Sneller Verbatim/mc

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR946/01

2001-10-22

In the matter between

Applicant

and

1st Respondent

2nd Respondent

J U D G M E N T

LANDMAN J: S¸d Chemie (Pty) Limited, dismissed its HR manager Mr Quitshana in April 2000 after a disciplinary tribunal found him guilty of insubordination. An internal appeal was unsuccessful. The parties thereafter agreed to refer the dispute to private arbitration in terms of the Arbitration Act 42 of 1965.

Mr W T Mothuloe was appointed the arbitrator. The arbitrator delivered a lengthy award and found that the dismissal of the employee was procedurally unfair and that this was the end of the inquiry. He therefore found it unnecessary

to find whether the dismissal was substantively unfair. He awarded the employee compensation in the amount equivalent to 10 times his monthly salary.

S¸d Chemie has launched an application in terms of section 33 of the Arbitration Act to set aside the award. Although the commissioner did not make a finding on the substantive fairness of dismissal, he was clearly of the opinion that the offence of insubordination had been committed and that it was a serious infraction. He also thought, although it was not necessary for him to decide this, that the sanction was too severe.

The arbitration award sets out the employee's complaint about the procedural unfairness of his dismissal.

The notice of appeal to the internal appeal tribunal sets out in some detail the complaints of the employee relating to the hearing before the disciplinary tribunal. The employee based his appeal on the following:

"I respectfully submit that the hearing was procedurally unfair in that the party prosecuting the case, Mr L C Dalton, was also the only witness against me.

The chairperson erred in dismissing me on the evidence which was lodged on hearsay presented by Mr Dalton with no attempt to call the witnesses involved, to enable me to cross-examine them.

I further respectfully submit that the chairman in the way in which he conducted this matter from the outset, clearly indicated that he was biased in favour of the company and that the outcome of the hearing was a foregone conclusion."

The employee was also dissatisfied with the fairness of the appeal hearing. He set this out in a document entitled "Reply to written summary by chairman of appeal hearing". He said:

"It is not, with respect, the chairman of the appeal hearing's duty to correct the deficiencies in leading further evidence to clarify issues which should have been

addressed at the disciplinary hearing.

I respectfully submit that to do so would be a gross irregularity and would confirm my suspicions that my dismissal is a foregone conclusion and that this appeal is merely designed to give the impression that my dismissal was procedurally substantive and fair."

and:

"I note with interest that the chairman of the appeal hearing has failed to address any of the points raised in my notice of appeal under the question of substantive fairness and, insofar as an offence may have been committed, the fairness of the sanction imposed. Instead the chairman of the appeal hearing has now raised an alleged previous written warning which does not exist and in respect of which no evidence whatsoever was led in the disciplinary hearing. The written warning to which reference is made is no more than an office memo which was never intended to be a written warning as alleged."

The arbitrator deals with the question of the procedural unfairness of the dismissal and he says in his award that Mr Dalton, the principal witness, engaged the assistance of Mr Louis Clarke, to preside over the disciplinary hearing. Two charges were preferred against the employee. Both of them were about the same facts. He notes that Mr Dalton said that he had made out a charge-sheet. But the arbitrator says that the disciplinary chairperson, Mr Clarke, testified that Mr Dalton came to see him, or called him to his office, discussed the matter and that he, Mr Clarke, assisted Mr Dalton to formulate the charges as well as to arrange administrative matters relating to the disciplinary hearing.

The arbitrator also notes that the chairperson of the hearing, dismissed the objection of the employee who was complaining about the duplication of charges, but thereafter Mr Dalton relented and abandoned to one charge. The arbitrator

then notes the complaint which is set out in the employee's documents, that Mr Dalton was the prosecutor and a single witness.

The award traverses, in more detail, the question of the charge-sheet. When the arbitrator was investigating and evaluating the evidence of Mr Dalton and Mr Clark, he set out certain admissions which merely reinforce what I have said above.

Then the arbitrator finds:

"Dalton himself now says that when the applicant breached the instruction that he had specially given to him, the trust relationship broke. Consequently I asked myself this question: Was the applicant brought to the disciplinary hearing and charged with this one charge of insubordination merely to create the window dressing to convict him of that charge and the rest that proceeded the hearing."

The arbitrator sets out certain practice which caused him to hold this opinion and continues:

"Admittedly there is no evidence placed before me to answer this question unequivocally in the positive. However, there are suggestions in the evidence before me that the question is pregnant with substance. For example the poor relations between the threesome and the foregoing factors in themselves."

The arbitrator considered and rejected the employee's complaint that because Mr Dalton was the sole witness, prosecutor and representative of the company, that this gave rise to an unfair hearing. He did this although he was not entirely comfortable with S¸d Chemie's failure to have arranged for a modest, yet acceptable disciplinary procedure, presumably to be conducted by an outside person. The arbitrator noted that the employee's attorney had not taken the point that cross-examination was not allowed but the arbitrator found that this

contributed to an unfair hearing.

The arbitrator also found the hearing to have been irregular because the chairperson guided Mr Dalton in the formulation of the charges and with the administrative details pertaining to the disciplinary inquiry. This led the arbitrator to find that the dismissal had been procedurally unfair. The arbitrator adopted the sanction for procedural unfairness as contemplated in the Labour Relations Act 66 of 1995 and awarded the employee compensation.

The parties chose the arbitrator and there is nothing irregular in regard to his finding that the disciplinary hearing was unfair, even though he appears to have been satisfied that the misconduct had been committed. That of course does not preclude him from finding that the hearing was procedurally unfair.

On the face of it there are no grounds to interfere with this finding. However, S¸d Chemie alleges that the arbitrator committed misconduct in the arbitration proceedings as he was biased against the company.

It is correct that the arbitrator descended into the arena. He also took at least one point which the employee had not taken with regard to the procedural fairness of the dismissal. He expressed himself clearly that in his view the dismissal was part of a fixed resolve of the company to rid itself of the employee; and, to some extent it, may be inferred that he regarded the disciplinary hearing to have been something of a sham. S¸d Chemie says that the arbitrator had decided in advance that the employer had not been accorded the respect which an employer of his seniority deserved. This was a relative consideration. Whether the arbitrator made too much of it is not a matter for this court to decide. The arbitrator was following a line of inquiry as the evidence unfolded. It was relevant to his final decision and was not improper for him to follow this line.

The arbitrator's description of Ms Cadwell as "impressionable and feebleminded" may have been harsh. Not having heard the evidence I am not able to say that it was actuated by ill motives. Certainly the relationship of godfather, goddaughter between Mr Dalton and Ms Cadwell aroused some suspicion in the mind of the arbitrator. Once again I cannot say that it was improper or irregular for him to have borne it in mind. It was important for the arbitrator to examine the reasons for the dismissal, including the motivation of the company.

It does seem that the arbitrator was sharp-tongued coming towards Ms Cadwell and Mr Dalton. In Mr Dalton's case it may have something to do with the tone of his voice when he answered questions put to him by the arbitrator. There is a hint that this may be so on the record.

Once again I did not hear the evidence and I cannot say that there was anything improper. I do not wish to be understood to say that I am in agreement with the arbitrator in the way he reasoned and expressed himself in his award. In certain circumstances this may be an indication of bias but on reading the award and the record I do not get this impression.

S¸d Chemie's attorney who represented it at the arbitration proceedings did not object to the arbitrator's conduct in any way. The arbitrator's award, his reasoning and his remarks in the award is the main complaint company's allegation of bias. I am unable to come to the conclusion that the arbitrator was biased.

S¸d Chemie also relies on two other grounds to attack the award, but they do not go to procedural unfairness and therefore it is unnecessary to go into them.

The result is that the finding of procedural unfairness and that the award of compensation is such that it cannot be disturbed.

In the premises therefore, the application cannot succeed and it is dismissed.

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A A Landman

Judge of the Labour Court of South Africa

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