

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

Case no: P286/06

In the matter between:

CHESTERON INDUSTRIES (PTY) LTD

Applicant

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1st Respondent

JONATHAN GRUSS NO.

2nd Respondents

RUDULPH POSTHUMUS

3RD Respondent

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an opposed review application in terms of which the applicant seeks an order setting aside the arbitration award of the second respondent (the commissioner) issued under case number ECPE606-06 dated 19 June 2006. In terms of the arbitration award the commissioner found that the dismissal of the third respondent (the employee) was substantively unfair and ordered his re-employment.

Background facts

[2] The employee who prior to his dismissal was employed by the applicant at its Port Elizabeth premises was employed as a selling device specialist. The employee was dismissed as result of the poor work performance. The dismissal was subsequent to a disciplinary hearing which was also conducted on 26th January 2006 and pursuant to both poor performance counselling and a series of warnings.

[3] The break-even target for the employee was R45, 000.00. The performance of the employee over a period of 3 (three) years was as follows:

- a. In 2003 the employee's monthly sales were in an amount of R30, 00. 00. He was down on his target by R15,000 .00
- b. In 2004 the monthly average sales were R12, 500 .00. He was down on his target by R32, 500. 00 bellow the target.
- c. In 2005 the employee's average sales were R15, 000. 00. He was down by R30, 000. 00

[2] During August 2005, the employee was counselled about his poor work performance and was advised that one of the managers would accompany him whenever he visits clients so that he could assist him. The employee having failed to improve his performance received his first written warning on the 12th September 2005. The second written was issued just under a month later on the 3rd October 2005. Further counselling and written warnings were issued against the employee with no sign of improvement. It

as a result of this that the applicant convened a formal poor performance hearing against the employee.

The arbitration award grounds for review and

[3] The commissioner dismissed the following contentions of the employee:

- a. that the dismissal was procedurally unfair.
- b. That he could not reach the targets for December 2005 as most of the businesses and factories were closed during that period. The commissioner found that this explanation was unsustainable because it was inconsistent with what other sales employees who were able to achieve their targets during the same period.
- c. That he had not been afforded training. The commissioner found that the employee had in fact been provided with training.
- d. That the employee was hampered in performing his duties. The commissioner found that the applicant had made extra effort to accommodate the employee and afforded him every opportunity to achieve his targets.

[4] The commissioner found on the basis of the above that the employee's poor performance was serious enough to justify dismissal. The commissioner also found that the targets which were set for the employee were reasonable. However, having made these findings the commissioner proceeded to conclude that:

“In my view it would not be fair taking into account financial consideration facing the Respondent in that the Applicant was not generating sufficient sales to justify his existence in the company to unilaterally amend the terms of conditions of the Applicant’s employment by changing the applicant’s remuneration package to that based purely on commission. It does not make sense to say that although an employee’s poor performance is serious enough to justify a dismissal the employer is not allowed to unilaterally alter the conditions of employment in order to accommodate an employee.”

[5] The commissioner further reasoned that:

“In an economic climate such as ours where a large percentage of the population is unemployed, employer should be encouraged to keep an employee (sic) in their employment by accommodating the employee in changing the remuneration structure of an employee, rather than dismissing him.”

[6] It was on the basis of the above that the commissioner concluded that the dismissal of the employee was unfair and that the applicant should rather have restructured the salary of the employee to that of 20% fixed commission. In arriving at this conclusion the commissioner reasoned that:

“ ... a rational sound financial reason for placing an employee under this circumstance on a commission basis, the employer would no longer be financially burdened with an employee who does not make sufficient sales to justify his existence. The commission base system would serve as a motivation tool to ensure that an employee generate sufficient sales in that his remuneration would be directly linked to his performance.”

The legal principles

[7] When arbitrating disputes concerning dismissal for poor work performance, commissioners are enjoined in terms of item 9 of Schedule 8 Code of Good Practice: Dismissal, to consider firstly whether an employee has failed to meet the performance standard. The next enquiry once it has been established that the employee has failed to meet the performance standard is whether:

- The employee was aware, or could have been expected to be aware, of the required performance standard;
- The employee was given a fair opportunity to meet the required performance standard

[8] The duty to show that the employee was incompetent rests with the employer who in general has to show this by adducing evidence that show poor

performance on the part of the employee. To this extent the employer has to show that its assessment of the performance of the employee was objective and reasonable.

[9] The positive result into whether the employee was aware of the performance standard and was given a fair opportunity to meet the required standard would lead to a further enquiry as to whether the dismissal was a fair sanction in the circumstances of a given case. Consideration of alternatives to dismissal would be a factor to take into account in assessing the appropriateness of the dismissal.

[10] In the present instance the commissioner having concluded that it had been established the employee had met the reasonable performance standard set by the applicant proceeded to determine the fairness of the dismissal. The commissioner reasoned that dismissal was not a last resort available to the applicant dealing with the poor performance of the employee. The commissioner found that the alternative to dismissal was employment of the employee on a salary structure based on a 20% fixed commission.

[11] In my view the conclusion reached by the commissioner is not reasonable and therefore fails to meet the standard set out in *Sidumo & Others v Rustenburg Platinum Mines & Others* [2007] 12 BLLR 1027 (CC). On the

commissioner's own finding the applicant had done every thing to accommodate the employee and afforded him over period of three years the opportunity to improve and meet the required standard. The applicant considered the alternative to dismissal being restructuring the salary of the employee to be based on a fixed commission. Having considered this the applicant took the view that the fixed commission arrangement would still not address the problem. The employer arrived at this conclusion having had regard to the warnings counselling and other measures that had been put in place to assist the employee. In this context the monthly performance of the employee towards the end of 2005 is instructive. In September 2005, the target for the employee was R35 000, 00 and he achieved R30 000, 00, the target for October 2005, was R45 000, 00 and the employee managed only R2 500, 00 and in November 2005, the target was R45 000, 00, he managed only R4 500, 00.

[12]The consistent failure by the employee to meet his targets was not nominal but was by significant margins and this was over a protracted period. His explanation attracted no sympathy in that whilst in one instance he blamed the period of the year for his low out put; all his colleagues met their targets without any difficulty. The various warnings issued seem to have had no mean meaning to the employee. I now wonder whether there would be any

meaning in as far as his performance is concerned if placed on a fixed commission salary scale.

[13]The above discussion when contrasted with the conclusion in the arbitration award reveals very clearly that the commissioner in his assessment of the fairness of the dismissal failed in a fundamental way to balance in a fair manner the interest of both parties. He failed in the exercise of his powers to appreciate that he needed to take into account the totality of the circumstances of the case before him, including the reason why the applicant dismissed the employee. The commissioner focused on the fairness of the dismissal only to the extent that it affected the employee and thereby arrived at a decision which a reasonable decision-maker could not have reached. In other words the commissioner failed to appreciate that fairness required him to also equally take into account the fairness of his decision on the applicant. It has to be noted that the solution which the commissioner devised in his award was in fact rejected by the employee. During his evidence when asked by the commissioner whether he was prepared to go into the commission based salary the employee indicated very clearly that he was not. This point is repeated in the answering affidavit employee at paragraph 42 where he states:

“I was further not prepared to work on commission to market products in which I was not properly trained.”

[14]In my view in the light of the above the award of the commissioner stands to be reviewed. In other words the commissioner ought to have found the dismissal of the employee to have been fair. However, I do not believe that it would be fair in the circumstances of this case to order costs.

[15]In the premises the following is order made:

- a. The arbitration award of the commissioner issued under case number ECPE606-06 and dated 19th June 2006 is reviewed and set aside.
- b. The arbitration award is substituted with the following award:
 - “1.The dismissal of the applicant, Mr Posthumus was both substantively and procedurally fair.*
 - 2. The unfair dismissal claim of the applicant is dismissed”*
- c. There is no order as to costs.

MOLAHLEHI J

DATE OF HEARING : 16 SEPTEMBER 2008

DATE OF JUDGMENT : 26 SEPTEMBER 2008

APPEARANCES

For the Applicant : Adv Kroon

Instructed by : **Joubert Galphin Attorney**

For the Respondent: **Adv Grobeler**

Instructed by **Marius Van Zyl Attorneys:**