IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

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| CASE NO: | C705/99 |
| DATE: | 19-5-2000 |

In the matter between:

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| COUNTRY FAIR FOODS | Applicant |
| and | |
| INDEPENDENT SERVICE AGRICULTURE FOOD WORKERS UNION | First Respondent |
| NICHOLAS KARELSE | Second Respondent |
| COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION | Third Respondent |

**JUDGMENT**

REVELAS, J:

1. This is a review application brought in terms of section 145 of the Labour Relations Act No. 66 of 1995 ("the Act").

. The applicant seeks to set aside an award made by the third respondent ("the Arbitrator") in favour of the second respondent. The applicant had dismissed the second respondent for, inter alia, and what could be best described as insubordination. The application for review is unopposed. The Arbitrator found that the dismissal of the second respondent by the applicant was unfair and awarded the second respondent compensation in the amount of R33 600.

3. The events which gave rise to the second respondent's dismissal are as follows. During March 1999, Mr Vauqulin, the applicant's former operations manager, visited one of the applicant's sites in Malmesbury. He wished to discuss certain problems surrounding the perpetual late-coming of two particular employees. There were also other employees present, including the second respondent, who was a supervisor. These employees were in the changeroom and were showering. Mr Vauqulin hurried them along and the first respondent attended the meeting with a towel wrapped around him for there was no time for him to get dressed. A suggestion was made by one of the employees that, as other employees were transported to work daily, this could prove to be a solution and a discussion ensued. According to applicant's founding papers the third respondent kept interrupting saying that he also wanted to be transported. It was common knowledge that the second respondent was transported normally by Mr Du Plessis, his immediate superior, with whom he had what is described in the founding papers as "a stormy relationship".

4. Mr Vauqulin told the second respondent not to interrupt. Thereupon the second respondent became aggressive and persisted in his view that he should be given an opportunity to speak to Vauqulin about his problems with Mr Du Plessis. Mr Vauqulin indicated that he had not finished speaking to the other employees and became aggressive. He made it clear that the grievance was more of a personal nature and that he would discuss it with the second respondent at some other time. This response angered the second respondent and he accused Vauqulin of

not wanting to listen. Heated words were exchanged between the second respondent and Vauqulin. The second respondent said to Vauqulin "jy kan ook maar gaan!" at some stage and simultaneously, he waved his hand towards Mr Vauqulin in a dismissive fashion. Vauqulin left the changeroom in an attempt to cool off, as I understand it, and almost immediately returned and told the second respondent that he had more respect for the other employees present than he had for the second respondent. Mr Vauqulin then advised the second respondent that he was suspended pending a disciplinary enquiry.

5. The second respondent was charged, inter alia, with “provocation, rudeness, aggression, insubordination, attempting to incite others, attempting to undermine the authority of a senior manager, refusal to follow the grievance procedure, breach of trust and good faith relationship, conflict of interest and failure to conserve the best interest of the company.” I may pause to remark here that it is of note that the applicant had cast an extremely wide net to secure a finding against the second respondent. A disciplinary enquiry was convened on 31 March 1999 and the second respondent was found guilty of eight of the nine charges and was dismissed.

6. The second respondent also alleged that he had a poor relationship with Mr Vauqulin. Their troubles had commenced in 1998 when the second respondent had reported the applicant to the Department of Labour for not paying overtime. They quarrelled often. It was in response to Vauqulin's comment that he had no respect for the second respondent, that the second respondent became angry and told Vauqulin to leave the

changeroom.

7. On the applicant's version, the second respondent was extremely aggressive. He spoke in a raised voice and addressed Mr Vauqulin in a disrespectful manner. He also made certain allegations regarding Vauqulin and hismanagement style in the presence of the other employees.There was also evidence led before the Arbitrator that on a previous occasion following an enquiry regarding some dispute between the second respondent and Mr Du Plessis, it was recommended by Mr Olivier who presided over that enquiry, that Mr Du Plessis required guidance. According to the second respondent nothing had been done about this. He had also received a written warning. Six months thereafter Mr Du Plessis issued a final warning against the second respondent for breach of bio-security rules. Four months after this occasion, another final warning was issued against the second respondent for the same category of offence. That warning was issued two days prior to the incident with Mr Vauqulin which forms the subject matter of this review.

8. The Arbitrator made certain findings that need to be quoted verbatim from her award:

"He (second respondent, according to the applicant) acted in an aggressive manner instead of listening. From this I draw the inference that he did not care for Karelse (the second respondent) and was not inclined to help him with his grievance as all the witnesses remember Vauqulin telling Karelse that he had more respect for Karelse's subordinates than for himself I deduce that Vauqulin repeated this more

than once and this angered Karelse who believed that he was in genuine need of assistance. He had not been listened to. He had been belittled and his authority undermined in front of subordinates. Vauqulin had become so angry and aggressive towards Karelse that Karelse described Vauqulin as

on the verge of saying the 'bad word'. Karelse

with a naked torso and a towel wrapped round his waist was in a vulnerable position; hardly in a position to stand up to Vauqulin and wave him away. I determine that Karelse had been provoked by Vauqulin who had been aggressive, insulting and rude. Karelse's reaction was a corresponding aggression but he knew that he was in a subordinate position and would not be able to walk away from the situation. I deduce that Karelse at that moment lost respect for Vauqulin and said 'you can go too'. This phrase in itself showed restraint. In the circumstances it could have been much worse."

9. The applicant's main ground of review is that the award of the Arbitrator is vitiated by a defect referred to in section 145(2)(a)(ii) of the Act, namely that the respondent "committed a gross irregularity" in the conduct of the arbitration proceedings. As shown before, and I would refer to another example hereafter, the Arbitrator's award is based on several inferences which she "deduced". In my view, she drew inferences on facts that were not before her. She inferred that Vauqulin repeated more than once, that he had more respect for the second respondent's subordinates than for the second respondent. That was simply not the evidence. She found that when Mr Vauqulin raised the question of transportation with his co-workers in the change room, the second

respondent "Saw relief from the strain of having to rely on Mr Du Plessis who gave him a lift every morning to and from work." This was not the evidence but an inference drawn by the Arbitrator and there was clearly not sufficient evidence before her to draw such an inference.

10. The second respondent's case was never that he was vulnerable because he only stood with a towel wrapped round his waist. This is an assumption the Arbitrator made on the basis of her own perceptions of what had happened. In any view it is hardly likely that amongst men who daily shower in the same change house for bio-security reasons, a naked torso would be a matter of “vulnerability”. On the evidence, which appears to be common cause, the second respondent was anything but vulnerable and stood up in no uncertain terms to Mr Vauqulin, unlike the Arbitrator found him unable to do. The Arbitrator also found that Mr Vauqulin was "aggressive, insulting and rude". The second respondent hardly behaved much better. The two men had, had after all, a heated argument.

11. The second respondent also drew other inferences which stand to be criticised but, notwithstanding the inferences she drew, I do not believe that her finding that the dismissal was unfair is incorrect. On the facts, both parties were at fault and misconduct emanating from the argument that occurred, in my view, does not warrant dismissal. Whether another arbiter of fact, or judge would agree or disagree with the arbitrator is not the test (see Carephone (Pty) Ltd v Marcus N.O. 1998(19) ILJ 145 IC).

12. However, the arbitrator in my view, exceeded her powers when she

compensated the second respondent instead of reinstating him. In terms of the Act, once a finding has been made that a dismissal was substantively

unfair, the arbitrator or judge is obliged to reinstate,

unless there are grounds to award only compensation. In this matter the arbitrator found that reinstatement would be impractical and therefore compensated the second respondent. In her award she states:

**"The employee has requested reinstatement. As the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, I am declining this request but award compensation."**

According to the record the arbitrator heard no argument on this question. The line of reasoning she followed in arriving at this conclusion is as flawed as her treatment of the evidence on the merits.

13. In these circumstances, the Arbitrator's award stands to be set aside. This is not a matter where the Court should substitute its own findings for that of the Arbitrator. In view of the nature of the reasoning of the Arbitrator as demonstrated above, if the matter is referred back to the Commission for Conciliation, Mediation and Arbitration to be heard by another Arbitrator to apply his or her mind afresh, a different result may follow, even if its only with regard to an appropriate remedy in terms of the Act.

15. In the premises I make the following order:

1. The award of the third respondent is set aside.

2. The matter is remitted to the CCMA for hearing before another Arbitrator other than the third respondent.

3. There is no order as to costs.

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REVELAS, J