Sneller Verbatim/lks
IN THE LABOUR COURT OF SOUTH AFRICA
BRAAMFONTEIN
2005-06-08 CASE NO: JR2123/03

In the matter between
BERCO EXPRESS Applicant
and
SATAWU obo D MOTOPI First Respondent
NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY Second Respondent
MAPALO TSATSIMPE N.O. Third Respondent

J U D G M E N T

REVELAS, J:

[1]This is an application in terms of section 145 of the Labour Relations Act 66 of 1995, as amended ("the Act"). The applicant seeks to review an award in terms of which Ms D Motopi, represented by SATAWU in this matter, was dismissed and the arbitrator held her dismissal to be unfair. The arbitrator granted her compensation in addition to retrospective reinstatement.

There are several grounds of review which will become apparent in the reasoning of this judgment.

[2]The facts which gave rise to an unfair dismissal dispute being referred to the National Bargaining Council for the Road Freight Industry were the following: Ms Motopi ("Motopi") was transferred to the applicant's POD section on 3 March 2003. She had previously worked in its zoning department as a supervisor. The procedures she had to follow in both departments were essentially the same. The transfer to the new department was subject to a three months' probation period. According to the applicant, Motopi was transferred to the POD department because she could not cope in the zoning department. At the time of her dismissal for poor performance, she had been in the employ of the applicant for a period of 18 months. There were certain specific procedures that she was required to follow, but failed to do. Despite the fact that she was expected to know what exactly she had to do. That was the case for the applicant.

[3]Furthermore, it stated that on 13 March 2003, Motopi was counselled with a view to improve her performance. She was also given warnings.
On 8 April 2003, she was charged with misconduct on two counts and she was notified to attend a disciplinary hearing of which she refused to acknowledge receipt of the notice but did attend the hearing. The chairperson who presided over the hearing or enquiry was from a different branch. It is common cause that there was also a meeting on 18 March 2003, and this meeting was also attended by Motopi's supervisor, the accounts manager. The national human resources manager then put to her certain aspects of her performance and advised that an investigation would be conducted pertaining to her performance. According to Motopi, this was the first time any concern regarding her performance was raised. She was not represented at the meeting, she stated that the purpose of the meeting was not to counsel her, as the human resources manager made it very clear to her that the purpose of the meeting was to investigate poor performance on her part. The minutes of the meeting were typed, which Motopi also refused to sign. She regarded it as an unfair meeting.
[4]The applicant maintained that the chairperson of the disciplinary enquiry was neutral, whereas in fact Motopi stated that she was biased. Motopi's dismissal was also upheld in an appeal procedure. The applicant led evidence that Motopi's incompetence had resulted in financial loss. Six warnings were issued to her in the 18th month that she had been employed by the applicant. There were three warnings still current on her file, the latter being a final written warning. The written warnings which had been given to Motopi were in respect of absenteeism. Regarding the first warning, she stated that she could not get hold of her supervisor, whose permission she needed prior to her absenteeism. She did not challenge that warning but she did challenge her final written warning regarding her performance, because she never attended an enquiry into her performance prior to the "so-called final written warning".
[5]She further stated that the procedure followed in her case was unfair. She also emphasised that when she returned from a month's leave in February 2003, she was advised of her transfer which was also made subject to a three month probation period. She told the arbitrator that her non-acceptance of the transfer would have meant the end of her employment with the applicant. In her new position she was not offered any training despite the fact that in the new section she was required to use a computer, whereas in the zoning section her tasks were normally performed manually.
[6]She conceded that she did not complete much of her work but

attributed that to the infrequent access to the computer which was shared amongst several office workers and the fact that the documentation needed to complete her task often arrived on her desk belatedly. The applicant's witnesses pointed out that she could have easily completed her computer work in 30 minutes and 30 minutes per day for working on the computer was all that was required. Furthermore, she could have arranged her own access to the computer as she was the supervisor and not a subordinate in her new section. It was further stressed, that she showed no appreciation of the seriousness of her situation. After the hearing, she remained absent for a period without any explanation.

[7]The arbitrator made certain findings which led me to believe that she was almost enthusiastic in her endeavours to assist the employee in question and there were several examples in the award to which I can refer in this regard. First of all, I will return to the issue of compensation. Section 193 of the Act is quite clear. When a dismissal is found to be substantively unfair, the correct remedy is reinstatement unless there are factors which indicate that it is not practical to reinstate. This was not such a matter. The arbitrator made such a finding of procedural unfairness but reinstated Motopi.

Section 193 provides for compensation as an alternative to reinstatement. Compensation may not be awarded in addition to reinstatement, particularly where the reinstatement order is retrospective and is coupled with an order which is very specific that there may not be any loss of remuneration or benefits, which was the case in this matter. The arbitrator misdirected herself in granting both reinstatement and compensation.

[8]Furthermore, the arbitrator exceeded her powers in conducting her own investigation and misdirected herself regarding the law and the facts when she considered the proceedings or events that led up to the final warning, as if that was part of the dispute she was tasked to arbitrate. In this regard, she stressed that there was no formal notification of the meeting held on 18 March. It was clearly a misconduct meeting where Motopi was not afforded the opportunity to state her case or lead evidence or cross-examine any person relating thereto. In this regard the arbitrator says the following:

> **"I am convinced that the said meeting was not a counselling session. According to the minutes the National HR Manager explained the purpose of the meeting and his explanation was 'the reason for this meeting is to investigate allegations of extreme poor work performance of DM (Motopi) the last three weeks'. There is nothing confusing about what the National HR Manager's explanation is. This was not a counselling session, there were, according to his explanation, allegations against the employee. The irony is that the employee was not made aware of those allegations. There is no indication that the accounts manager uttered a word. It was only the National HR Manager firing questions at the employee."**

[9]I have also read the documents contained in support of this application and it is quite clear that it was a counselling session for poor performance. The arbitrator clearly confused poor performance and misconduct and her confusion led to very unfair results. For a counselling session, an employee need not receive formal notification. There were other warnings on the file which related to misconduct but these were not discussed in detail, merely referred to. The general impression given by the HR Manager was that Motopi was performing poorly. There was also previous counselling and she was also asked whether she needed any assistance. She never said that she did.

[10]Furthermore, the arbitrator had the following to say about the chairperson at the disciplinary hearing:

"a.The hearing was very irregular. On page 16 the initiator was given the opportunity to present her case. The chairperson and the employee's representative asked her several questions. At that time the employee had not been given the opportunity to present her case but the chairperson however asked her (the employee) questions as if she had presented her case.

b.The chairperson was not the referee but a player. She asked questions not for the sake of clarity. Example, 'was Dinah (Motopi) on probation?' Nobody said anything about probation and she seemed to be having information that was not raised at the hearing.

c.Page 17. The employee had still not been given the opportunity to present her side of the story. The chairperson continued asking questions.

d.Page 18. The employee had still not been given the opportunity present her side of the story. The chairman made conclusion about the employee even before hearing was concluded. Example: 'Stated that this has nothing to do with Dinah's case. She wasn't coping in the one department and she was moved. **She is also not coping in this department.**

e.The chairperson asked the initiator (bottom half page 18) if there was anything she needed to add (bottom of page 18 and the whole page 19) is the initiator's additional information after the chairperson saw it necessary to have additional information. The employee had still not been given an opportunity to present her case.

f.Page 20. The employee had still not been given an opportunity to present her case. The chairperson could not wait for the hearing to be finalised before making her own conclusions. Example, she stated: 'Dinah shouldn't let anyone take the pods (sic)'.

g.Page 21. The employee had still not been given the opportunity to tell her side of the story. The chairperson's interest in the case was evident when she '**called Babsie into the hearing", introduced her and wanted to know from her if Dinah can do the job**'. **Her questions were not for clarity but really cross-examining the employee and the company's witnesses. According to the minutes she 'faced the accused and wanted to know if she agrees.**

h.Page 22. The employee had still not been given the opportunity to present her side of the story. From this page it is clear that the chairperson had taken a side. She was answering questions, not directed to her, example: The employee's representative wanted to know if the employee could not be demoted like others who are not performing as required, and the chairperson responded 'if there are no positions open she cannot'. In another example is when the employee's representative asked if the

employee could not be moved back to the zone and the chairperson responded 'no, because she is good in admin'. This clearly demonstrates which side she favoured."

[11]The aforesaid criticism of the disciplinary process is most unwarranted. I have perused the minutes of the hearing carefully. It is not a verbatim transcription and tends to be rather cryptic but contains full sentences. To call the hearing very irregular was indeed irregular on the part of the arbitrator. The fact that the arbitrator herself was biased in favour of Motopi in this matter, was very evident. For example, she stated that the chairperson was biased because she asked whether Motopi was on probation. I fail to comprehend why. That was a very reasonable question in a matter about poor performance. The arbitrator, as I said before, did not appreciate the difference between poor performance and misconduct. Both aspects featured in this matter in any event.

[12]The fact that a person called Babsie was called into the hearing to testify as to whether Motopi could "do the job", is no indication of a biased chairperson. This does not amount to cross-examination. I fail to see on what basis the arbitrator could accuse the chairperson of cross-examination in that regard.

[13]She also seems to hold it against the applicant for transferring Motopi to the POD department from the zoning department, and given as a reason that she was not coping there. There was nothing in the evidence to suggest that Motopi was performing her duties well. In fact, that is not a finding that the arbitrator had made. In my view, the criticism that the arbitrator levelled at the applicant in dealing with this poor performance case, is irrational in relation to the evidence which was before her.

[14]This award falls to be set aside. However, I am not prepared to substitute the award with one holding that the dismissal was fair. This was indeed a poor performance case and the applicant had done frightfully little by way of explaining what precisely was required of Motopi in this POD section. I was not informed what the POD section is and as I am not an employee of the applicant I am in no position to assess whether there was a valid reason for dismissing the applicant. The matter was presented as if I had special knowledge of what happened in that department. I do not. I have pointed out the several misdirections of the arbitrator.

[15]The matter should be referred back to the National Bargaining Council for the Road Freight Industry to be arbitrated by a different arbitrator. I make no order as to costs.

_____

E. REVELAS