Scotts.**

8.6 This is evidence given under oath which was not challenged. In *casu*, the employee preferred to refer customers to other dealers who then gave him money which he failed to disclose to the Company.

8.7 I find that the employee used his fiduciary position to make a profit for himself and therefore the dismissal was substantively fair."

8 Although the Commissioner found the dismissal to be substantively fair, he also found that it was procedurally unfair. The finding of procedural unfairness flows from the fact that at the disciplinary enquiry, the employee was not given an opportunity to raise factors in mitigation before the sanction of dismissal was imposed.

THE TEST FOR REVIEW

9 The employee has raised a number of attacks on the arbitration award. Each will be dealt with separately.

1

10 The test for review in terms of section 145 of the Act has been authoritatively settled by the Labour Appeal Court in **Carephone (Pty) Ltd v Marcus N.O. & Others (1998) 19 ILJ 1425 (LAC)**. The question that must be asked is whether there is "**a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at**" - 1453 E.

THE ALLEGED BIAS OF MS SMITH

11 The employee contends that the chairperson of the disciplinary enquiry Ms Smith, was biased. In this regard, the Commissioner made the following finding:

"**7.6 In regard to the bias of the chairperson, it was submitted that the employee, prior to the enquiry, saw Ms Smith, the chairperson, Mr Green and a Mr Scotts together for approximately 15 minutes. Ms Smith denied this under oath and testified that she only met with Mr Green for two to three minutes only. Whilst with Mr Green they did not discuss the details of the case at all. I am unable to find, in the light of this evidence, that there was prior discussions of part of the evidence before the commencement of the hearing between Mr Green, Ms Smith and Mr Scotts. Ms Smith also denied ever being a subordinate of Mr Green.**

7.7 Regarding the submission that Ms Smith's decision to find the

employee guilty is not substantiated by facts before her and was so grossly unreasonable such that in all probabilities it points to bias, I accept that there were discrepancies in this regard, however, I do not agree that they are such that one can only in all probabilities come to the conclusion of bias."

12 The employee contends that this finding by the Commissioner was not substantiated by the evidence before him. It is contended that at the arbitration Smith could not deny the employee's version that she was with two witnesses for the Company for at least 20 minutes before the commencement of the enquiry. This contention is simply not borne out by the transcript of the arbitration proceedings. The transcript reflects that Smith admitted to being in the presence of Green, prior to the commencement of the enquiry, "**for a minute or two**". Putting the matter at its highest for the employee, the evidence goes no further than establishing peripheral contact between the chairperson of the enquiry and a witness for an insubstantial period of time. While it is undesirable for those charged with adjudicatory functions to conduct themselves in any manner which might create a reasonable apprehension of bias (see **BTR Industries South Africa (Pty) Ltd & Others v Metal and Allied Workers Union & Ano. 1992 (3) SA 673 (A) at 690 A - 695 C**) the facts of the present case are not such as to create an apprehension which is reasonable.

13 Much of the rest of the attack concerning the alleged bias of Smith turns on the findings made by her at the disciplinary enquiry. She is criticised for finding

the employee guilty in the face of an apparent acceptance that the money received by the employee was for spotter's commission and not chops. This, it is argued, shows that Smith was biased and did not apply her mind properly and independently to the facts. She is criticised for taking irrelevant considerations into account. This criticism of Smith, even if well founded, a matter on which I make no finding, misses the point. At issue, is whether or not the Commissioner, not Smith, committed a reviewable irregularity of the sort contemplated by section 145 of the Act.

14 The Commissioner made it clear in his award that he was conducting a fresh hearing. In that process he had the benefit of receiving oral evidence and reaching conclusions based on his evaluation and assessment thereof. In the weighing of the evidence, he would also be required to have regard to the documentary evidence. This included the notes of the disciplinary enquiry and other relevant documents. The manner in which the attack on Smith has been formulated would entail this Court sitting in review of her decision. That is not what the present proceedings entail.

15 In the **Carephone case (supra)** the Labour Appeal Court was at pains to emphasise that the distinction between review and appeal must be maintained. The attack relating to Smith's alleged bias has all the hallmarks of an appeal, rather than a review. Much of the criticism of Smith is based upon the

contention that on the evidence before her, she could not have come to the conclusion which she did. This, it is contended, is indicative of pre-judgment. Even if it were permissible for this Court to review the proceedings at the disciplinary enquiry, the mere fact that an adjudicator comes to a wrong conclusion is not in itself indicative of bias (Cf. **R v Silber 1952 (2) SA 475 (A) at 482 E - 483 C**). For purposes of the present review, the issue is whether or not the Commissioner, in his assessment of Smith's conduct, came to a conclusion which was not justifiable in the specialised sense in which that term is used in the **Carephone case (supra)**.

16 As I have already indicated, Smith gave evidence before the Commissioner. There is nothing in the transcript which, in my view, points to bias on her part. On the contrary, she displayed a clear understanding of her role as the presiding officer at the disciplinary enquiry and clearly understood the need for impartiality.

17 In my view, therefore, this ground of review fails.

SMITH'S FAILURE TO CONSIDER MITIGATING CIRCUMSTANCES

18 It is common cause that Smith failed to afford the employee the opportunity to submit evidence in mitigation before imposing the sanction of dismissal. This was admitted in her evidence before the Commissioner.

19 She stated that although she did not have regard to the employee's record and personal circumstances, she gave thought to the severity of the conduct and would have recommended dismissal even if the employee had a clean record. She also stated that the employee had a right of appeal against her finding.

20 The Commissioner made the following finding on this issue:

"**7.8 The fact that the employee was not given an opportunity to raise mitigating factors coupled with the procedural discrepancies alluded to above makes me come to the conclusion that the dismissal was procedurally unfair.**

7.9 However, it must be noted that at the arbitration hearing I was not addressed about the mitigating factors the employee wanted to raise at the disciplinary hearing. ..."

The Commissioner stated further:

"**9.1 Although the dismissal was procedurally unfair, the employer complied substantially with Item 4 of Schedule 8 and further that nobody placed the mitigating factors the employee claim(ed) he was not allowed to put at the disciplinary hearing at arbitration. This would have assisted me to determine the weight to attach to the seriousness of the procedural unfairness which occurred.**

9.2 Consequently I do not order any compensation or re-instatement. ...."

21 The review in this regard is difficult to fathom. It is argued on behalf of the

employee that the Commissioner's failure to request the employee to submit mitigating circumstances constituted a serious error of law. In my view this argument again misses the point. The Commissioner found that the dismissal was procedurally unfair. The employee has no complaint about this finding. His complaint is different. He alleges that the Commissioner (not Smith) was under a duty to request him to submit mitigating circumstances. This seems to confuse the function of a presiding officer at a disciplinary enquiry with the functions of a Commissioner performing a statutory arbitral function. The Commissioner's duty, in the present case, was to consider whether the employee's dismissal was substantively or procedurally unfair.

22 In the founding affidavit, much of the attack is directed at Smith's failure to hear factors in mitigation. These attacks have nothing whatever to do with the Commissioner. The contention that the Commissioner had a duty to elicit factors in mitigation was made for the first time in argument. No case has been made out on the papers that the Commissioner either failed to exercise a discretion in this regard or abused his discretion. In so stating, I do not wish to be understood as suggesting that mitigating factors are irrelevant to the task of a Commissioner. I go no further than stating that the attack on the Commissioner in this regard is misconceived. There may well be cases in which the Commissioner should actively elicit evidence in mitigation. This may arise, for example, where the employee has no real understanding of his or her rights and duties. In the present

case, however, the employee was represented at the arbitration proceedings by an advocate. Witnesses called by the Company were cross-examined. The employee himself gave evidence. In these circumstances I am of the view that no criticism can be levelled at the Commissioner. I should add that even in the present proceedings, the employee has not stated on oath what evidence of a mitigatory nature he would have led, if given the opportunity to do so.

23 For the sake of completeness, I should mention that the attack made in the founding affidavit in this regard is that once the Commissioner had concluded that the dismissal was procedurally unfair he was bound to remedy the matter with one of the remedies provided in section 193(1) of the Act. It is contended that his failure to do so constitutes gross misconduct and an excess of power. Since the employee had stated that he did not wish to be reinstated, it is contended that the Commissioner ought to have ordered the Company to pay compensation in terms of section 194 of the Act. In my view this attack is misconceived. It assumes that in cases involving a finding of procedural unfairness the Commission has no discretion concerning the award of compensation. This is not the law. See: **Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC) at 99H - 100 A paras 39 - 40.** In the present case, no case has been made out in the founding affidavit that the Commissioner failed to exercise a proper discretion in deciding not to award compensation. On the contrary, it is the employee's contention that he had no discretion in this regard. I have already

indicated that this argument is based upon a misconception of the law.

THE FINDING ON SUBSTANTIVE FAIRNESS

24 In his founding affidavit the employee states that when he was employed, he was interviewed by Mr Green who stated that he was not allowed to take chops. The employee understood this to mean that he was not allowed to receive "**kickbacks**" or underhand payments from other dealers for transactions referred to them.

25 I have already pointed to the apparent confusion in the employee's evidence concerning the alleged difference between spotter's commission and chops. At the arbitration hearing, Mr Green stated that when he interviewed the employee, he explained all the elements of trading. The employee stated, however, that Green only referred to chops and never said anything about spotter's commission. On the employee's version, therefore, it goes no further than an assertion that he was never told not to accept spotter's commission. This scarcely advances his case. There are many situations in which an employee can be expected to know and understand that conduct contrary to the interest of his or her employer is unacceptable without the need to be specifically told. The relationship between employer and employee is predicated upon trust. The governing principles are succinctly summarised by Myburgh JP in **Sappi Novoboard (Pty) Ltd v**

Bolleurs (1998) 19 ILJ 784 (LAC) at 786 F - 787 D paras 7 - 8:

"**7 It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully:** ***Pearce v Foster & Others (1886) QB 356 at 359; Robb v Green (1895) 2 QB 1 at 10; Robb v Green (1895) 2 QB 315 (CA) at 317; Gerry Bouwer Motors (Pty) Ltd v Preller 1940 TPD 130 at 133; Premier Medical and Industrial Equipment Ltd v Winkler & Others 1971 (3) SA 866 (W) at 867 H*****. The relationship between employer and employee has been described as a confidential one (*****Robb v Green at 319*****). The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' (*****Premier Medical and Industrial Equipment Ltd v Winkler at 867 H; Jones v East Rand Extension Gold Mining Co. Ltd 1917 TH 325 at 334*****). If an employee does 'anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him':** ***Pearce v Foster at 359*****. In** ***Gerry Bouwever Motors (Pty) ltd v Preller*** **it was said at 133: 'I do not think it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him'. The conduct of an employee in receiving a commission which arises out of the employment relationship without the knowledge of his employer constitutes a lack of good faith:** ***Boston Deep Sea Fishing & Ice Co. v Ansell (1888) ChD 339 (CA) at 363 - 4; Levin v Levy 1917 TPD 702 at 705; Gerry Bouwer Motors (Pty) Ltd v Preller at 133*****.**

8 The following remarks, which were made in relation to the duty a director owes his company, are apposite to the duty an employee owes employer:

' The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud or absence of ***bona fides*****, or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well intentioned, cannot escape the risk of being called upon.'**

(*Regal (Hastings) Ltd v Gulliver & Others [1942] 1 All ER 378 at 386 B*).

Even if the respondent did not act dishonestly, if his conduct 'was of such a type that it was inconsistent, in a grave way - incompatible - with the employment in which he had been engaged as a manager' (*Sinclair v Neighbour [1966] 3 All ER 988 at 989 E - F*) the appellant was entitled to dismiss him."

26 The case of **Gerry Bouwer Motors (Pty) Ltd v Preller 1940 TPD 130**, referred to by Myburgh JP is instructive. In that case the respondent, Preller, was employed as a used car salesman by the appellant company. The evidence established that on certain occasions he sold motor cars to customers and induced them to insure the cars with the Dominion Insurance Company. For this, he received certain benefits, including cash payments from the Dominion Insurance Company of which his employer was unaware. He was dismissed by the Company for this conduct. Grindley-Ferris J observed at 132-133:

"**The position then is this: The defendant company knew that the plaintiff was placing insurances of cars with the Dominion Company and it raised no objection. As its credit manager said, all it was concerned with in the first instance was to see that the car was insured with some company 'but when our firm is responsible for placing the insurance, we want the commission'. The words of the credit manager which I have quoted are, I think of great importance. They mean that when the company through one of its employees places the insurance the company wants its commission, but that when the purchaser himself elects to effect the insurance, as he is entitled to do, the company cannot claim commission. If that is what the credit manager meant then it seems to me that the reason why the defendant company raised no objection to the insurance of cars sold by the plaintiff being placed with the Dominion Company with no resulting commission was**

because it assumed that the purchaser and not the plaintiff had chosen such company. The placing of the insurance with the Dominion Company by the plaintiff put the defendant company in the same position as if it had itself placed the insurance as far as its right to claim commission was concerned and I have no doubt that had the defendant company known the true position it would not have allowed it to continue. Therefore, although the plaintiff may have acted openly and *bona fide* his conduct prejudiced the company which employed him. In *Levin v Levy* ... Curlewis J said that 'the mere fact' of an agent receiving and retaining a secret commission in connection with the performance of his duty 'constitutes unfaithfulness and dishonesty towards his principal'. It would appear therefore that it is unnecessary to determine whether the defendant company was prejudiced because the mere fact that the plaintiff accepted the gifts and did not disclose such acceptance to his employer amounted to unfaithfulness and dishonesty towards the latter."

27 The argument advanced by the employee is that once the Commissioner had found that the money accepted by the employee was for spotter's commission, it followed that he was not guilty of accepting bribes. I have already indicated how the charge was understood and interpreted both at the disciplinary enquiry and in the arbitration. It is now contended, however, that the Commissioner in effect re-formulated the charge. For this, reliance is placed upon that part of the arbitration award in which the Commissioner stated that "**the issue now remaining is whether in accepting spotter's commission the employee used his fiduciary position to make a profit for himself or not**".

28 In my view, the formulation of the issue by the Commissioner and his ultimate finding does not, in substance, amount to the re-formulation of the charge. The principal enquiry is whether or not the characterisation of the issue by the

Commissioner amounts to the creation of a new complaint to which the employee has not had an opportunity to respond. A similar situation arose in **Boardman Brothers (Natal) (Pty) Ltd v Chemical Workers Industrial Union (1998) 19 ILJ 517 (SCA)**. Smalberger JA observed at 521 D - F:

"**It is clear from the record that the reason why the employees were dismissed was because of the finding that they had been dishonest. According to the appellant's disciplinary code, being absent from a work station and sleeping while on duty are not offences punishable with dismissal on the first occasion. It was conceded on behalf of the appellant that but for the finding of dishonesty, dismissal would not have been an appropriate sanction.**

Although the employees were charged with dishonestly claiming payment from the appellant for time not worked, this was an incorrect formulation of the complaint. The real thrust of the appellant's case was that the employees had dishonestly taken money for work not done. Nothing turns on this difference. All the relevant facts were canvassed before the Industrial Court and the nature of the employees' alleged dishonesty is ultimately a matter of inference from those facts."

29 In my view, the same approach governs the present matter. This case is not of the sort considered by Sutherland AJ in **Mndaweni v JD Group t/a Bradlows & Ano (1998) 19 ILJ 1628 (LC)**. In that case, the employee was charged with misappropriation of customer money based on a particular incident concerning a customer. The dispute was referred to arbitration and the Commissioner found that the incident on which the charge had been based had not been proved. He nevertheless upheld the decision to dismiss, on the strength of the evidence of another incident involving a different customer implicating the employee in

misappropriation of money. Sutherland AJ observed at 1630 J - 1631 A:

"**As I have stated a new charge was introduced during the arbitration proceedings for the first time. In my opinion it is clear that our law does not entitle a Commissioner to hear a new charge which did not form the basis of the dismissal under consideration.**"

In the present case, there is no question of a new charge being introduced. While the use of the word "**bribes**" in the formulation of the charge is inept, the essence of the offence was "**trading in an unacceptable manner**". In my view, the arbitrator was entitled to take a dim view of the employee's conduct. The employee's task was to work in the best interests of the employer. Central to that task was to ensure that custom flowed to the employer. In the case of the referral of the BMW to Sea Point Car Mart and the receipt of a commission in respect thereof, clearly amounted to personal enrichment and trading in an unacceptable manner to the financial prejudice of the employer. This seems to be the incident which carried greatest weight with the Commissioner. It is accordingly not strictly necessary to deal with the referral of customers to other dealers in cases not involving the purchase of BMW vehicles. In my view, however, and on the analogy of **Sappi Novoboard (Pty) Ltd v Bolleurs (supra)** and **Gerry Bouwer Motors (Pty) Ltd v Preller (supra)** the employee received a commission arising out of the employment relationship which was incompatible with his duties towards his employer.

30 In the circumstances, the application is dismissed with costs.

_____

G J MARCUS

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

Date of Hearing: 24 June 1999
Date of Judgment: 25 June 1999

For the applicant: Advocate GJ Rossouw
Instructed by: Neels Engelbrecht Attorneys

For the Third
Respondent: Advocate MM De Jongh
Instructed by: Rita Jordaan Attorneys