

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NUMBER:

J1614/99

On this the 27th day of March 2002
Before Revelas J

Applicant

and

1st Respondent

2nd Respondent

JUDGMENT

REVELAS J:

1. This is an application for review of an award issued by the third respondent (“the arbitrator”), in favour of the second respondent, the erstwhile employee of the applicant. It is in dispute that the second respondent was dismissed by the applicant. The applicant insists that the second respondent had resigned from its employ, whereas the second respondent contends that he was dismissed and that there was indeed a letter from the applicant, terminating his services, to prove this.
2. The second respondent commenced employment with the applicant on 30 June 1997 and held the position of marketing manager.
3. The facts which gave rise to the present matter before me, occurred during April 1998.

4. On 22 April 1998 the applicant held a cocktail party subsequent to a presentation given. Several of the applicant's clients and prospective clients attended.
5. It is common cause that at this gathering, the second respondent expressed the opinion that he did not believe that the applicant would be operational within a year's time. This was said in the presence of potential clients and existing clients. The reason he gave for expressing the aforesaid opinion, was the poor sales figure of the applicant.
6. On 23 April 1998, the second respondent was called to a meeting with Mr. Steven Price and Mr. Ewins of the applicant and questioned about his conduct of the previous evening. According to the second respondent he was suspended where and then. The following week he received a fax dated 24 April 1998 advising him that he was summarily dismissed. There was no enquiry or hearing prior to his suspension, nor his dismissal.
7. When the second respondent was appointed by the applicant, he earned a salary of R10 000,00 plus an allowance of R1 500,00 for a motor vehicle and in January 1998 his salary was amended. His gross salary for February 1998 was R7 500,00 per month, his gross salary for March 1998 was R4 500,00. The second respondent contends that when these changes were made, it was made clear that if he did not accept the reduction in remuneration, he would no longer be employed.
8. The applicant's version of events was that on the day of the presentation, the second respondent indicated to Mr. Ewins that he wished to resign. Mr. Steven Price, gave evidence that he heard the second respondent saying this.
9. The applicant's case was further that the third respondent misappropriated his credit card which was issued to him by the applicant. The applicant also alleged

that the second respondent was involved in numerous accidents with the respondent's company vehicle and never reported those incidents. The applicant alleged that there are many other events which led the second respondent to be summarily dismissed.

10. It is common cause that the second respondent was never called to a disciplinary hearing.
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11. The arbitrator found that the probabilities favoured the third respondent. In terms of the second respondent's contract of employment, he was required to resign in writing, which was not done.
12. It was also not in dispute before the arbitrator that the second respondent was suspended after the cocktail party, a step which would have been entirely unnecessary if the second respondent had in fact resigned.
13. The dismissal letter dated 24 April 1998, indicates clearly that the applicant was dismissed, since it states categorically that the second respondent was summarily dismissed without further notice. The contents of this letter was not challenged to be untrue. Therefore the arbitrator found that he had no reason to reject it as false.
14. Finally the arbitrator found: **“ the probabilities are high (sic) that the applicant was dismissed rather than having resigned. This also substantiated by the inconsistency of the respondent's reason why and how Erasmus' services were terminated. On the one hand Mr. Price says that the applicant has to be dismissed owing to his conduct at the cocktail party, on the other hand it is submitted that he resigned.”**
15. The arbitrator held that the second respondent's dismissal was procedurally and

substantively unfair. He found that it was procedurally unfair because no disciplinary enquiry was held. In respect of substantive unfairness he found that no evidence was submitted to demonstrate that the applicant had breached a rule which he was well aware of. I assume this breach related to the fact that the third respondent had discredited the applicant in front of clients. He further found that evidence relating to the abuse of credit cards and damage to the applicant's motor vehicle was unsubstantiated before him and could not justify the dismissal of the third respondent. The arbitrator found that the applicant was dismissed without any valid reason.

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16. The applicant submitted during the arbitration that the dispute was settled during a conciliation meeting, and the second respondent was paid a cheque of R4 428,84 in consequence thereof. The second respondent however argued that this payment was for his outstanding salary and that he was entitled to that payment.
17. The arbitrator referred to the file and stated in his award that the file indicated that nothing in the file had indicated that settlement was reached at some point and since there was no documentary proof of such an agreement, he could not accept that the matter had become settled. It also appears from the pay slip in respect of April 1998, that the second respondent was paid the cheque in "**Lieu of Final Notice**".
18. The arbitrator awarded the applicant an amount of R71 500,00 for substantive and procedural unfairness, being an amount equal to eleven months' remuneration calculated at the rate of the second respondent's remuneration at the time of the dismissal.
19. The arbitrator held that the total remuneration of the applicant at the time of the dismissal was R6 500,00 per month. The applicant argued that R1 500,00 the equivalent of a car allowance should not have been included in this amount.

20. The arbitrator's award was further attacked on the following grounds:
 1. It was argued that the arbitrator was not justified in accepting the uncorroborated evidence of the second respondent that he had been dismissed, in the face of the evidence of the applicant's employee, Mr. Steven Price who had testified that a postponement prior to the arbitration hearing, in view of the uncertainty as to whether or not the matter had been settled and would continue. It seems that the applicant also believed that it could have called a further witness, which it could not since the postponement was refused.
 2. The second respondent was represented at the arbitration hearing by a representative for a trade union named "Job Security". The applicant contends that the representative was from a firm and was not a trade union official. No consent was sought from the applicant with regards to the representative the second respondent and neither was any argument presented to the first respondent for the representative to be allowed to represent the second respondent. The applicant argues that in permitting Mr. Ray-Howett to represent the second respondent at the arbitration proceedings, the arbitrator committed a fatal irregularity which in itself warrants setting aside of the award.
21. The factual findings of the arbitrator on the probabilities do not warrant interference. In the face of the letter of dismissal, the third respondent discharged the onus of proving that there was a dismissal. There was no disciplinary enquiry and the applicant had no valid reason, on the evidence presented to the arbitrator, to dismiss him.
22. The next question is whether the refusal to postpone the matter amounts to an irregularity. In the light of the letter of dismissal and the absence of a hearing, it is difficult to comprehend to what extent further evidence would have assisted the applicant's case. The arbitrator was enjoined to resolve the dispute expeditiously

and had a discretion whether or not to grant a postponement. I am unable to find that he failed to exercise this discretion properly.

23. The applicant was timeously advised of the arbitration hearing and was legally represented. As far as representation is concerned, there is nothing before me, nor was there before the arbitrator to suggest that the representative was not a trade union member but a legal practitioner. In fact he deposed to an affidavit stating that he was a member of Job Service Trade Union.
24. None of the grounds advanced by the applicant warrants setting aside the arbitrator's award, which is made an order of court and the application is dismissed with costs.

Revelas

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