THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number: C1083/14

In the matter between:

PICK 'N PAY RETAILERS PTY (LTD) Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION First Respondent

BENNETT, CM N.O. Second Respondent

THE JOINT AFFIMATIVE MANAGEMENT FORUM

obo ISAACS, M Third Respondent

Heard: 3 June 2015

Delivered: 3 December 2015

JUDGMENT

RABKIN-NAICKER J

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[1] This is an opposed application to review an arbitration award under case number WECT13743-14. The second respondent (the Commissioner) found that the dismissal of Margaret Isaacs (Isaacs) was substantively unfair and his award stated that she be reinstated with effect from 3 September 2014, as though the dismissal had not occurred, with continuity of employment and accrual of all benefits other than full remuneration. The sanction of dismissal was substituted by one of unpaid suspension from 3 September 2014 to 15 October 2014.

[2] Isaacs had been employed by the applicant (the company) since September 1993. Since about 2007 she had been employed as a Deli Manager. On 3 September 2014, she was dismissed having been charged with unauthorised consumption of company stock: "in that you consumed cheese in your department on the 9th of the 5th 2014 without authorisation" and the breach of the company's tasting policy in respect of same. She had pleaded guilty to tasting a piece of grated cheese in contravention of the company's 'tasting policy'. The policy provides as follows:

> "Tasting Procedure:
>
> Absolutely no tasting of any company food product is allowed and cannot take place unless the following steps have been strictly adhered to:
>
> - A product is to be shop-used as per the prescribed company procedures; and
> - A Store Manager (or in his absence the person designated to run the strore), must specifically authorize a tasting session to take place and the persons who will participate in the tasting; and
> - The Store Manager (or in his absence the person designated to run the store) is to identify an area for the purpose of tasting; and
> - The Store Manager (or in his absence the person designated to run the store) must be present during the tasting session.
>
> Staff will not be allowed to taste the products of demonstrations or food/drink items on promotion served to customers. These products used for demonstrations and promotions are to be shop-used as per the prescribed company procedure."

[3] In his analysis of the evidence and argument before him, the Commissioner found *inter alia* as follows:

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"There is no doubt that Applicant knowingly broke the rule. She brought no evidence in support of her claim that the cheese was tasteless or that she had received a customer complaint. Although no testimony was led or documentary support submitted, the CCTV footage of 16 May 2014 suggested that the event of 9 May 2014 was not an isolated incident.

These things having been said, the Code of Good Practice: Dismissal, contained in Schedule 8 of the Labour Relations Ac 66 of 1995 as amended, advocates the application, where appropriate, of progressive disciplinary action, noting that not all breaches of rule warrant the imposition warrant the imposition of what, in labour terms, the ultimate sanction. An employer should apply a lesser sanction if that will bring about the desired result, being a sustained change of behaviour/compliance with the rules of the company. I do not overlook that certain behaviours are generally regarded as dismissable regardless of mitigation, for example theft. The courts have endorsed the view that theft is theft and that dismissal is an appropriate approach. I accept that Applicant did not in her mind consider her actions to equate to theft. I also accept Respondent's "a rose by any other name would smell as sweet" argument – it does not matter how one describes Applicant's actions: intrinsically they amounted to unauthorised consumption [in other words theft] of company product.

My problem is that morally I have difficulty in reconciling the severity of the sanction with an unblemished employment record of 21 years' duration. I further have difficulty in simply accepting without doubt that no lesser sanction would have achieved the desired effect; that is to stop the misconduct that is contributing to high shrinkage. The union brought the 2014 Labour Court decision in Pick n' Pay retailers (Pty) ltd v CCMA and others (C566/2011) ("Gelant") to my attention. This case has remarkable similarities to the one before me, involving the unauthorised consumption of company product by a departmental manager of some 27 years unblemished service with the employer. Respondent noted in the matter before me that this court case was the catalyst for the introduction of a formalised tasting policy. Interestingly, the court expressed the same reservations that assail me now, being the appropriateness of the sanction of dismissal. Where these two cases can of course be distinguished is by the existence in this matter of a known formal procedure that did not exist at the time

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of the “Galent” case. Respondent argued both in court and before me that the purpose of the tasting procedure was to avoid the application of initiative by staff, thereby avoiding the potential of free-for –all tasting justified by using one’s initiative that could result if no such policy were in place, with the concomitant result of increasing shrinkage. I accept the legitimacy of the argument but still feel that the slavish imposition of the sanction of dismissal in response to breach of the rule in no more than the application of a zero-tolerance policy.”

[4] The crux of the company’s review grounds is that the Commissioner failed to take all relevant facts and circumstances into account in his decision regarding the substantive fairness of the dismissal, and failed to appreciate that he had to assess whether the company (in the weight that it attached to the gravity of the offence and to the aggravating and mitigating factors) acted fairly. It was submitted on behalf of the company that it is not for the Commissioner to impose his own sense of morality on what an appropriate sanction should be but rather to properly consider the aggravating and mitigating factors taken into account by the employer. In this regard the judgment in **Sidumo** was relied on. It is worth recording the paragraphs cited by the company in respect of the majority judgment:

“[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the

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employer. What is required is that he or she must consider all relevant circumstances……"

[5] On my reading of the award, indeed on its face, the Commissioner accepted the validity and importance of the rule breached given the problems of shrinkage experienced by the company, but not what he refers to as a 'slavish imposition' of the dismissal penalty in respect of its breach. In **Shoprite Checkers (Pty) Ltd v Mzolo**[1] the issue of a 'zero tolerance policy' and a Commissioner's duties to evaluate the fairness of a dismissal were also in issue. The LAC per Landman JA dealt with certain 'general considerations' applicable to cases of this type:

" [17] It is also necessary to make some further remarks as regards dismissal for a first offence ie a "zero tolerance" policy. A dismissal will only be fair if it is procedurally and substantively fair. A commissioner of the CCMA or other arbitrator is the initial and primary judge of whether a decision is fair. As the code of good practice enjoins, commissioners will accept a zero tolerance if the circumstances of the case warrant the employer adopting such an approach.

[18] <u>But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach.</u> The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, a "no go area" for commissioners. A zero tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise designed for the refuse bin. See the incisive contribution by André van Niekerk "Dismissal for Misconduct – Ghosts of Justice, Past, Present and Future" in Le Roux R and A J Rycroft (eds) *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (Juta 2012) 102-119. Commissioners should be vigilant and examine the circumstances of each case

[1] Unreported (LAC 49/14)

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to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees." (my emphasis)

[6] The Commissioner in this case did take account of the serious problem the company was facing, as well as all other relevant circumstances arising from the evidence before him. He found the Company's approach amounted to one of zero-tolerance. He also pertinently considered the fact that this was a first offence, as well as the very long service of the employee. His assessment of the fairness of dismissal as an appropriate sanction cannot be faulted in my judgment, even his his use of the word "morally" was not apposite. The decision is also in line with the concept of proportionality as set out above by the LAC, bearing in mind the scale of the unauthorized consumption by this employee. In addition, the Commissioner did not award full back-pay in the light of what he described "as the seriousness of the misconduct" and recorded the period 3 September to 15 October 2014 as an "unpaid suspension".

[7] In all the above circumstances, I make the following order:

1. The review application is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: The Joint Affirmative Management Forum

Respondent: Bowman Gilfillan Inc

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