Sneller Verbatim/mc

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J2519/00

2001-05-22

In the matter between

SENTRY SECURITY Applicant

and

1ST Respondent

2ND Respondent

3RD Respondent

J U D G M E N T

Delivered on 2 July 2001

REVELAS J:

1. This is an application to review and set aside an award made by the first respondent in favour of the third respondent dated 28 April 2000. The application is brought in terms of section 145 of the Labour Relations Act 66 of 1995, as amended, ("the Act").

2.

3. The third respondent was employed by "Armed Response" since January 1994, as a credit controller. He had been a polio sufferer since childhood. Consequently he became semi-paralysed in his left leg. He also, apparently, suffers from a poor sense of balance.

4. In June 1998 Armed Response was taken over by the applicant in this matter, ("Sentry Security") and the third respondent's employment contract was

transferred to the applicant.

5.On 26 February 1998 the respondent's legal representative wrote to the applicant and raised a number of concerns regarding certain changes in the third respondent's employment conditions as a result of the take-over, including the fact that it had come to the third respondent's attention that there was an intention to move the credit control department, where the respondent was working, to a new office located upstairs. It was stressed that the third respondent was not able, to descend and ascend stairs on a continuous and regular basis.

6.On 6 March the applicant informed the third respondent that no decision had been taken regarding any relocation. The applicant also indicated that the third respondent would not be required to climb stairs on a regular and continuous basis.

7.A further letter was written on 11 March 1998, on behalf of the third respondent. It was once again emphasised that the third respondent was experiencing difficulty in negotiating the stairs in an office environment.

8.In August of the same year the applicant had relocated to new work premises where the credit control department was located on the first floor.

9.The third respondent handed the applicant a medical certificate to the respondent at the time when the relocation took place. The certificate states as follows:

health if he was forced

to work on the second/third floor of a building which does not have a lift. I recommend that you give him an office on the ground floor."

10.On 28 August 1998 when the relocation took place the respondent's credit control manager wrote to the third respondent's representative as follows:

"**1. The company takes note of the recommendation contained in the medical report on your client's physical circumstances.**

2.Accordingly the company will make available a desk and a computer on the ground floor of the company offices. Your client will therefore –

(a)be able to continue to be employed as a credit controller; and

(b)not be required or requested to take any stairs at any time during the working day;

(c)to further accommodate and safeguard your client's disability and vulnerability in positively unfriendly working environment your client will no longer be required nor requested to drive anywhere on behalf of the company."

2.The applicant in September raised certain grievances. He alleged that his location on the ground floor was negatively affecting his ability to earn commission and that the current situation was affecting his efficiency. He also expressed fear that his prospects for promotion would be adversely affected by the circumstances as he found it difficult to manage people. He complained furthermore that the office was too small.

3.On 26 October 1998, the third respondent requested in writing to be permitted to move to the credit control office on the first floor.

4.After the move to the first floor of the applicant's building, the third respondent occupied a work station in the credit department for a period of two months without as much as a suggestion that he was uncomfortable.

5.This was after he had been moved to a downstairs office where the applicant had accommodated him. He stated that his current situation was not working and he would be more productive with his colleagues. He then joined them, but in December 1998, he handed in his letter of resignation and terminated his employment with the applicant with effect

from 31 January 1999, after working one month's notice.

6. In an analysis of the evidence, the second respondent ("the arbitrator") concluded that the third respondent was constructively dismissed as the applicant made it intolerable for him to continue with a working relationship. He was awarded compensation in the amount of R34 000 being equivalent to five months' salary, at the rate of remuneration he was receiving at the time of his resignation.

7. The arbitrator accepted that the test for constructive dismissal is an objective one with reference to the matter of *Smith-Kline Beecham (Pty) Ltd vs CCMA and Others* (C) 70/1999. She stated that the crisp questions to be asked are:

"Did the company do all that could be expected of a reasonable employer to accommodate Pagel's (the third respondent's) disability?"

"Was the alternative offer of accommodating Pagel on the ground floor a solution which made it possible for him to continue fulfilling unhindered in time and function for which he was employed?"

She held that:

"The question however remains without Pagel's active participation in the problem solving process, can it be said that the solution arrived at was the only alternative and that all other possible avenues had been exhausted?."

She also concluded:

"I do not believe in the final analysis that Sentry intended to create an intolerable work environment for Pagel. Intention on the part of the employer is not necessary in order to establish a constructive dismissal."

8. Much of the arbitrator's reasoning concerned whether there was a proper consultation process regarding the third respondent's use of stairs. She found that there was no proper consultation with the third respondent. Patently there was. His attorneys were in correspondence

with the applicant's attorneys on the issue. He raised grievances. The fact that they were not all immediately adhered, to does not mean that they were not dealt with or not considered. The very fact that the third respondent was especially moved to a downstairs office is indicative thereof that the applicant considered the third respondent's grievances. It was no easy task to accommodate the third respondent.

9. It was common cause before the arbitrator that the third respondent lived in a block of flats where he was required to negotiate a flight of stairs daily. The applicant found a runner (an assistant) for the third respondent to carry messages and make deliveries for him.

10. It is also a significant that the third respondent actually wanted to be retrenched and that his attorneys had attempted to negotiate with the applicant in this regard. The third respondent’s position was not redundant and the applicant needed and wanted the services of the third respondent and they had made their opinion of him known. There was no reason why he should have been retrenched.

11. It is also true that on 20 March 1998 the third respondent wrote to his representative wherein he stated that:

"The above matter has been resolved to my satisfaction and my concerns are now being addressed. Please would you stop any further action immediately."

12. The aforesaid actions do not reflect the attitude of an employer who did not wish to want to accommodate its employees. Particularly, in circumstances where the employee's permission is not required to relocate, it can hardly be said that there was no consultation.

13. In a letter dated 14 September 1998 the third respondent states:

"**Although I appreciate every effort that is being made to accommodate me, I am concerned that the current situation is affecting my ability to earn commission**."

14.There was no evidence before the arbitrator that the third respondent's capacity to earn commission was indeed impaired. On the facts before the arbitrator, the third respondent's case was that there should have been no relocation. It would be unfair to the applicant, if it were to move expected that the whole credit control department elsewhere to accommodate the third respondent.

15.On the same day the third respondents legal representative wrote:

"If at the end of the day no feasible or reasonable accommodation of our client's unique circumstances are practical, a consultation should be entered with a view to his proposed retrenchment."

16.The reasons for him wanting to sit and work on the first floor, were advanced by the third respondent as follows:

"The current situation is not working (i e his location on the ground floor) and I feel I would be more productive with my mates."

17.Even though the second respondent referred to all the relevant authority with regards to constructive dismissal and confirmed that the intention on the part of the employer is not a necessary ingredient in establishing a constructive dismissal and that the test is an objective one, this is not in fact what she applied.

18.She applied a subjective test, solely taking into account the point of view of the third respondent and his discomfort, without taking into consideration that in the circumstances there was very little that the applicant could do. It would be unfair to expect an employer to move a whole department, staffed by several persons, to another floor because of one employee, even one in the third respondent's position. The applicant should not have been forced to engage in a retrenchment exercise either.

19.The award falls to be set aside, because the arbitrator did not apply her

mind to the evidence before her and came to a conclusion which is rationally and reasonably disconnected to the facts.

20.I have also considered the question of costs. The third respondent continued to persue an unsustainable case against the applicant and there is no reason why he should not pay the applicant's costs of having to bring a review to set aside the decision of the first respondent.

21.I have also considered whether this matter should be referred back to the CCMA. I do not believe so.

22.I therefore make the following order:

1. The award made by the first respondent under case number GA57190 dated 28 April 2000 is set aside.

2. The award of the third respondent is substituted with the following: "The third respondent was not unfairly dismissed by the applicant, but resigned of his own accord."

3. The third respondent is to pay the applicant's costs.

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