

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

CASE NO: JR 1414/07

In the matter between:

AIR-O-THENE PRODUCTS (PTY) LTD

APPLICANT

AND

**CHRISTINE FORD
ZODWA MDLADLA**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

NYATHELA AJ

Introduction

[1] This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) of an award issued by the second respondent on 04 May 2007 under case number MEGA 7310. In terms of the award, second respondent found that the dismissal of the third respondent was both procedurally and substantively unfair and ordered the applicant to reinstate third respondent with back pay. Applicant also seeks to stay the enforcement of the award pending the finalization of the review in terms of section 145(3) of the LRA. First respondent is opposing the review application.

The parties

[2] The applicant is Air-o-Thene Products (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa. The first respondent is the Christine Ford a former employee of the applicant. The second respondent is Zodwa Mdladla, a commissioner of the MEIBC. The second respondent is cited herein in her capacity as the commissioner who presided at the arbitration

proceedings under case number MEGA 7310.

The Facts

[3] The first respondent was employed by the applicant on 04 December 2003 as a Sales Representative. On or about 15 December 2004, first respondent was charged with misconduct and poor work performance. She was found guilty and dismissed. On 11 February 2005, first respondent referred a dispute to the Bargaining Council. The dispute was conciliated and remained unresolved. The dispute was arbitrated on 23 March 2006 and concluded on 27 February 2007. The award was issued on 04 May 2007.

Grounds for review

[4] In the founding affidavit the applicant contends amongst others that:

4.1. The second respondent failed to apply her mind sufficiently to the evidence led during the course of the arbitration proceedings and failed to rationally and correctly link the relevant facts which were given in evidence to her findings and ultimately her award.

4.2. The second respondent misdirected herself and erred in finding that the dismissal was procedurally unfair.

4.3. The second respondent committed a gross irregularity in that her calculation of the compensation payable was erroneous.

Analysis

Substantive fairness

[5] It is not in dispute that applicant complained about first respondent's alleged poor performance prior to her dismissal. Second respondent therefore correctly classified this dispute as a dismissal for poor performance.

[6] Schedule 8 item 9 (b)(ii) of the LRA provides amongst others that in determining whether a dismissal for poor work performance is unfair, one should consider whether or not the employee was given a fair opportunity to meet the required standard. In this matter, it is not in dispute that the second respondent did not have computer skills at the time when Lance Whitford introduced the use of computers and required her to compile reports on spreadsheet using a computer. Applicant never disputed having knowledge that the first respondent had no computer skills to enable her to prepare the reports required from her.

[7] There was however no evidence tendered by the applicant during the arbitration hearing that the first respondent was ever trained on how to use a computer to prepare the reports in question. In view of the above information which was before second respondent, I find that the conclusion reached by second respondent that the dismissal of the first respondent was substantively unfair is not a decision which a reasonable decision maker, given the materials before her, could not have reached in the circumstances.

Procedural fairness

[8] It is common cause that applicant did not provide first respondent with a bundle of documents which it intended to use in the disciplinary hearing despite that first respondent had requested the documents prior to the date of the hearing. Applicant's argument in this regard is that it could not have produced the said documents since the thrust of the charges is that first respondent did not prepare the documents hence it did not have any such documents requested.

[9] However, page 79 line 16 of A2 which is the minutes of the disciplinary hearing, Mr Lance Whitford who led applicant's case during the disciplinary hearing produced a bundle of documents which he used to prove the allegations against first respondent during the hearing.

[10] First respondent was only given documents during the disciplinary hearing and required to proceed with the hearing forthwith without first being allowed an opportunity to peruse the documents and prepare her own bundle of documents to counter the documents presented by the employer if need be. Clearly first respondent could not have adequately prepared herself to cross-examine the employer's witnesses when she received documents during the hearing.

[11] The fact that applicant deemed it necessary that it has to use documents to prove its case and actually used the said documents implies that the applicant did in fact have the documents which were relevant to the proceedings and should have been made available to first respondent prior to the hearing. It follows logically therefore that first respondent was entitled to be given an opportunity to prepare herself for the hearing since she only received documents during the hearing. The refusal by the chairperson of the hearing to grant postponement was unjustified in the circumstances and rendered the proceedings unfair.

[12] In view of the foregoing, the argument by the applicant's legal representative that second respondent did not apply her mind properly to the facts before her in arriving at the decision that first respondent's dismissal is procedurally unfair is rejected.

Compensation

[13] Applicant's contention is that second respondent did not apply her mind to the facts and erred in calculating the amount of compensation payable in that she included commission in calculating the remuneration.

[14] It is not in dispute that prior to applicant taking over Versapak first respondent's remuneration included commission. Applicant changed the remuneration and removed the commission in calculating the first respondent's remuneration. It is only this aspect of first respondent's terms and conditions of employment which appears to have changed after the transfer of business to applicant.

[15] As pointed out above, section 197 of the LRA provides that an employer who takes over a business as a going concern may not change the terms and conditions of employment of employees from the old business in a substantial way. What is implied in the section is that the employer may unilaterally change the terms and conditions of employment as long as the changes are not substantial. In the circumstances, second respondent's finding that section 197 of the LRA precludes an employer from unilaterally changing the terms and conditions of employment at all is not a correct reflection of the law.

[16] In this matter, the employee retained her salary and other terms and conditions of employment despite the transfer. The only change is with regard to the payment of commission. I do not find that the change to the payment of commission can constitute a substantial change to terms and conditions of employment in the circumstances. I therefore agree with applicant's legal representative that there was an error in the manner in which second respondent calculated the remuneration as commission should have been excluded from the calculation.

Order

[17] In the premise I make the following order:

17.1 The application to review and set aside the arbitration award issued by the second respondent on 04 May 2007 under case number MEGA 7310 is dismissed.

17.2 I substitute paragraph 4.1.2 of the award with the following order:

The applicant is ordered to pay first respondent compensation in the sum of R192 000-00 which is equivalent to first respondent's 12 (twelve) months remuneration calculated at her rate of remuneration at the time of her dismissal which was R16 000-00 (sixteen thousand rand) per month.

17.3. I make no order as to costs.

Nyathela AJ

Date of Hearing : 26 June 2009

Date of Judgment: 03 February 2010