IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: P316/00

In the matter between:

Applicant

and

First Respondent

Second Respondent

Third Respondent

JUDGMENT

FRANCIS AJ

Introduction

1.The applicant is East London Joinery Works, a company duly incorporated with limited liability in terms of the Company Laws of the Republic of South Africa.

2.The first respondent is F T Knox NO, who is cited in his capacity as arbitrator of the Building Industry Bargaining Council. The second respondent is the Bargaining Council (the Council). The third respondent is Alfred Cummings, an adult male and former employee of the applicant.

3.This matter relates to the third respondent's dismissal by the applicant on 22 November 1999 which the third respondent alleges was unfair.

4.The third respondent referred the said dispute to the Council on 10 December 1999. The parties failed to settle the

dispute at conciliation, and the third respondent referred the dispute to arbitration. The first respondent made a finding in favour of the third respondent.

5.The applicant has now brought a review application in terms of section 158(1)(g) of the Labour Relations Act, 66 of 1995 (the Act) to set aside the aforesaid award that was issued by the first respondent in favour of the third respondent on 22 March 2000.

Material facts

6.From the facts, evidence, submissions and documents that were presented at the arbitration proceedings, it appears that the third respondent was employed by the applicant as a general worker during June 1996. In terms of the company rule in place at the applicant, employees could only remove wood cut-offs or other waste products from the company with the express permission from the applicant's management. This rule was well known in the company, and was a reasonable and justifiable rule pertaining to the applicant's business and operations. This rule was also contained in the applicant's staff procedures.

7.On 18 November 1999, the third respondent, together with another employee, a Mr L Present, attempted to leave the company premises at the main gate, each with a bundle of wood cut-offs. Neither of the two employees had permission to remove the said wood from the premises. At the main gate, the third respondent and Present were confronted by Sidwell Makuala (Makuala), a security guard who was on duty. Makuala asked the applicant and Present whether they had authority to remove the wood. After they had both replied that they did not have any authority, Makuala instructed them to return and obtain the necessary authority before removing the wood from the company premises.

8.The third respondent did however not go to any of his superiors to obtain the said permission. Present decided to

leave his bundle. The third respondent, however, without the prerequisite permission simply forced his way past Makuala. This, the third respondent did in the face of a second challenge by Makuala. Makuala immediately reported the matter to a senior manager of the applicant, a Mr P Hugo.

9.The third respondent was than called to a disciplinary hearing which was held on 22 November 1999, concerning the above incident. The third respondent, at the start of the hearing, pleaded guilty to all the charges against him, except for the charge of removing company property without permission. Following the disciplinary hearing, the third respondent was found guilty of removing company property without permission and was dismissed. His appeal was unsuccessful.

10.Evidence was led that the staff policy of the applicant clearly sets out the requirements with regard to the removal of company property from the premises, and which classified it as misconduct of dishonesty. The third respondent also acknowledged in his contract of employment that he could be summarily dismissed in the event of dishonesty.

11.The first respondent found that the third respondent had been unfairly dismissed and ordered that he be re-employed.

12.The applicant initially relied on ten grounds of review which were reduced to two at the hearing of this matter. It contended that the first respondent:

12.1 Reached a conclusion which was not supported by the facts presented and more specifically by the facts he found to be present, and thus acted in an irregular manner;

12.2 Interfered with a sanction imposed by the applicant, in the absence of any factors which called for his interference and in so doing exceeded his powers and acted in an irregular manner.

Submissions

13. The applicant submitted that in finding that the third respondent's dismissal was substantively unfair, and in ordering re-employment, the first respondent totally disregarded the company staff code and the contents of the third respondent's own contract of employment. The applicant therefore had a proper and fair substantive reason to dismiss the third respondent. The dismissal was clearly arrived at pursuant to a fair procedure. It was submitted that it was also clear from the evidence presented that the employment relationship between the applicant and the third respondent had been irretrievably destroyed. The arbitration award was wrong in fact and in law, and irregularly arrived at, and could not be justifiable, on an objective basis either in fact or in law, or having regard to the evidence properly before the first respondent. It was further submitted that when the first respondent found that the applicant 'had not always been consistent' in the application of the rule that permission was required before wood could be removed by the employees from the company premises, that this finding was irrational, unreasonable and completely unjustifiable in relation to the evidence properly before the first respondent, and was contrary and irreconcilable with the first respondent's own findings on the evidence presented. It was argued that the applicant had always been consistent in the application of its policy that permission was first required before wood could be removed from the premises by an employee. There were no deviations from the rule, on the evidence before the respondent, which was also confirmed by the third respondent's own witnesses.

14. The third respondent opposed the application on the basis that there was no grounds for the relief that the applicant was seeking. Further that there was laxity on the part of the applicant in enforcing the rule and verbal authority had been requested by the applicant. The first respondent had conducted an *inspection in loco* and found that even though the rule was that permission had to be sought first before the wood could be removed, there had always been laxity on the part of the applicant in terms of enforcing this rule. It was contended that the first

respondent had applied his mind to the sanction. The first respondent did not act irrational, unreasonable or unjustifiably. The third respondent had admitted the misconduct but challenged the sanction of dismissal as not appropriate. It was argued that in terms of the principles of fairness, the first respondent reasonably concluded that the sanction imposed by the applicant was too harsh in the circumstances.

Analysis of the facts and arguments raised

15. As indicated earlier, the applicant had initially relied on several grounds of review in its application. These were reduced to the two grounds that are referred to in paragraph 11 above.

16. The first respondent found that:

"A fair procedure was held, but that the sanction of dismissal was too harsh in the circumstances ..... and that although a rule had been broken, the employee had not been devious and nor had the intention to be dishonest in his actions. He had, however been rather arrogant in not heeding the challenge from the security guard."

17. The applicant's witness testified that when he confronted the third respondent about the planks that he was removing from the premises, the third respondent pushed him out of the way. This evidence was not rejected or found to be not credible and should have been accepted. This evidence was further supported by the evidence led by Zandisile Mkukane, a shop steward employed by the applicant, testifying on behalf of the third respondent who said that:

"The third respondent at the hearing ..... did admit to having forced his way past the watchman."

The conclusion which must be drawn is that the first respondent saw this assault by the third respondent on the witness to constitute mere arrogant behaviour.

18. There is no basis in law or fact for such an inference and that the only conclusion to be made from such conduct is

that the third respondent was not prepared to be stopped from removing the planks from the premises of the applicant.

19.The first respondent further recorded the following mitigating factors:

"Attempt to obtain permission, length of service, prior disciplinary record, inconsistency of employer application of policy/procedure."

The third respondent in this regard had testified that:

"Voor dit het ek vir Louis gevra kan ek kry daardie, kan ek vat van daardie 'scrap'.... Hy het my net gekyk en ek het dit toe maar so gevat hy se ja ek kan maar vat....."

and

"He went back to Louis the foreman who was here earlier on and he said Louis was busy so then he went back and took the planks and he walked out with the planks."

20.The evidence of Louis Badenhorst was regurgitated by the first respondent as follows:

"Basically what he had told us is that no-one came to ask him for permission and he does not have the necessary authority to give permission."

And under cross examination the following answer was elicited from Badenhorst:

he said to me that he would like to take a couple of ..... timber home and I told him basically the process of make yourself a bundle, take it to management and management ..... So definitely that day on the 18th he never came to you? ..... He never came to me."

21.It is clear that in order to make a finding that the third respondent attempted to procure permission, the version of Badenhorst had to be rejected. The version was however not expressly rejected and no reason was provided for rejecting it. Mkukane further confirmed that he had requested permission from the managing director prior to

taking the planks. He thus confirmed the evidence of Badenhorst that permission needed to have been procured from management.

22.The first respondent disregarded the evidence of Badenhorst as well as the circumstantial evidence led, in order to make a finding in mitigation in favour of the third respondent without any basis for doing so and thus reached a conclusion which was not supported by the facts led.

23.There was no evidence of any inconsistency on the part of the applicant in the application of the rule. Here again Mkukane led crucial evidence. He testified that he was dismissed for not having proper authorization. On appeal it was found that he did in fact have the required permission, and the sanction was overturned, Mkukane related a further incident where an employee of the applicant removed wood but also had permission to do so.

24.Again the first respondent made an inference in relation to mitigation which was not supported by the facts. The third respondent therefore acted in an irregular manner in taking into account mitigating factors which did not exist. He failed to take into account the serious nature of the assault on the security guard.

25.The first respondent could not interfere with the decision made by the chairperson of the hearing, save where no reasonable employer would have come to the same conclusion or if it did not induce a sense of shock to the first respondent.

26.In *County Fair Foods(Pty)Ltd v CCMA and others* [1999]11 BLLR 1117(LAC) per Kroon JA at 1121 D-F:

"*It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which the non-compliance with the standard will be visited. Interference therewith is only justified in the case on unreasonableness and*

unfairness."

Per Ngcobo AJP:

"*In particular, commissioners must exercise greater caution when they consider the fairness of a sanction imposed by an employer. They should not interfere with the sanction merely because they do not like it...Where an employer, upon investigation, has acted fairly imposing the sanction, the commissioner should not disturb it . The mere fact that the commissioner may have imposed a somewhat different or a somewhat more (presumably less) severe sanction that the employer would have, is no justification for interference by the commissioner. The minds of equally reasonable people differ.*"

27.The first respondent at no stage indicated that the rule was unreasonable, nor that the sanction provided for in terms of the disciplinary code was unreasonable nor that the sanction imposed was unreasonable. It is clear that the sanction imposed by the first respondent was his preference rather than an interference with the sanction on the basis that the sanction imposed was unreasonable.

28.The first respondent interfered with the sanction imposed in the absence of any unreasonableness being showed on the side of the applicant and despite a clear breach of the rule by the third respondent. There consequently existed no basis in the facts found by the first respondent to justify interference with the sanction imposed by the applicant . The first respondent acted in an irregular manner in doing so. He clearly misconceived his powers and in doing so exceeded them.

29.In the circumstances I make the following order:

(a) The arbitration award made by the first respondent is reviewed and set aside.

(b) The arbitration award is substituted with the following:

"The dismissal of the third respondent was substantively and procedurally fair."

(c) There is no order as to costs.

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FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: 20 OCTOBER 2000

: 8 DECEMBER 2000

: ADVOCATE A J NEL
INSTRUCTED BY SNYMAN VAN DER HEEVER HEYNS

FOR THIRD RESPONDENT : V GINGER - UNION OFFICIAL