

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

NOT REPORTABLE

CASE NO: JR792/09

In the matter between:

GOODMAN THABISO MASOEU

APPLICANT

AND

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

1ST RESPONDENT

COMMISSIONER BONGE T MASOTE

2ND RESPONDENT

SHOPRITE CHECKERS (PTY) LTD

3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction 1

[1] The applicant has requested reasons for the order made by this Court on 20th August 2009, in which his application to review the arbitration award issued under case number GAJB 38267-08 dated 25th March 2009 was dismissed. In terms of the arbitration award the commissioner found the dismissal of the applicant to have been both procedurally and substantively fair.

Background facts

[2] The applicant was prior to his dismissal on 18th December 2008 employed by the third respondent as a baker. The applicant was dismissed from the employ of the third respondent for absconsion.

[3]The applicant's case was that his dismissal was procedurally unfair because he was not given an opportunity to state his side of the story. Secondly, that he did contact the third respondent regarding his absence but was dismissed by the third respondent without being given an opportunity to present his case at a disciplinary hearing.

[4] The third respondent's case at the arbitration proceedings was that the applicant was away from work between the period 10th November 2008 and 18th December 2008 and failed to contact the third respondent and inform it about his whereabouts. Secondly that the applicant failed to inform the third respondent about his whereabouts even after he had been asked to do so through telegrams dated 11th December 2008, 12th December 2008 and 15th December 2008 respectively.

Grounds for review and arbitration award

[5] The first attack on the award relates to the allegation that the commissioner arrived at a wrong conclusion because she failed to apply her mind to the evidence and the material presented to her during the arbitration proceedings. In this respect the applicant contends that based on the contradictory evidence presented by the third

respondent the commissioner failed to appreciate her role in that she used contradictory evidence of third respondent.

[6] The applicant contends that during the arbitration proceedings the third respondent said that the first time it heard about his whereabouts since his disappearance was when the applicant referred the dispute to the CCMA whereas the third respondent's witness conceded during cross-examination that he was informed that the applicant reported for duty on the 22nd December 2008.

[7] The second attack on the arbitration award relates to the allegation that the commissioner committed gross misconduct or irregularity in the conduct of the arbitration process in the sense that she misdirected herself as to the onus of proof

[8] The third attack on the award relates to the allegation that the commissioner exceeded her powers by failing to consider relevant items in the Code of Good Practice. In this respect the applicant complains is that not all employees were dismissed following their absence from work.

[9] The commissioner in her brief analysis of the evidence and submissions by the parties found that the third respondent had discharged its onus of proving that the dismissal was procedurally fair after having found that it was clear that the applicant waived his right to state his case because he did not contact the person he was called upon to contact in the telegrams sent to him.

[10] The dismissal of the applicant was also found to be substantively fair in that the applicant was found to have breached rule 5 of the rules applicable at the third respondent's work place in that he was absent for the period 10th November 2008 to 18th December 2008, which amounts to 38 days without authorization or verifiable reasons. Further that the applicant failed to inform the third respondent about his whereabouts even after he was asked to do so through three telegrams.

The test for review

[11] The test for review is set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC). The enquiry in the reasonable decision-maker test is to determine whether the decision reached by the commissioner is one which a reasonable decision maker could not reach. In assessing the reasonableness of the award the Court takes into account the material evidence which was before him or her during the arbitration proceedings.

[12] In *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and others* [2008] 3 BLLR 197 (LAC), the Court emphasized that the reasonable decision maker's test:

“... is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objective of the Act and particular the primary objective of the effective resolution of disputes, awards of the

CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that the decision of the arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all circumstances, have reached.”

Evaluation

[13] The applicant testified during the arbitration proceedings that his absence and failure to inform the third respondent about it, was necessitated by the death of his brother and the fact that he was responsible for arranging his burial. In my view, the commissioner correctly rejected the applicant’s testimony in this regard and found that it would have taken the applicant less than five minutes to call the third respondent to inform it about the death of his brother. Further, that the employee could not provide the date on which his brother passed away, the date of his burial and could also not produce a death certificate.

[14] The applicant further testified during the arbitration proceedings that he did contact the third respondent when he called his supervisor Mr Ndlovu on 1st December 2008, to inform him about the reason why he did not report for duty. The applicant contended that he was told by Mr Ndlovu that the third respondent had declared him as a deserter. The commissioner again rejects the applicant’s testimony in this regard based on the fact that the third respondent only took the decision to declare the applicant a deserter on the 15th December 2008, after it had previously sent two

telegrams to him asking about his whereabouts and the reasons for his absence.

[15] The commissioner further found that the applicant was aware of the rule dealing with steps that an absent employee is required to take and that the rule was fair, valid and reasonable.

[16] During the hearing of this application the applicant conceded to the substantive fairness of his dismissal but persisted that it was procedurally unfair.

[17] It is common cause that employees charged with absenteeism must generally be given an opportunity to explain their absence. This applies also to employees who have been absent for a period deemed by the employer's disciplinary code to amount to desertion. See *John Grogan Workplace Law Ninth Edition page 185*. In *SA Broadcasting Corporation v Commission for Conciliation, Mediation and Arbitration and others (2001) 22 ILJ 487 (LC)*, this Court held that:

“[13] The real problem arises from circumstances of unexplained absence. Mere absence is no more conclusive evidence of desertion (which is absence plus an intention not to return), than it is evidence of wilful absence without leave (which axiomatically includes an intention to return, albeit at a time of employee's choosing). The means by which the employer established the existence or absence of the intention to return is the critical point of the debate. What constitutes desertion is of course a matter of fact. In some instances an unexplained absence for a reasonable

period, that is to say, reasonable in relation to the employer's operational requirements, will establish the fact of desertion. In the instance of an employee who remains away from the workplace and whose whereabouts are not known and who is out of reach of the employer, it is plainly impractical to impose upon an employer the obligation to convene a disciplinary enquiry before reaching the conclusion that the fact of desertion has occurred and in consequence of which it is entitled in response thereto to elect to terminate the contract.

[18] Whether or not an employer should convene a disciplinary enquiry before taking a decision to dismiss, is dependent on the relevant circumstances and the practicality of so doing..."

[18] It is clear from the record that on the 22nd December 2008, when the applicant resurfaced on the third respondent's workplace allegedly for duty, his services had been terminated already by a telegram dated 18th December 2008 after the employee had failed to respond to 3 (three) previous telegrams sent by the third respondent before asking about his whereabouts.

[19] In this regard and based on the authorities quoted above I am unable to agree with the contention of the applicant that the commissioner failed deal with the material evidence which was before her. I am unable to agree with the contention of the

applicant that the commissioner committed gross irregularity or exceeded her powers.

Accordingly, I am of the view that the arbitration award of the commissioner cannot be faulted for being unreasonable.

[20] It was on the basis of the above discussion that I made the order as follows:

“1. The review application is dismissed.

2. There is no order as to costs.”

Molahlehi J

Date of Hearing : 20th August 2009

Date of Judgment : 15th September 2009

Appearances

For the Applicant : Mr Goodman Masoeu (in person)

(Unopposed matter)