REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

# THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

## JUDGMENT

Case no: C 358/07

In the matter between:

| | |
|---|---|
| **NUMSA** | **First Applicant** |
| **SANDISILE NKUKWANA** | **Second Applicant** |
| and | |
| **GFD MOTORS (PTY) LTD** | **First Respondent** |
| **URSULA BULBRING N.O.** | **Second Respondent** |
| **DISPUTE RESOLUTION CENTRE** | **Third Respondent** |

**Heard**: **28 May 2013**

**Delivered**: **24 July 2013**

**Summary:** Review – dismissal unfair, but no relief awarded. Award reasonable. LRA s 193(2) considered.

---

**JUDGMENT**

---

STEENKAMP J

Introduction

[1] The employee, Sandisile Nkukwana[1], was dismissed. The arbitrator, Ursula Bulbring[2], found that his dismissal was substantively unfair; yet she ordered no relief. Is that a reasonable award?

Background facts

[2] The employee was dismissed following a disciplinary hearing where he faced the following allegations of misconduct:

> "Gross insubordination and serious disrespect towards a superior. Failure to carry out a reasonable instruction."

[3] The alleged misconduct arises from an incident where the employee became aggressive towards his superior, left the work premises (a service station) and refused to return to work.

[4] The employee was a petrol attendant. He was booked off work with chickenpox from 6 to 10 December 2006.[3] He was not required to work on 11 and 12 December 2006 as those were his "off days". It is common cause that he was due back at work on 13 December 2006 but he did not go to work. He arrived at work for the day shift on 14 December 2006.

[5] What happened on that day is not common cause. However, the arbitrator preferred the version of the employer's witnesses, Alethea Cocotos (its site manager) and Henrietta Rondganger (administrative assistant). The employee testified at arbitration and he did not call any further witnesses.

[6] The applicants have not challenged the arbitrator's findings with regard to credibility and the facts. They only challenge the arbitrator's decision not to order any relief. In these circumstances, the court is not called upon to question the arbitrator's findings as to what happened on the day.



---

[1] The second applicant.

[2] The second respondent.

[3] The employee was dismissed in February 2007. The arbitration was held on 12 June 2007. The award was handed down on 20 June 2007. The applicants filed their review application on 13 August 2007. For reasons that are not clear to the court or germane to this dispute, answering papers were only filed five years later, in August 2012. The application was heard before this court in May 2013.

[7] On his arrival at work on 14 December 2006, the employee reported to Cocotos in her office. He had white spots all over his face because of the calamine lotion that he had used to relieve the itchiness resulting from chickenpox. Cocotos sympathised with him as she had also had chickenpox as an adult and it was not a pleasant experience. She asked him if he was well enough to work and he replied that he was. She told him that it was not appropriate for him to work on the forecourt with the white spots on his face as customers may be concerned about the spots and whether or not the condition was still contagious. The employee refused to wash the calamine lotion off his face and Cocotos said that, in that event, he could choose one of three options: he could return to the doctor to obtain a further sick certificate; or he could go home and take unpaid sick leave; or remain at work if he washed off the calamine lotion.

[8] The employee became agitated and Cocotos told him that she would telephone his doctor. She did so and the doctor told her that it was not necessary for the employee to apply the calamine lotion during working hours; it would only be necessary at night. Cocotos relayed this to the employee but he would not believe her. Cocotos telephoned the doctor again and the doctor spoke to the employee personally, confirming the advice given to Cocotos.

[9] Cocotos reiterated the three options to the employee. He became aggressive, told Cocotos that he did not care what the doctor had said, and stormed out of her office. Cocotos asked the employee to return to her office but he refused.

[10] The employer's director, George Cocotos, who was on the forecourt, saw what was going on and told the employee to calm down. The employee shouted at George, "I know you want to fire me because you are a racist anyway." This took place in front of approximately 8 petrol attendants and several customers.

[11] Cocotos called the employee to her office. He did not respond and walked away. After about 15 minutes other staff members told Cocotos that the employee had left. Cocotos phoned him on his cellphone but it was on voicemail. She left a message saying that he had no permission to leave

and that he should return to the premises and see her in her office. She received no response.

[12] Approximately 2 ½ hours later Cocotos received a telephone call from the Bargaining Council (MIBCO) informing her that the employee had been to its Dispute Resolution Centre[4] to lodge an unfair dismissal dispute. Cocotos told the DRC that the employee had not been dismissed but that he had left the premises without permission.

[13] Several days later, having not returned to work, the employee delivered a conciliation referral form to the employer's offices. Cocotos immediately sent a letter to the employee by registered mail. It reads in part:

> "We herewith wish to acknowledge receipt of your notice to refer a dispute to the DRC… We, however, dispute the contents thereof. You were not dismissed on 14 December 2006. You were asked to report to the office to collect a notice to attend a disciplinary hearing, which you refused to do. You then left the premises without clocking out and have been absent without permission ever since. Since you were not dismissed we would urge you to return to work as soon as possible."

[14] The employee did not respond. On 2 January 2007 Cocotos sent him a further letter. It reads:

> "Kindly be informed that you have been absent from work for a continuous period of 14 days… You have also failed to respond to a letter sent to you on 19 December 2006 requesting you to return to work. The company therefore has no other option but to assume you have absconded, and wish to cancel your contract of employment. Your contract of employment has therefore been cancelled as from 14 December 2006… If you have no intention of absconding, you will be required to provide the company was valid reasons for having been absent for the period in question and for not having informed your supervisor of these reasons. Depending on the merits of your case, a hearing will be held to allow you to present your case."

[15] Again there was no response. The DRC conciliation took place on 1 February 2007. The parties reached agreement that the employee would return to work on 2 February 2007. He did so and was called to a

[4] The third respondent.

disciplinary hearing that took place on 9 February 2007. He was dismissed on 11 February 2007.

The arbitration award

[16] At the arbitration, the employee alleged that Cocotos had used racist language towards him. The arbitrator noted that the assertion of racism was made late during the arbitration and was not put to Cocotos by the employee's trade union representative during her evidence. The arbitrator found that the employee fabricated large parts of his evidence. She rejected his version. The arbitrator further found that the employee was disrespectful and rude towards Cocotos; that he refused to obey a reasonable instruction to return to her office; that he embarrassed Cocotos in front of staff and customers; and that he made a deliberate and defiant challenge to Cocotos's authority by walking away from her when she was talking to him in the office and by leaving the premises without permission or authority.

[17] The arbitrator found that the employee did commit misconduct, i.e. insubordination; disrespect; and failing to carry out a reasonable instruction. However, she found that the insubordination was not gross.

[18] Having taken into account the Code of Good Practice: Dismissal, the arbitrator concluded that, although the employee had committed misconduct, the decision to dismiss was unreasonable and unfair in circumstances where it was based on a single incident and the employer had agreed to reinstate him following conciliation at the DRC. She found that the dismissal was substantively unfair.

[19] With regard to the appropriate remedy, however, the Commissioner made the following finding:

> "As to the appropriate remedy I believe that neither reinstatement nor compensation is appropriate in the circumstances of this matter. Attitudes have hardened over time on both sides. In addition the employee's unfounded allegations of racism and other utterances of [George Cocotos] and [Alethea] Cocotos go to his honesty. On a balance of probabilities these utterances were not made and make a future relationship untenable."

[20] The arbitrator thus found that the dismissal was substantively unfair but awarded no relief. The applicants seek to have that award reviewed and set aside, asking the court to award the employee retrospective reinstatement and compensation; alternatively remitting the matter to the DRC.

Evaluation / Analysis

[21] The applicants[5] argue that the arbitrator's award is one that a reasonable decision-maker could not reach.[6] They do not take issue with the arbitrator's findings on the merits, but only with the fact that she did not order any relief. And as Mr *Ngako* pointed out, the LAC interpreted *Sidumo* in *Fidelity Cash Management v CCMA*[7] that it is the commissioner's sense of fairness that must prevail.

[22] The applicants submitted that, in terms of s 193(2) of the LRA[8], reinstatement is the preferred remedy for unfairly dismissed employees, unless one of the exceptions in subsections (a)-(d) applies. That much is trite law.

[23] In this case, the arbitrator applied her mind to the evidence and came to the conclusion that the exception in s 193(2)(b) applies, i.e. that the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. In this regard, she found that attitudes had hardened; that the employee had made unfounded allegations of racism against his employers; and that this is indicative of his dishonesty.

[24] Those conclusions appear to be reasonable from a perusal of the evidence and the arbitrator's credibility findings. Mr *Ngako* could not point to any evidence to the contrary.

[25] What the arbitrator did not address as clearly as she should have, is why the same considerations apply to her decision not to order any

[5] i.e. NUMSA and the employee.

[6] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[77] [2008] 3 BLLR 997; (2008) 29 *ILJ* 964 (LAC).

[8] Labour Relations Act 66 of 1995.

compensation either. It would appear so from a logical and consequential reading of the award ("...neither reinstatement nor compensation appropriate in the circumstances"). She should perhaps have spelt it out in more detail; but that alone does not render the award reviewable (as opposed to appeal).

Conclusion

[26] The award is not one that a reasonable decision-maker could not reach. On appeal, this court may have ordered some relief; but the award is not reviewable.

[27] The employer and the trade union, NUMSA[9], have an ongoing relationship. This is not a matter where I consider a costs award to be warranted.

Order

[28] The application is dismissed.

_____

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

| | |
|---|---|
| APPLICANT: | Xolisa Ngako of Ruth Edmonds attorneys, Johannesburg. |
| FIRST RESPONDENT: | CJ Vermeulen<br>Instructed by Bellingan Muller, Bellville. |

[9] The first applicant.