IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J4380/01

In the matter between:

Applicant

and

ROYALYARD HOLDINGS 11

1st Respondent

2nd Respondent

REASONS FOR JUDGMENT GRANTED ON 8 OCTOBER 2001

REVELAS J:

1.The second respondent was appointed by the first respondent to chair a disciplinary hearing into a number of charges (some relating to fraud), against the applicant, who is the managing director of the respondent, as well as two other companies.

2.A notice to attend a disciplinary hearing scheduled for 11h30 on 20 September 2001 was served on the applicant. In this letter, dated 21 September 2001, the applicant was advised of the venue of the hearing and the identity of the chairperson of the hearing. It was first given as Mr. G Doubell, but later the second respondent was appointed. In this letter the applicant was further advised that he may be " **assisted at the hearing by a fellow employee of Royalyard or any of its subsidiaries. No outside representation or representation by a lawyer or Labour Consultant will be permitted"**

3.It is common course between the parties that there is no disciplinary code applicable in which provision is made for representation of employees at disciplinary enquiries.

4.A written request addressed to the first respondent's attorneys of record to permit legal representation was declined by the respondent through its attorneys of record in a letter.

5.At the commencement of the disciplinary hearing, Mr. Peter Dawe, who represented the respondent, objected to the presence of the applicant's attorney who accompanied him to the hearing. He stated that this was a

internal disciplinary hearing and legal representation was not permitted. The second respondent advised Mr. Dawe that if the first respondent did not wish him to consider the issue of legal representation, then Mr. Dawe should advise him as his brief was to chair a disciplinary hearing concerning the charges set out in the charge sheet. However, if the first respondent permitted the second respondent to consider the issue of legal representation, then he will do so and make a decision.

6.After the applicant's attorneys had addressed the second respondent on the issue of why he should be allowed legal representation, and the first respondent's representative replied to the contrary, the second respondent again raised the issue of whether or not the first respondent was prepared to confer him with a discretion to consider legal representation and whether that was not part of his mandate. If he had no mandate then he advised that he had could not entertain the issue and could be forced to disallow legal representation. After a brief adjournment and advice by Mr. Dawe that the second respondent was not permitted to consider the issue of legal representation, the second respondent ruled that he did not have the necessary discretion to consider the issue of legal representation.

7.On 5 October 2001 the applicant brought an urgent application to this Court seeking interim relief in the following terms:

he second respondent (or anyone else in his stead) to exercise his

discretion on whether to allow the applicant legal representation at the disciplinary hearing scheduled for 8 October 2001 or on any other date that it may be held; alternatively,

2.Directing that the applicant be allowed legal representation at the disciplinary hearing to be held on 8 October 2001 or any other date that it may be held."

8.I made it quite clear from the onset that I was not inclined to grant the second part of the relief sought and only considered the first part thereof. I also granted an order, after hearing argument, in those terms. The reasons for my order are set out hereunder and are given in response to a written request by the applicant to provide reasons for my order which was granted on an urgent basis. Due to time constraints and other work related commitments, such as writing many more judgments, I intend only to give brief reasons which, in the event of an application for leave to appeal, will be added to.

9.When an employee accepts an offer of employment, any disciplinary code brought to his or her attention becomes part of the terms and conditions of the employment contract between the employer and the employee. If such a code precludes legal representation during disciplinary inquiries, the chair persons chairing any disciplinary inquiry, involving the parties to the contract, would be bound thereby. *In casu,* there was no

disciplinary code applicable.

10.The notice of the disciplinary inquiry informed the applicant that legal representation was not permitted. The notice in question, unlike a disciplinary code, does not constitute terms and conditions of employment. The notice was a unilateral decision introduced by the first respondent.

11.In my view, a decision in a written notice of this nature should not entitle an employer to strip the chairperson of the disciplinary inquiry from exercising an inherent discretion, to hear an application by an employee to be legally represented.

12.I wish to make one thing quite plain. I accept that there is no inherent right to legal representation at a disciplinary hearing. The absence of a disciplinary code precluding legal representation also does not bolster any expectation in that regard. However, in the absence of a code or agreement regulating representation during inquiries, it would be unfair if the chairperson were to be disallowed by the employer party, who appointed him or her to chair the proceedings, from exercising a discretion to consider such an application. In my view, that would be contrary to the *audi alteram parte*m principle, because what the employer is saying to the employee in this instance is: "you may not be heard" and to the chairperson: "you may not hear him on this particular issue".

13.Mr. Dawe, a man who had substantial legal expertise according to the papers, unreasonably and unfairly restricted the second respondent from exercising any discretion. In effect, he instructed the second respondent, (whom the first respondent had appointed to chair the disciplinary inquiry), not to consider the application for legal representation.

14.The second respondent, clearly has an inherent discretion to entertain such an application, even if he, for other considerations, would not grant such an application. To fetter him to the extent of instructing him not to hear it, was unfair and prejudicial to the disciplinary inquiry as a process. In the circumstances, I gave the order to the effect that the second respondent be permitted to exercise his discretion.

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E. Revelas

Adv. P A Buirsky

Instructed by Sampson Okes Higgens Inc.

Mr. R Bahna

Instructed by Knowles Husain Inc. Attorneys