**IN THE LABOUR COURT OF SOUTH AFRICA**

**CASE NUMBER : J3461/98**

**In the matter between :**

**JOSEPH PELLETIER** **Applicant**

**and**

**B & E QUARRIES (PTY) LIMITED**
**Respondent**

**CASE NUMBER : J3822/98**

**In the matter between:**

**B & E QUARRIES (PTY) LIMITED** **Applicant**

**and**

**COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** **First Respondent**

**LOUISE CHAROUX** **Second Respondent**

**JOSEPH PELLETIER** **Third Respondent**

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**J U D G M E N T**

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***KENNEDY AJ :***

[1] Two related applications have been brought before me. Both arise from an arbitration award handed down by a Commissioner of the Commission for Conciliation, Mediation and Arbitration ("***the CCMA***"), Ms Louise Charoux ("***the Commissioner***"). In her award, dated 2nd October 1998, the Commissioner found that the dismissal of Mr Pelletier was substantively unfair, and ordered his former employer, B & E Quarries (Pty) Limited ("***the employer***"), to pay him an amount equal to four months remuneration.

[2] The first application before me, bearing case number J3461/98, was brought by Mr Pelletier and seeks an order in terms of section 158(1)(c) of the Labour Relations Act No 66 of 1995 ("***the Act***"), to make the Commissioner's award an order of Court. This was followed by a separate application, brought by the employer, under case number J3822/98, in which the employer seeks to have the Commissioner's award reviewed and set aside under section 145 of the Act. The review application is the basis on which the employer resists Mr Pelletier's application to have the award made an order of Court. It was agreed during

argument that in the event of the review being unsuccessful, the award should be made an order of Court. I shall accordingly now proceed to deal with the various grounds advanced on behalf of the employer in support of the review application.

[3] Two of the grounds raised by the employer relate to the conduct of the arbitration proceedings. The first objection is that the Commissioner should not have sat as the arbitrator in the proceedings. The second relates to the failure by the Commissioner to exclude Mr Pelletier's attorney from the proceedings.

***SHOULD THE CONCILIATOR HAVE ACTED ALSO AS ARBITRATOR?***

[4] The objection to the Commissioner sitting as arbitrator arises because she had previously acted as the Commissioner during the stage of conciliation which preceded arbitration, and because, at the end of the conciliation proceedings, she made a number of statements reflecting her preliminary views on the merits of Mr Pelletier's claim. She indicated to the employer's representatives that in her view the employer had been "***too harsh***" in deciding to impose the sanction of dismissal, and that

an arbitrator at any forthcoming arbitration proceedings would "***probably see it in the same light***".

[5] In a statement filed by the Commissioner, she does not deny having made the remarks attributed to her, but places them in the following context:

"***As Commissioners usually arbitrate their conciliations this is an area where particular care is taken, not to be perceived as predetermining the dispute before evidence is led in the matter. I do at the conciliation phase explain the law to the parties and indicate what an arbitrator will probably consider at the arbitration proceedings. This is in order to assist parties in making an informed decision during the conciliation process. I wish to point out that if the [employer] did not feel comfortable with me arbitrating the dispute, they should have applied in terms of section 136 of the LRA for another arbitrator to do the case, which they failed to do.***"

[6] Section 136(2) of the Act specifically provides that a Commissioner who has attempted to resolve the dispute through conciliation may also sit as the arbitrator in respect of the same

dispute. This is subject to the provision in section 136(3) that any party to the dispute who wishes to object to the arbitration being conducted by the Commissioner who had attempted to resolve the dispute through conciliation may do so by filing an objection in that regard with the CCMA. Section 136(4) obliges the CCMA, when it receives such an objection, to appoint another Commissioner to resolve the dispute by arbitration.

[7] In the present matter, no such objection was lodged on the part of the employer to the Commissioner sitting as arbitrator. During argument, Mr van Zyl, who appeared for the employer, acknowledged that such an objection could and perhaps should have been raised prior to or at the commencement of the arbitration proceedings. However he submitted that this did not preclude the employer from raising the objection thereafter. He submitted further that it was improper in the circumstances for the Commissioner to have sat as arbitrator and that she should have recused herself ***mero motu***. The reason advanced for this by Mr van Zyl was the statements made by the Commissioner at the conclusion of the conciliation proceedings, which, according to the deponent to the founding affidavit, had the result that the Commissioner's "***judgment was slanted and/or had preconceived ideas pertaining to the merits of the***

***dismissal.***"

[8] I accept that it may in some circumstances be appropriate for Commissioners ***mero motu*** (or where a proper objection is raised) to recuse themselves before sitting as arbitrators in disputes where they have attempted to conciliate the dispute. In my view however, there is no merit to the objection raised by the employer in the present matter. Although the Commissioner's explanation may not be completely satisfactory in all respects, it appears to be clear that what she is intending to convey is that she did not prejudge the matter before evidence was led during the arbitration, but had merely conveyed her ***prima facie*** views to the parties, based on the information she had been given during the conciliation proceedings, with a view to their considering their position for possible settlement during the conciliation stage.

[9] It is in my view unrealistic to suggest that a conciliator may not come to some ***prima facie*** views on the prospects of success, or that it is improper for the conciliator to convey this to the parties and, if conciliation fails, later to sit as arbitrator. Section 136(2) of the Act specifically provides that a Commissioner who has acted during the conciliation stage may

also act as arbitrator. If a party wishes to object to the Commissioner sitting as arbitrator, on grounds such as those raised in the present matter, it is in my view ordinarily incumbent upon the party to raise such an objection before the arbitration takes place, in terms of section 136(4) of the Act. The employer has not offered any explanation why this was not done at that time. If its representatives had genuinely believed that the arbitrator had prejudged the matter and had a closed mind, it is highly likely that they would have raised such an objection at the outset. Their unexplained failure to do so at the time suggests that the objection has been raised as an afterthought. In my view, the employer cannot now legitimately raise the objection. I am not persuaded that any impropriety or injustice occurred in this regard.

***THE FAILURE TO EXCLUDE THE ATTORNEY FROM THE ARBITRATION PROCEEDINGS***

[10] The next objection raised by the employer is that the Commissioner acted improperly in failing to exclude Mr Pelletier's attorney from the arbitration proceedings. At the outset of those proceedings, the employer's representative (a lay person) objected to Mr Pelletier being represented by his attorney, Mr van

Rensburg. Mr van Rensburg argued before the Commissioner that the matter was of such a nature that his client should be allowed to be represented by his attorney under section 140(1)(b). This was refused by the Commissioner, who did however state the following:

"***I, however, have no objection to his representative, Mr van Rensburg, sitting in on the matter and if there is any questions that you*** [i.e Mr Pelletier] ***wish to raise with him or things you wish to discuss with him I will give you the opportunity to go out and speak with him on the matter.***"

[11] Accordingly, Mr van Rensburg remained at the side of Mr Pelletier during the proceedings. On a few occasions he made remarks which are recorded in the transcript. In my view, what he stated on each occasion was innocuous and appears to have been either to clarify something for his own mind, or to assist to clarify a point of confusion for others. On only one occasion (recorded at page 245 of the record, lines 8 to 13) did his intervention involve anything more than a few words and on that occasion he was attempting to clarify confusion regarding dates. This was allowed by the Commissioner. Mr van Zyl submitted

that this was improper. He acknowledged that the Commissioner had a discretion whether or not to allow legal representation, but submitted that once this discretion was exercised in disallowing legal representation, the Commissioner did not have any discretion to allow the attorney to say anything at all.

[12] In my view, the approach suggested by Mr van Zyl is unduly formalistic. By allowing the attorney to remain in the room and on a few occasions to make a few remarks, the Commissioner did not act in my view improperly or irregularly in the sense that this could constitute a ground to justify reviewing and setting aside the proceedings. It does not appear that any injustice to the employer resulted from what occurred in this regard. Accordingly, in my view, this ground of review has no merit.

***THE ARBITRATOR'S APPROACH TO THE PREVIOUS FINAL WARNING***

[13] A number of further grounds of review were raised which can conveniently be dealt with together. They relate to a final warning which was issued to Mr Pelletier in an incident which

preceded the final incident which resulted in his dismissal. The background facts relevant to this aspect are briefly the following. During July 1997, the employer issued Mr Pelletier with a first written warning arising from his absence from work on the 13th July 1997. There was a further incident of alleged misconduct during October 1997, which led to Mr Pelletier being subjected to a disciplinary enquiry. At the conclusion of that enquiry, on 21 November 1997, Mr Pelletier was found guilty of gross insubordination and being absent without leave. He was issued with a final written warning. He did not appeal against the findings or the warning which was issued. He did however refer a dispute relating to that warning to the CCMA. That came before Commissioner Cloete for conciliation during March 1998. It is uncertain on the papers what exactly occurred before Commissioner Cloete. The employer states that he found that he had no jurisdiction to deal with the matter as Mr Pelletier had in the interim been dismissed. Mr Pelletier in his answering affidavit states that he does not recall this, but he states that he does recall the employee's representative making application for a postponement to which he consented. On either version, it is apparent that Mr Pelletier did not pursue the matter as a separate dispute, but raised it again only in the arbitration proceedings which arose from his dismissal. Subsequent to the

outcome of the disciplinary enquiry held in November 1997, there was a further incident: Mr Pelletier was again absent from work on the 22nd January 1998 when he want to the Department of Labour to lodge various complaints against his employer. This absence resulted in his being charged with being absent from work without permission. The disciplinary enquiry was held on 26th January 1998. He was found guilty of the charge of misconduct. The fact of his previous written warning was taken into account, in dealing with the issue of punishment, and a decision was made that he should be dismissed. It was that decision which he then referred to the CCMA for conciliation before the Commissioner on 3rd April 1998. Thereafter the matter came before the same Commissioner in arbitration proceedings which were held on the 14th September 1998.

[14] During the course of the arbitration proceedings, the Commissioner allowed a substantial amount of evidence to be led by Mr Pelletier in relation to the events leading up to the issue of the final warning in November 1997. At one stage during the proceedings, the Commis-sioner appears to have acknowledged that the fairness or otherwise of the final written warning was not an issue to be decided by her. She posed the question to Mr Pelletier (at p 248 of the record) as to why he thought the

disciplinary enquiry of the 21st November was unfair and then made the remark "***Well, not that that is going to be the matter here before me today, because the one before me is when you were dismissed.***" Notwithstanding this, the Commissioner allowed Mr Pelletier to give a great deal of evidence about this issue. Indeed, as Mr van Zyl for the employer correctly pointed out, most of the evidence led related to the charge and disciplinary enquiry of November 1997, rather than that relating to the events in January 1998, which culminated in Mr Pelletier's dismissal.

[15] In her award, the Commissioner referred to the evidence relating to both disciplinary hearings, i.e that on 20th November 1997, and that on the 26th January 1998. She dealt at length with the evidence of Mr Pelletier regarding the reasons for this absence during October and November 1997. The Commissioner concluded in that regard:

"***On the evidence before me it was unfair on the part of the*** [employer] ***to give*** [Mr Pelletier] ***a final written warning under the circumstances. He produced a doctor [sic] certificate to confirm that he was hospitalised.***"

In relation to the disciplinary hearing conducted in January 1998, in which he was found guilty, the Commissioner stated the following:

"***At this point in time*** [Mr Pelletier] ***was working for the*** [employer] ***in Johannesburg. Mr Pelletier testified that on 22 January 1998 he left his workplace to report certain alleged unfair labour practices practised at the*** [employer] ***to the Department of Labour. Mr Pelletier said that when he told Mr Frank le Roux, the workshop manager that he was going to the Department of Labour, Mr le Roux `cut the line`. He also said Mr le Roux said he could go. Mr McNamara, the manager in Johannesburg, testified that Mr Pelletier was supposed to report to him and not to Mr le Roux.*** [Mr Pelletier] ***said his instructions from Mr Thiele, the workshop director was that he had to report to either Mr le Roux or Mr McNamara. It is unclear whether Mr le Roux granted permission or not. If it was not granted, I believe it was unreasonable not to grant the permission. The Department of Labour is open during office hours only. On the evidence before me,*** [Mr Pelletier] ***told Mr le Roux that he was going to the Department of Labour. I***

***find on the evidence produced that the dismissal of*** [Mr Pelletier] ***on 26th January 1998 was substantively unfair.***"

[16] Mr van Zyl raised a number of objections to the approach of the Commissioner in this regard. First, he submitted that the Commissioner had lacked the jurisdiction to hear evidence relating to the previous written warning, and by allowing such evidence to be heard, acted in a manner which was grossly irregular and ***ultra vires***. Second, he submitted that, even if such evidence could be led, the Commissioner had acted improperly in making a finding on the fairness or otherwise of the warning. The third argument was that even if the Commissioner was properly entitled to consider the validity of the final warning, she "***could not have done so in a proper and/or objective and/or rational fashion based upon the lack of evidence at the*** [Commissioner's] ***disposal during the course of the arbitration proceedings.***"

[17] In my view there is some merit in Mr van Zyl's submission that the question of whether the final written warning was fair or not was not a matter for determination by the Commissioner. The dispute which had been referred to the Commissioner first for conciliation and thereafter for arbitration

was confined to the dismissal during January 1998. As noted above, Mr Pelletier had on 22 January 1998 (the day he was absent from work) referred the previous dispute regarding the alleged unfairness of the prior warning (and various other complaints which he had regarding his treatment) to the CCMA. That dispute came before Commissioner Cloete in March 1998, but appears not to have been pursued. A separate dispute was referred to the CCMA arising from his dismissal. The form submitted by Mr Pelletier on the 5th February 1998 referred to the dispute as being one concerning "***unfair dismissal***", for which he sought compensation. After conciliation attempts before Commissioner Charoux failed, he submitted the necessary form requesting arbitration, in which he again defined the dispute as concerning "***whether the termination of the Applicant's services constituted an unfair labour practice***". Although Mr Pelletier presumably regarded the issuing of the warning as being one of the relevant events leading up to his dismissal, it does seem to me that there is some merit in Mr van Zyl's argument that the challenge to the fairness of the warning was a separate issue from that referred to Commissioner Charoux.

[18] However, even if it is accepted that the

Commissioner erred in allowing evidence and making findings on the fairness of the final warning, it does not in my view necessarily follow that this vitiates the entire award or that it renders it liable to be set aside on review. While the Commissioner made a definite finding to the effect that the issuing of the final written warning was unfair, that was not the only reason on which she concluded that the dismissal was unfair. In other words, she did not find the dismissal was unfair merely or exclusively because the employer relied upon an unfair previous warning in dismissing Mr Pelletier. The Commissioner made a further finding which she regarded as justifying the conclusion that the dismissal was unfair, namely that Mr Pelletier either had permission to be absent from work, or, if this was not granted, it should have been granted and that in the circumstances it was unfair to dismiss him. This justification exists independently of the earlier finding that the previous warning was unfair. Had the Commissioner not made any such finding on the previous warning, it is apparent from her award that she would in any event have concluded that the dismissal was unfair for the other reason, being that permission was or should have been granted for Mr Pelletier's absence on 22 January 1998.

[19] Professor Baxter in **Administrative Law at p 520 to 521** gives a useful analysis of the question, which he poses and answers in the following terms:

"***A public authority will often base its decisions upon a variety of factors, rather than one alone. Does the presence of one or more impermissible reasons for his action render the action invalid even if these are also accompanied by permissible reasons?***

***The answer seems to depend upon the degree to which the bad reason (or reasons) has infected the act in question. Judges have used various tests to express this: it is said that the act will be vitiated if the bad reason was a `substantial', `material', or `the dominant', factor motivating the decision or if, together with a good reason, it `cumulatively' led to the decision to act being made... Where it is impossible to distinguish those reasons which were decisive from those which were not, and one or more of the reasons are bad, the Court has no choice but to set the decision aside....***

***It is submitted that the test might better be formulated in***

***the following way: would the authority, had it not been actuated by the bad reason or reasons, have reached - and been legally able to reach - the same decision upon the basis of the remaining, permissible reasons? The question is hypothetical and its answer involves some speculation. Nevertheless, by characterising it in this way the public authority is not penalised for insignificant errors when it would have reached the same decision anyway. If permissible reasons for the decision still remain and they would still have dictated the decision, no prejudice has been suffered.***"

This approach finds support in **Congress of South African Trade Unions v District Magistrate of Uitenhage 1987 (2) SA 102 (SE) at 110 B - D**

[20] The fact that much of the time spent during the arbitration proceedings involved evidence relating to the previous warning, cannot in my view be decisive. It would appear from the Commissioner's award that if she had not considered and decided, in Mr Pelletier's favour, the issue of the previous warning, she would in any event have for a different reason found that the dismissal was unfair. This is apparent from

her finding that Mr Pelletier had either been given or should have been given permission to be absent. Even if the matter had been approached on the basis that the final warning was valid and could be relied upon by the employer, the same result would have followed.

***WAS THE COMMISSIONER'S FINDING RATIONALLY JUSTIFIABLE?***

[21] The next issue which then arises - and on which the employer has raised a further challenge in the review - concerns the Commissioner's finding that it was unfair to dismiss Mr Pelletier for his absence on 22 January 1998 because permission either was or should have been granted for Mr Pelletier's absence. Mr van Zyl submitted that the Commissioner's decision in this regard was not rationally justifiable. He referred to a number of contradictory elements in the evidence. In his evidence in chief in the arbitration proceedings, Mr Pelletier said that he had phoned his supervisor Frank Roux (referred to in the Commissioner's award as Mr le Roux) and that he had told him that he was leaving for the Labour Department. He continued:

"***He*** [Roux] ***say Ok and then he ... (indistinct). So then***

***presume he told me Ok to go, that I can go...***" (page 251 of the record).

When asked by the Commissioner whether he had thought that he had permission, Mr Pelletier said:

"**Yes, he say Ok... Frank Roux.**" (page 252)

Mr Pelletier was cross-examined during the arbitration proceedings by Mr McNamara on behalf of the employer. The following was stated in this regard (at p 256):

"***When you said ... you told Frank and you asked him to go to labour, did you ask him or did you tell him? - I tell him, `Frank, I am going to the Labour Department'.***

***So you did not ask him to go? - No, I said I am going so he knows I am going. I let him know***".

[22] Mr Roux did not testify before the Commissioner. However the employer's witness, Mr Bosman handed to the Commissioner two statements made at the time of the disciplinary enquiry. The one, made by Mr Pelletier and signed

on the 26th January 1998, read:

"***J Pelletier states that he phoned Frank Roux and informed him that he was going to Manpower. I did not ask permission to do so nor did Frank Roux give his permission.***"

This was not put to Mr Pelletier during cross-examination before the Commissioner, but it appears to be consistent with the concession he made during cross-examination by Mr McNamara referred to above.

The statement of Mr Roux read as follows:

"***Joseph Pelletier phoned me and told me he was just dropping everything off by the machine and he is going to Manpower. I tried to talk to him about going to Manpower and asked him if we could not sort out ourselves. He said he didn't want to speak to me or R Till (fleet director). He has enough of being shouted at in Ladysmith, PE and JHB that he got treated worse than a dog and that there is nothing to talk about and that he is going to Manpower.***"

[23] During argument for the employer, Mr van Zyl criticised the Commis-sioner for failing to deal with the evidence relating to this issue and in particular the evidence in the form of Mr Pelletier's statement specifically admitting that permission had not been granted. He submitted further that the Commissioner had ignored the statement altogether. In my view, this criticism goes too far. The Commis-sioner's reference to this aspect in her award does seem to me to be unfortunately cryptic. However, there is in my view no basis to infer from the lack of a specific reference to Mr Pelletier's written statement that she ignored it altogether or failed to apply her mind properly to the matter. What the Commissioner appears to have had in mind was that regardless of the contradictory evidence in relation to the issue, even if it is accepted that no permission was granted (which appears in my view to have been an appropriate conclusion), the permission should have been granted. In other words, even if Mr Roux was not asked for and did not give permission, the employer should have allowed him to go or at least have tolerated his absence and not have dismissed him for this reason. It is of interest in this regard to note that the affidavit of Mr Zunckel, a member of the employer's management who acted as the Chairperson of the disciplinary

enquiry, stated that:

"***During the course of the disciplinary enquiry it was never contended on behalf of the*** [employer] ***that*** [Mr Pelletier] ***was not allowed to approach the Department of Labour or the CCMA at all. Indeed, had*** [he] ***followed the proper procedure consent, in all likelihood, would have been granted to*** [him] ***to proceed to the Department of Labour at a specific time and/or day.***"

[24] It is clear in my view that the Commissioner considered that dismissal was excessive and therefore unjustified in the circumstances where Mr Pelletier had failed to obtain permission before absenting himself from work on the day in question. If this were an appeal, there may well have been considerable merit in an argument that the approach of the Commissioner was wrong, that greater weight had to be attached to the importance of management asserting its authority and discipline to ensure that its employees did not leave without obtaining permission, and particularly given the history of previous such incidents, that dismissal was justified. In my view, there would have been much to commend such an argument if this were an appeal, but it is not. It is important to bear in mind

in review proceedings the reminder posed by Froneman DJP in **Carephone (Pty) Limited v Marcus N.O and Others (1998) 19 ILJ 1425 (LAC) at 1434 C - E, para 32**, that notwithstanding the widening of the scope of judicial review under the new Constitution, there remains a very clear distinction between reviews and appeals. At **1435 B - C para 36,** the learned Deputy Judge President stated that a review judge must remain "***aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable.***" The test was posed in these terms:

"***Is there 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?***" (at **1435 E - F para 37**).

See also: **County Fair Foods (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others (1999) 20 ILJ 1701 (LAC) at 1706 D - 1707 B, paras 9 and 10; p 1712 G - I, paras 26 and 27 and p 1715 J to 1716 G, paras 42 to 44;**

**Coetzee v Lebea N.O and Another (1999) 20 ILJ 129 (LC) at 133 D - F**

[25] I am of the view that while the Commissioner's approach in the present matter may well be subject to criticism in various respects, there was no error of such a nature which no reasonable Commissioner might have made. There is in my view a rational basis for her conclusion that dismissal was unjustified. I therefore conclude that there is no justification for setting aside the award of the Commissioner.

[26] Accordingly I grant the following orders:

(a) In case number J3822/98: the application is dismissed.

(b) In case number J3461/98: the arbitration award of CCMA Commissioner Charoux dated 2 October 998 in CCMA case number GA 25999 is made an order of Court; and

(c) the costs incurred in respect of both cases (J3822/98 and J3461/98) are to be paid by B & E Quarries (Pty) Limited.

**P M KENNEDY**
**ACTING JUDGE OF THE LABOUR COURT**

DATE OF HEARING: 19th August 1999
DATE OF JUDGMENT: 6th October 1999
Applicant represented by: Attorney C van Zyl of Van Zyl Inc, Port Elizabeth
No appearance for First and Second Respondents.
Third Respondent represented by: Attorney M van Rensburg of Marius van Rensburg Attorneys, Johannesburg