IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER : J3579/98

In the matter between:

GIMINI INDENT AGENCIES CC t/a S & A MARKETING	**Applicant**
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER P J VAN DER MERWE	**Second Respondent**
LEWI EGNOS	**Third Respondent**

J U D G M E N T

KENNEDY A J:

1[] The Applicant dismissed the Third Respondent from its employ on 5th May 1998. The Third Respondent challenged the fairness of that dismissal in arbitration proceedings before the Second Respondent ("***the Arbitrator***"), a commissioner of the Commission for Conciliation, Mediation and Arbitration ("***CCMA***"). In an award handed down by the Arbitrator on 26th October 1998, the dismissal was found to be substantively fair, but procedurally unfair. The latter finding was made, according to the Arbitrator's award, "***on account of lack of impartiality***" on the part of the chairperson of the disciplinary enquiry, **viz** Mr Rappaport, the managing member of the Applicant close corporation. The Arbitrator awarded the Third Respondent compensation equivalent to "***the remuneration that he would have received between the date of his dismissal on 5 May 1998, and the date of the arbitration on 13 October 1998, calculated on the basis of his salary at the time of his dismissal.***"

2[] The Applicant challenges the validity of the Arbitrator's award by way of review proceedings brought before this Court under section 145(1) of the Labour Relations Act No 66 of 1995.

3[] The following background events, which emerge from

the evidence placed before the Arbitrator, are relevant. The Third Respondent was employed by the Applicant on the 1st April 1997 as an accountant/ bookkeeper. The relationship between the Third Respondent and the Applicant, and particularly its managing member, Mr Rappaport, soon became problematic. He was accused of poor performance, for which he was counselled during the latter half of 1997. He was not awarded a year end performance bonus at the end of 1997. He felt resentful about this, as well as various other grievances. These included the alleged failure by management to honour an undertaking to provide him with an assistant. He also felt aggrieved about being relocated to an office which allegedly was not properly ventilated; about the alleged failure to repair a printer; about the failure to provide a debtor's clerk with a computer which led to the clerk using the Third Respondent's computer, which affected the Third Respondent's ability to perform his work; and about the timing of leave. These disputes led to conflict particularly with Mr Rappaport who, the Third Respondent alleged, had an adverse "***mindset***" towards him and conducted a "***relentless campaign against (him) in an attempt to force (him) out.***" Mr Rappaport testified before the Arbitrator (according to his award) to the effect that the Third Respondent "***refused to accept that he was performing poorly, and***

reacted by attempting to justify his poor performance and carrying out personal attacks against the managing member. This continued for a four month period until the company felt it had no alternative but to advise the [Third Respondent] ***that he was relieved of his position as bookkeeper, and that as from 1 April 1998, his position would be that of 'debtor's clerk'".*** The Third Respondent challenged this effective demotion by referring a dispute to the CCMA for conciliation. Prior to the conciliation, the Applicant acknowledged that it had not complied with the requirements of the Labour Relations Act, and restored the Third Respondent to his previous position as bookkeeper.

4[] The Third Respondent was then required to attend a "***performance meeting***" on 20th April 1998. His poor performance was discussed at length. He was again informed that he had been reinstated into his previous position as bookkeeper. However, on 22nd April 1998, the Third Respondent wrote a letter to the Applicant stating that he did not believe that he had been reinstated. He indicated that he refused to return to his previous position. The Applicant responded by notifying the Third Respondent that he was required to attend a disciplinary hearing on

a charge of refusing to obey a lawful and reasonable instruction to return to his previous position. The disciplinary hearing held on 28th April 1998 was chaired by Mr Rappaport. The Third Respondent was found guilty of the charge. He was issued with a final written warning and instructed again to return to his position as bookkeeper. He refused to comply with this instruction. He was accordingly notified that he was required to attend a further disciplinary hearing on 4 May 1998. That enquiry was chaired by Mr Rappaport.

5[] There is no material dispute over what occurred during the very brief enquiry on 4 May 1999. The Arbitrator recorded in his award that:

> "***The*** [Third Respondent] ***and the managing member*** [Mr Rappaport] ***were in agreement that this is what happened:***
>
> ***- the persons present were Mr Rappaport the managing member, Mr G Berman, executive sales manager, and the*** [Third Respondent] ***himself.***
>
> ***- The managing member asked the*** [Third Respondent] ***only one single question, namely `Are you going***

to return to your position as bookkeeper?'

- ***The*** [Third Respondent] ***replied that he would call him at 2:00.***

- ***After having said that, the*** [Third Respondent] ***got up and walked out of the hearing without any further ado, leaving the managing member and Mr Berman behind.***

- ***Nothing else was said.***

- ***The*** [Third Respondent] ***phoned at 2:00 and told the managing member that he was not coming back.***"

6[] The Arbitrator made the following comments in his award in relation to the issue of procedural fairness:

> "***1. The*** [Third Respondent] ***by his own admission did not challenge the impartiality of the disciplinary hearing on the day that he attended it. He just walked out. In doing so, he could not be advised of his right of appeal against the findings of the hearing. He also, as a result of his own actions, forewent the opportunity to put***

his case, and he did not insist on being furnished with the minutes of the hearing.

2. He was advised timeously enough of the enquiry to prepare himself, and to call a witness or witnesses, which he failed to do.

3. Item 4 of Schedule 8 of the LR Act stipulates that the `employer should conduct an investigation to determine the grounds for dismissal. This does not need to be a formal enquiry.' The size of the company, coupled with the fact that the [Third Respondent] ***was counselled on a number of occasions and the fact that there was an exchange of letters over a period of months between the*** [Third Respondent] ***and the managing member culminating in a final written warning, did nonetheless warrant a more formal enquiry. The employment relationship between the*** [Third Respondent] ***and the company had deteriorated to such an extent that it had become intolerable, and that the impasse had to be broken. The*** [Third Respondent's] ***final act of defiance by walking out of the hearing without any warning or question, and thereafter***

confirming [sic] ***his answer to one question which he was asked, was just the final straw in the total breakdown of the relationship. As an employee, the*** [Third Respondent] ***has to accept the major portion of the blame.***

4. Despite the foregoing, the [Third Respondent's] ***assertion that the hearing was not impartial, carries a great deal of weight. Mr Rappaport, the managing member who was in charge of the final disciplinary enquiry on 4 May 1998, could not possibly have acted sufficiently impartial*** [sic]. ***He was too deeply and too personally involved in the `feud' between the*** [Third Respondent] ***and the company. He had been the subject of personal ridicule and insulting remarks in letters addressed to him by the*** [Third Respondent].

5. Despite the size of the company, and a less formal disciplinary hearing, attempts should have been made to ensure impartiality in the interest of a fair hearing under the chairmanship of a more independent and impartial chairman.

6. ***...***"

7[] The Applicant contends that the Arbitrator's findings on procedural fairness, and his award of compensation, are not justifiable in terms of the test identified by Froneman D J P in **Carephone (Pty) Limited v Marcus N.O and Others (1998) 19 ILJ 1425 (LAC) at 1435 E; [1998] 11 BLLR 1093 (LAC) at 1103 B - C para [37]**. The test was posed in the following 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?***"
>
> There are a number of useful formulations of how this test is to be understood and applied. Thus, Pretorius A J in **Shoprite Checkers (Pty) Limited v CCMA and Others (1998) 19 ILJ 892 (LC) at 900 D - G, paras [28] to [30]**, referred to the requirement that the decision "***must be capable of objective substantiation***". The decision is reviewable "***where***

the conclusions reached ... are not capable of reasonable justification when regard is had to the factual premises on which they are based."

Tip A J in **Director General : Department of Labour v Claassen and Others [1998] 6 BLLR 591 (LC) at 596 F** referred to factors which "***go to the very process of the reasoning and the connection or absence thereof between the premises and the outcome.***"

In **Cash Paymaster Services (Pty) Limited v Mogwe and Others (1999) 20 ILJ 610 (LC) at 616 A** Seady A J referred to the need for the outcome to be "***rationally justifiable***".

Cheadle A J in **Coetzee v Lebea N.O and Another (1999) 20 ILJ 129 (LC) at 133 F - G** stated that "***the best demonstration of applying one's mind is whether the outcome can be sustained by the facts found and the law applied. The emphasis is on the range of reasonable outcomes and not on***

the correct one"

In **Kynoch Feeds (Pty) Limited v CCMA and Others [1998] 4 BLLR 384 (LC) at 393 J to 394 B**, Revelas J stated that "***It has also been held that where a decision-maker takes a decision unsupported by any evidence or by evidence which is insufficient to reasonably justify the decision arrived at, or where the decision-maker ignores uncontradicted evidence which he was obliged to reflect on, the decision arrived at would be set aside.***"

In **Morningside Farm v Van Staden N.O and Another [1998] 5 BLLR 488 (LC) at 490 H** Revelas J set aside a decision of a CCMA arbitrator on the basis that "***there was a glaring inconsistency between the facts found by the first respondent and the final conclusion arrived at by him.***"

Tip A J in **Standard Bank of SA Limited v CCMA and Others [1998] 6 BLLR 622 (LC) at 627 J to 628 A** indicated that relief by way of review would be available

"***where a commissioner sitting as arbitrator has misconstrued oral or documentary evidence, or has ignored or misapplied relevant legal principle, to an extent that is inappropriate or unreasonable, then such commissioner has failed in the task assigned under the Act.***"

8[] The Applicant has raised three grounds on which it contends the Arbitrator's decision should be reviewed and set aside. The first of these was summarised in Mr Hardie's heads of argument as follows:

"***The Second Respondent held that the Third Respondent forewent his right to a disciplinary hearing by walking out of it on 4 May 1999. Once this was found, there could be no procedural unfairness in the form of insufficient impartiality on the part of the chairperson, because no disciplinary hearing took place.***"

9[] During argument, Mr Hardie submitted in essence the following. The right of an employee facing disciplinary charges to have them heard and decided by an impartial chairperson is one of the aspects of the right to a fair procedure. The Arbitrator in the present matter found that the effect of the Third Respondent

walking out of the enquiry was to forego the right to a fair hearing. It was in effect a waiver of the right to a fair opportunity to be heard. Mr Hardie referred in this regard to the article of Edwin Cameron "***The Right to a Hearing Before Dismissal - Problems and Puzzles***" (**1988**) **9 ILJ 147 at 176 to 178** in which it was stated that:

> "***... An employee can by his or her conduct abandon or waive the right to a pre-dismissal hearing. Waiver in law occurs when a person with full knowledge of a legal right abandons it. In the employment context it would be unrealistic to apply the full requisites of the legal doctrine of waiver before an employee's conduct could be said to exempt an employer from the hearing requirement. All that should be required is that the employee should indulge in conduct which establishes that the employer can no longer reasonably or fairly be expected to furnish an opportunity for a pre-dismissal hearing.***"

10[] Mr Hardie submitted that once the Arbitrator found that the employer was not obliged to hold a fair hearing, it was not

justifiably reasonable for the Arbitrator to examine whether the requirements of procedural fairness had been met and in particular to find that the Applicant had acted unfairly by having the enquiry chaired by a person who was not impartial. Mr Hardie submitted further that once the Third Respondent waived the one component of a fair hearing, namely the opportunity to present his case, he waived the other components of fair procedure, which would include the right to have the matter decided by an impartial chairperson.

11[] In my view these submissions are unpersuasive. The premise on which Mr Hardie's argument is based, namely that the Arbitrator found that the Third Respondent "***forewent his right to a*** [fair] ***disciplinary hearing by walking out of it***", is an incorrect characterisation of what was in fact found by the Arbitrator. As appears from his award, he found that by walking out of the enquiry the Third Respondent "***forewent the opportunity to put his case***" [my emphasis]. In other words, the Third Respondent waived the right to be present at the enquiry, to cross-examine the employer's witnesses, and to present his own evidence and argument both in relation to the merits and, if found guilty, the appropriate penalty. The Arbitrator did not go on to find that the waiver of this component of the right to a fair hearing amounted to a waiver of the other components of a fair hearing, which would include the right to have the matter heard and decided by an impartial chairperson. Nor was this in my view a logical consequence of the Arbitrator's finding, as Mr Hardie contended. On the contrary, in my view it cannot be that if an employee decides to

walk out of a disciplinary enquiry, that can give the employer free rein to have the matter decided by a person who may, for example, be biased or ***mala fide***. It is in my opinion clear from the award of the Arbitrator that all he had in mind, when referring to the consequences of the Third Respondent walking out of the enquiry, was the waiver of his right to the opportunity to present his case and not the waiver of his right to have the matter decided by an impartial decision-maker.

12[] Applying the test for review referred to above, it cannot in my view be said that there is no reasonable objective basis to justify the connection made by the Arbitrator between the material properly available to him and the conclusion which he eventually arrived at. The evidence presented before the Arbitrator showed a history of events characterised by serious antagonism between the Third Respondent on the one hand and Mr Rappaport on the other. As sub-mitted by Mr ***van As***, who appeared for the Third Respondent, they were the two protagonists in the saga which had been charac-terised by on-going personal conflict. The Third Respondent had numerous grievances directed specifically at Mr Rappaport. The Third Respondent was accused of failing to comply with Mr Rappaport's various instructions. The Third Respondent had

directed criticism and abuse at Mr Rappaport personally. The charge of which the Third Respondent was found guilty and for which he was dismissed was disobedience of Mr Rappaport's instruction and gross insubordination towards Mr Rappaport. It was Mr Rappaport who had chaired the previous disciplinary enquiry and who had given the final instruction for the Third Respondent to return to his position which he had disobeyed.

13[] In these circumstances there is in my view at least a rational connection between that factual material before the Arbitrator and his conclusion that Mr Rappaport was so personally involved to the extent that he could reasonably be perceived as not being sufficiently impartial to chair the disciplinary enquiry. Accordingly the Applicant's attempt to review the Arbitrator's award on this ground must fail.

14[] This conclusion also disposes of the second argument raised by Mr Hardie, namely that there "***was no evidence, alternatively insufficient evidence before the Second Respondent to justify the conclusion that the Applicant's Mr Rappaport had acted impartially*** [sic] ***at that disciplinary hearing on 4 May 1998; alternatively there was insufficient evidence to make the inference that the Applicant's Mr Rappaport was insufficiently impartial to conduct a fair hearing as chairman on 4 May 1998***". Mr Hardie submitted further that the Arbitrator made a positive finding that he was

actually biased (and not merely that there was a reasonable basis for suspicion of bias) and that there was no evidence to justify this. In my view this seeks to read too much into the award. When properly analysed, it simply seeks to convey that Mr Rappaport was, in view of his personal involvement in the earlier events, clearly inappropriate and not sufficiently detached to chair the enquiry. Mr Rappaport was essentially the main complainant and therefore in effect would have been a judge in his own cause. That is an automatic disqualification:

> See the judgment of Lord Browne-Wilkinson in **R v Evans and Others, ex parte Pinochet Ugarte; R v Bartle and Others, ex parte Pinochet Ugarte (Amnesty International and Others intervening) (No 2) (1999) 6 BHRC 1 (HL)1 at 10 d - 11 d**
>
> For the reasons set out above, I am of the opinion that there was an adequate factual basis to justify the Arbitrator's conclusions in that regard.

15[] The third argument advanced by Mr Hardie was to the effect that there was overwhelming evidence before the Arbitrator

showing that there had been a complete breakdown of the relationship between the parties, that the Third Respondent was to blame for this, that he had throughout been insubordinate to management and particularly to Mr Rappaport and he had not raised any objection to Mr Rappaport on the basis of impartiality prior to the CCMA arbitration proceedings. Mr Hardie submitted further that "***any person sitting in Mr Rappaport's shoes would only have come to the same finding that he did, and therefore that that suspicion is without foundation.***" These submissions are in my view unpersuasive. It is at least questionable whether one can make the assumption that dismissal was inevitable. As has frequently been remarked in our case law, it is dangerous to make such an assumption. See for example **Administrator Transvaal v Zenzile 1991 (1) SA 21 (A) at 37 C - F**. The Applicant's argument seems to amount to a "***no difference***" argument. It ignores the need to recognise that whatever the merits of the charge against an accused employee may be, and however probable or inevitable dismissal may be, it is important that value be attached to the fairness of the process which leads to the result. Even if it transpires that the result does not favour the employee, it must at least be the product of a process which can objectively be regarded as fair. One component of this is that the person who chairs the

disciplinary enquiry must not be a person who has an interest in the outcome or in respect of whom there is reasonable ground for suspicion of partiality or bias. In my view there was at least a rational basis for the Arbitrator in the present case to conclude that it was unfair and inappropriate for the enquiry to have been chaired by Mr Rappaport.

16[] The final argument advanced on behalf of the Applicant was summarised in the following terms in Mr Hardie's heads of argument:

> "***Having found that the Third Respondent's dismissal was unfair for reason of the chairperson's insufficient impartiality, the Second Respondent in making his award, never considered whether he should, in the exercise of his discretion, award no compensation to the Third Respondent.***"

17[] Mr Hardie correctly pointed out that the Arbitrator had such a discretion, either to award compensation on the basis provided for in section 194(1) of the Labour Relations Act, or to award no compensation at all. In this regard he referred to the judgment of Froneman D J P in **Johnson and Johnson (Pty)**

Limited v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC) at 99 I - 100 A, para [40]. Mr Hardie referred to the fact that the award does not make any express reference to such a discretion or to the Arbitrator being aware of it or as to how he exercised it. He submitted further that in view of the factual circumstances of the case, and in particular the serious misconduct of the Third Respondent, had the discretion been exercised judicially, it would have been inevitable that it would have been exercised against awarding any compensation to the Third Respondent. Such an award of compensation would, Mr Hardie argued, unjustifiably "***have been rewarding the Third Respondent for his unreasonable and flagrant defiance of his employer on an on-going basis***"

18[] For the reasons I have given above, this reasoning is in my view not convincing. There was at least a rational basis for the Arbitrator to conclude not only that there was unfairness in the procedure followed, but also that compensation was justified. Such compensation would not, as Mr Hardie contended, reward the Third Respondent for his unacceptable conduct, but would be a ***solatium*** for the loss of his right to fair procedure and a punitive measure to penalise the employer for denying him that right.

Johnson & Johnson (*supra*) at 100 A - B para [41]

19[] At best for the Applicant, the award is silent as to whether or not the Arbitrator was alive to the fact that he had a discretion whether or not to award compensation. It is significant to note that this line of attack, namely that the Arbitrator did not consider or did not properly consider whether to exercise his discretion against awarding compensation, was not raised at all in the Applicant's founding affidavit. Accordingly this attack must likewise fail.

20[] In the result:

(a) The application is dismissed.

(b) The Applicant is ordered to pay the Third Respondent's costs of the application.

PAUL KENNEDY
ACTING JUDGE OF THE
LABOUR COURT
20 AUGUST 1999

Date of hearing : 6th August 1999
Date of judgment: 20th August 1999

Applicant represented by: Attorney S B Hardie
Applicant's Attorneys: Edward Nathan & Friedland Inc, Johannesburg

No appearance for First and Second Respondents
Third Respondent represented by: Advocate M J van As
Third Respondent's attorneys: Sampson Okes Higgins Inc, Johannesburg.