



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

Case No C912/2010

In the matter between:

Howard Lorenzo Benjamin

Applicant

and

COLCAB

Respondent

Heard: 19/11/2012

Delivered: 9/7/2013

Summary: Claim for automatically unfair dismissal

JUDGMENT

RABKIN-NAICKER J

- [1] Before the commencement of the trial, the applicant (Benjamin) applied for a postponement on the grounds that he did not have legal representation and that his finances would permit him to do so only around 15 December 2012. This application was opposed and I declined to grant the postponement in view of the fact that the matter had been postponed twice before in order for Benjamin to obtain legal assistance.

- [2] On 22 February 2010, Benjamin was issued with a verbal warning for being late for work on 22 February 2010. The verbal warning lapsed on 21 August 2010. On 31 March 2010, he was issued with a written warning for being late for work on 16 March 2010. The written warning lapsed on 30 September 2010.
- [3] On 13 May 2010, Benjamin was issued with a final written warning for being later for work on the 3rd, 4th, 5th, 6th, 7th, 10th and 13th May 2010. The final written warning would have lapsed on 13 May 2011.
- [4] On 15 June 2010 he was issued with a notice to attend a disciplinary enquiry to be held on the 18 June 2010 in respect of allegations of poor time keeping on 2nd, 3rd, 7th, 9th and 14th June 2010.
- [5] The disciplinary hearing was held on 18 June 2010 in the wake of which Benjamin was dismissed. One of the grounds of appeal to the company Benjamin made after his dismissal was that he was victimized, harassed and discriminated against on the basis that certain of the company's management had a grudge and vendetta against him after he had approached the company for a wage increase. He was unsuccessful in his appeal.
- [6] Benjamin alleges that his dismissal from the respondent (the company) was automatically unfair in terms of Section 187 (1)(c), (d) and (f) of the LRA.

Evidence on behalf of the Company

- [7] Mr Alastair Robert Davis (Davis), the machine shop manager of the company testified that the company manufactures refrigerator cabinets. Benjamin worked in the spares department as an assistant together with his supervisor Shireen Hansen and a third employee who died in January 2010. He was a grade 'e' employee according to the grading schedule of the MEIBC Main Agreement.

- [8] Davis had started a disciplinary process against Benjamin in February 2010 because of his late coming. The company's disciplinary code is progressive proving for verbal, then written warnings. Davis referred to a copy of Benjamin's time keeping and leave record which was not in dispute.
- [9] Davis testified that at the disciplinary hearing Benjamin's defence to the charges was that the trains were late and that he had phoned in to tell his supervisor that he was going to be late. On the evidence before him, the disciplinary chairperson found Benjamin guilty of all the specific charges of late coming. The issue of Benjamin's mother's illness raised in the pleadings in the matter before court as a reason for his late coming, was never raised in the disciplinary hearing. Davis said he did recall that in 2010 the company's production director had assisted Benjamin to get his mother into care to rectify his late coming.
- [10] He testified that that to his knowledge Benjamin had never filed a grievance relating to his grading. Nor had he filled in a form to request payment for any work he had done outside of his normal grade duties. Davis denied strongly that he had discriminated against or victimized Benjamin. His dismissal was due to persistent late coming. He had only become aware of Benjamin's unfair labour practice referral to the Bargaining Council after Benjamins' dismissal.
- [11] Mr Burger (Burger) who at the material time was the production manager at the company testified that he used to get regular phone calls complaining that Benjamin was not at work and other employees had to be called to his department. He had called Benjamin one day early in February 2010 and Benjamin had explained he had trouble getting in on time because of his mother's illness. He had told Benjamin to take time off to try and sort out a care home for her.
- [12] Benjamin had raised with him that as he was making crates he should be graded as a carpenter and he had also been involved in glass making. Burger had checked with the MEIBC and was advised that making the packing cases did not constitute carpentry. He said that if Benjamin had done duties such as glass work he could have filled in the requisite form to claim extra pay.

- [13] Burger confirmed he was at the disciplinary hearing and he was not asked about the issue of Benjamin's mother's illness – it was not raised there. He knew that Benjamin had referred an unfair labour practice dispute to the MEIBC regarding the final written warning issued on the 3 June 2010. He denied that this referral had anything to do with Benjamin's dismissal stating that Benjamin had the right to refer such a dispute. It was put to Burger under cross-examination that he should have instructed Benjamin's supervisor to fill in the form. Burger denied this stating that the issues he had raised i.e. the crate-making and glass work with him did not constitute extra work outside of his grade.
- [14] The company also called two witnesses regarding the procedural fairness of the dismissal whose testimony was effectively unchallenged.

Evidence for the Applicant

- [15] Shireen Hansen, Benjamin's former supervisor testified that he had been working on crates and that when Benjamin questioned this the production manager had shouted at him not to make the crates any more. The making of crates was a carpenter's job. She was aware of the form but did not tell Benjamin to fill it in. The workload in the department was too much and she had asked for more staff. She worked with six people now.
- [16] Under cross examination she said she had never seen the MEIBC agreement but to her understanding glass and crate making work was in a higher grade but was part of their job.
- [17] Benjamin testified that when he was employed it was on grade "H" and he was later promoted to grade 'E'. He testified about his mother's illness and the problems this gave him in getting to work on time. In the disciplinary he had explained about her illness and the problems with Metro Rail. He said he was discriminated against and victimized because other times he had been late over and above the 2 days family responsibility leave he had been given, should have also been treated as family responsibility leave.

- [18] He testified that other people who were also late were not treated consistently. When he referred an unfair labour practice dispute to the bargaining council the disciplinary action against him got worse. The company could have been more lenient considering he has a family of seven to look after. He believed that his treatment was due to the fact he had asked for more money. Under cross examination he conceded that Burger had been sympathetic to his situation with his mother. He agreed that between January 21 2010 and June 18 2010 he had been late on 51 occasions. He could not dispute Davis' evidence that he had not been aware of the final written warning until after Benjamin's dismissal.
- [19] Benjamin conceded he had not lodged any grievances. This was because it would not serve any purpose. It was put to Benjamin that at the disciplinary enquiry there was no proof that trains were running late. Benjamin answered that he had said that most employees take earlier trains and sometimes when trains were delayed he took his car. He did not choose to take the earlier train, he had obligations to take his children to school and crèche.
- [20] It was put to Benjamin that he had specifically wanted this matter to be heard in the labour court. He agreed there was a discussion regarding this and that he had been adamant that he wanted it to be heard as a victimization case. He agreed he insisted on this despite the advice of his trade union.

Evaluation

- [21] Benjamin elected to approach this court and was insistent that his dismissal was automatically unfair. On the evidence before court he has not raised a credible possibility that his dismissal was for a prohibited reason in terms of section 187 of the LRA. Benjamin conceded the company could be correct regarding the fact that they did not know about the unfair labour practice referral until after his dismissal. The issue of Benjamin's family responsibility leave for his mother did not feature after February 2010, and had no connection with the disciplinary action taken against him. Given that I do not find that Benjamin has met the evidentiary burden to establish a credible

possibility that his dismissal was automatically unfair, it is not necessary to deal with the question of the proximate cause of his dismissal.

[22] The company argued that the court should award costs against Benjamin who had been specifically warned that these may be ordered against him. Benjamin had been advised by the Legal Aid Board not to approach this court but was insistent nonetheless. Benjamin submitted that he had no income so could not sustain a costs order. He had felt he had something he needed to fight for in order to make up for the suffering his dismissal had caused his family. In these circumstances, on the basis of law and fairness, I decline to make a cost order in this matter.

[23] I order as follows:

[1] The applicant's claim is dismissed.

Rabkin- Naicker J

Judge of the Labour Court

APPEARANCES

For the Applicant: In person

For the Respondent: Mr. G. Cassells Maserumule Inc

LABOUR COURT