

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

Case No: JR 525/04

In the matter between:

DAVID GERHARDUS HARMSE

Applicant

and

TELKOM SA LIMITED

1st Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

2nd Respondent

COMMISSIONER R. HLONGWANE

3rd Respondent

REASONS

REVELAS J

- [1] This was an application to review and set aside an award of the third respondent (“the arbitrator”) who had found that the applicant’s dismissal by the first respondent (“Telkom”) was both procedurally and substantively unfair. The applicant had been in the employ of Telkom for 32 years. He was dismissed for promoting an employee of Telkom to a higher level without the necessary authority.

- [2] The applicant held the position of Senior Manager, Field Operations, responsible for the Durban area, when he was dismissed on 21 February 2003. His job content was to “effectively manage field operations portfolio in order to achieve organizational objectives and customer service” and that he could “recognize” and “reward” performance.
- [3] The dispute about an alleged unfair dismissal which the applicant had referred to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) remained unresolved and was eventually arbitrated by the arbitrator.
- [4] The applicant raised several grounds of the review. Firstly, he protested that the record of the review proceedings were incomplete. Secondly, he contended that the arbitrator did not understand nor did he listen to the evidence which was led at the arbitration hearing. *Inter alia*, he did not understand the involvement of Telkom’s Human Resources Department in the actual promotion. The applicant contended that the evidence of the two witnesses (Mr Amod and Mr Glas) that the ultimate responsibility for the promotion, was that of the applicant, and not Human Resources, should not have been accepted because they gave no reasons for their opinions. Another ground for review was that there was an unusual delay between the actual investigation and the disciplinary enquiry. The arbitrator accepted there was a proper explanation for it

- [5] The respondent alleged that during August 1998 the applicant had promoted Ms Kim Willemse to a full time position on level B3. She held the position of technical officer.
- [6] The applicant's version is that he, when he was still Manager: Access Planning, requested the Senior Manager, Human Resources, to arrange for Ms Willemse to be appointed on the top scale of level B4 in a full time position. She was then appointed on level B3. He said he had acted on the advice of Mr Peach. Telkom disputed that the applicant gave such evidence about Mr Peach at the arbitration hearing. According to the applicant he did, and this was borne out by the arbitrator's notes.
- [7] During 1999 Telkom changed its grading system during a project called National Grading Alignment Project. Grade B3 was changed to Grade 10 under the new system. Grades B4 and B5 became Grade 9. Job grading was performed by Human Resources practitioners on a specialised computer programme. When the subsequent spread sheet containing the new grades was produced, it reflected Ms Willemse remaining on level 10 (B3) but that she was performing functions on a higher grade "to be contracted".
- [8] The applicant said he had asked Mr Fouche, Telkom's Human Resources Manager, whether Ms Willemse could not be placed on Grade 9 since she was doing duties applicable to a higher grade. According to the evidence of Mr Fouche, he had told the applicant that although the dispensation she was on did not warrant a promotion to Grade 9, the work she performed warranted it. Telkom denied that such evidence was given by Mr Fouche at the

arbitration hearing. Page 159 of the record clearly reflects at lines 18 – 24 that Mr Fouche indeed gave such evidence. The evidence of the applicant was that Mr Fouche's body language was such that he understood him to mean that he was still considering the matter. This evidence is very important because it is indicative of mitigatory circumstances.

- [9] I am not sure if there is merit in any of the grounds of review raised by the applicant mentioned above. My concern in this matter is that the arbitrator had found that “[I]t is reasonable for an employer to be harsh and to adopt an attitude of zero tolerance to employees who conduct themselves in a dishonest and untrustworthy manner, irrespective of years of service and personal sacrifices made by such employees in the interests of the employer”, and that the “trust relationship had irreparably broken down”. These are indeed strong sentiments expressed by the arbitrator.
- [10] The applicant was not suspended pending the investigation into his conduct. He was sent to one of Telkom's branches in Kwa-Zulu Natal, which was not doing so well. This fact raises the question whether the applicant was really regarded as untrustworthy and dishonest, so as to destroy the trust relationship. The arbitrator simply accepted it to be so, without applying his mind properly.
- [11] The conduct in question indicates impetuosity on the applicant's part, which makes his misconduct fall in the category of disobedience, rather than dishonesty. There was no personal gain in it for him and it was clearly not conduct that could be hidden or that he could get away with. It was also not the type of conduct

which outweighed thirty two years of service. It was conduct that warranted a strong warning or other corrective discipline, not dismissal.

[12] Moreover, the above observations are strengthened by the fact that Ms Willemse is still in the employ of Telkom, without being demoted, after Telkom's case was that the applicant and Ms Willemse conspired to have her promoted.

[13] In my view, the arbitrator's failure to afford mitigatory factors in this matter their due regard means that the arbitrator did not apply his mind to the facts before him. That rendered the award reviewable.

[14] The award was set aside and substituted with one retrospectively reinstating the applicant. The first respondent was ordered to pay the costs of the application.

Judge Elna Revelas

Judge of the Labour Court of South Africa

Date of hearing: 03 February 2006

Date of judgment: 28 February 2006