Sneller Verbatim/HVR

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR134/01

2002-02-04

In the matter between

ILIAD AFRICA TRADING (PTY) LTD t/a

RIETPAN HARDWARE AND BUILDING SUPPLIES Applicant

and

TOLI, S N.O. (cited in his capacity as arbitration

commissioner of the Building Industry Bargaining

1st Respondent

THE COMMISSION FOR CONCILIATION,

N 2nd Respondent

3rd Respondent

J U D G M E N T

REVELAS J:

1. This is an application for review in terms of section

145(1)(a), 145(1)(b) and 145(2) of the Labour Relations Act 66 of 1995 as amended, ("the Act"). The first respondent, in his capacity as an arbitrator conducting an arbitration regarding a dispute which was referred by the third respondent to the second respondent,("the CCMA"), concerning an alleged unfair dismissal.

2. The first respondent found that the third respondent had been substantively and procedurally nfairly dismissed.
3. It was common cause before the first respondent that the third respondent had received several warnings from the applicant regarding his poor timekeeping. It was common cause that the respondent was often absent from the workplace. A disciplinary inquiry was held and the third respondent was found guilty of the offence.
4. As I understand it, the third respondent admitted that he committed these offences and the question of sanction was the main issue before the chairperson who conducted the disciplinary inquiry.
5. The arbitrator, for reasons best known to himself, found that the dismissal was substantively unfair.
6. The procedural unfairness found, was on the basis that the third respondent wished to appeal against the decision of the applicant that this was unreasonably refused.
7. The first respondent found that since the applicant's

code provided for an appeal and denying the third respondent the opportunity to appeal, amounted to procedural unfairness. The third respondent was then compensated by the first respondent with an amount equal to 13 months' remuneration.

8. In *Cox v Commission for Conciliation, Mediation and Arbitration and Others* (2001) 22 (ILJ) 137 the Labour Court held as follows at page 145:

> **"The further issues raised by the applicant are also without merit. The fact that the second respondent did not consider the dismissal to be procedurally unfair because the applicant was not allowed to appeal despite of the provision in the collective agreement/disciplinary code for such appeal cannot be a basis for review, particularly since second respondent noted the employer claimed for refusing an appeal which was that having regard to the nature of the charges and the fact that "the applicant's case may be heard by an independent person, there was no one in the company who was qualified to deal with the appeal. Further, however, had the second respondent found that an appeal had to be granted and failure to do so constituted an unfair procedure in effecting a dismissal it would not have made any difference as the second respondent stated in his award: 'I do not regard the fact that there was no appeal as constituting an unfair procedure. Even if that was so this is a matter in which I would not grant the**

applicant compensation for a procedural defect of that nature.'"

9. It was also alleged that the chairperson of the disciplinary inquiry, Mr Barbis, had knowledge of the events giving rise to the disciplinary enquiry thereof and should not have heard the matter as he was biassed.

10. The fact that Mr Barbis had been involved in prior disciplinary proceedings against the third respondent in the past, does not *per se* disqualify him from acting as a chairperson in this particular matter. Obviously Mr Barbis must have had knowledge of these events as he after all works for the applicant as well. He did not have direct knowledge of the events and he was not the prosecutor in the matter or the person who initiated the enquiry.

11. In any firm, company, business or body that acts as an employer, there will always be the chance of the disciplinary chairperson knowing about the matter. Unless he was the prosecutor in the matter or was demonstrably, a chairperson is not automatically precluded from presiding because of being an employee who has knowledge of the matter. If that was a basis to disqualify a chairperson then hardly any employer could ever discipline its employees, for this reason alone.

12. In the circumstances I find that this award of the first respondent falls to be set aside and substituted with the following:

"The dismissal was fair."

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E. Revelas