
Of interest to other judges

# THE LABOUR COURT OF SOUTH AFRICA,

# HELD AT CAPE TOWN

**Case no: C 527/2018**

In the matter between:

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| **XOLELWA NTANTISO** | **Applicant** |
| and | |
| **THE COMMISSION FOR MEDIATION, CONCILIATION & ARBITRATION** | **First Respondent** |
| **GILL LOVEDAY (*N.O.*)** | **Second Respondent** |
| **IVY MOON 114 (PTY) LTD T/A PICK N PAY BRACKENFELL** | **Third Respondent** |



**Date of Set Down: 11 November 2020**

**Date of Judgment:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 13 November 2020.

**Summary: (**Review – Alleged unreasonableness owing to failure to consider applicant's side of proceedings – layperson – failing to set out grounds in any adequate detail in founding papers – permitted with respondent's agreement to expand on missing details in argument – award not unreasonable – application dismissed)

**JUDGMENT**

LAGRANGE J

Introduction

[1] The applicant in this matter is Ms X Ntantiso ('Ntantiso'), who had worked as a cashier before her dismissal by the third respondent ('PnP'), a PnP franchise holder. The applicant drafted her own papers and represented herself.

[2] The applicant was dismissed for insubordinate behaviour towards her manager when she refused to remove an unauthorised hairpin from her hair after been instructed repeatedly to do so. The arbitrator found that the dismissal was substantively fair. Procedural fairness was not an issue.

[3] In brief, the employer had a policy governing the personal appearance of staff, though the applicant argued she was not aware of it. One aspect of the policy was that hair accessories had to be navy blue or black. On the day in question, the applicant was wearing a light blue hairclip.

[4] Her supervisor noticed this and asked her to remove it, but she refused, pointing out another staff member whose hairpin did not comply with the policy. The supervisor, Ms L Jacobs ('Jacobs') told the other staff member to remove her hairpin too, which the latter did. However, the applicant still refused to remove hers. An altercation ensued and the matter ended in a disciplinary enquiry being convened. I do not intend to deal with the evidence in detail in the judgment except in so far as it might be necessary to address the grounds of review.

[5] It should be mentioned in passing that PnP filed its answering affidavit over two years late, though it had filed a notice of opposition about eight weeks

after receiving the founding papers at the beginning of June 2018. It applied for condonation for the late filing of the answering affidavit. The applicant did not oppose the condonation application. In terms of paragraph 11.4.1 the Labour Court Practice Manual, it is not necessary for a party to seek condonation for the late filing of an answering affidavit unless a notice of objection is filed by the applicant. Accordingly, it is not necessary for the court to entertain the condonation application. In any event, even if the applicant had objected, I would have been inclined to condone the late filing thereof notwithstanding the long delay, for the following reasons.

[6] The explanation for the delay was that the employer organization representative who had represented the employer at the hearing and whose address had been used in the CCMA proceedings anticipated receiving the record. The founding papers had been served on the employer's organization, but the record was served on the employer itself. The employee who received the record did not know that the employer's organization had not received the record. It was only when the notice of set down of the hearing was received late in 2019 that the respondent realized it should have filed an answering affidavit which it then did.

[7] The explanation of the failure of the employee who received the record to follow up with the employer organization representative is unsatisfactory. If she did not know what to do, the obvious course of action was to call the representative and to check-up. Her conduct was grossly negligent. However, considering the merits of the review which are dealt with below, the late filing of the answering affidavit would have been condoned despite this.



The arbitrator's reasoning

[8] The arbitrator's reasoning is set out in summary form below.

[9] The applicant's failure to wear the correct colour hairpin was only a breach of a minor rule governing the wearing of hair accessories. If that was the misconduct which she had been charged with and dismissed for, the arbitrator would not have found her dismissal fair. The arbitrator

emphasised that the applicant was dismissed for being insubordinate and her insubordination was “serious, persistent and deliberate”.

[10] The arbitrator considered but dismissed the applicant’s contention that she was unaware of the policy. On a previous occasion when she had worn the wrong colour hairclip she had removed it without question when the manager instructed her to do so. Moreover, the applicant did not remove it on the second occasion not because she was unaware of the policy, but because she claimed that other cashiers had told her to ignore the policy. When she was told to remove the hairpin she pointed out another staff member with the wrong colour hairpin. Jacobs immediately told that staff member to remove her hairpin too, which the staff member in question immediately did. Even so, the applicant still refused to remove her own and demanded an explanation from the supervisor why she had to.

[11] Jacobs had repeated the instruction several times and an audible altercation arose between them in full view of customers and other staff. The altercation attracted the attention of the store manager who called both of them to his office. When he repeated the instruction, the applicant still refused to remove the hairpin because she felt the manager was victimizing her. She persisted with this argument at the disciplinary inquiry and stated there that she would still refuse to remove the hairpin in future if instructed to do so by the manager in question.

[12] The applicant said she felt that she needed the hairpin in the same way that she needed her glasses. The arbitrator considered this argument and her claim that other cashiers had worn hairpins without consequences. Apparently the hairpin was used to scratch an itchy scalp. The arbitrator found that the colour of the hairpin was irrelevant to what it was used for. Simply wearing the correct colour hairpin would have resolved the problem. The arbitrator accepted that Jacobs could not be constantly policing every cashier on duty to see whether they complied with rule, but when she did notice someone was not complying, she would instruct them to remove it.

[13] There was also no prior history with the manager to suggest that Jacobs was targeting the applicant. A previous written warning issued to the applicant for insolence had nothing to do with Jacobs and the applicant had

conceded that before the incident which led to her dismissal she had a good relationship with the manager. The arbitrator concluded that the applicant's real problem was with a rule she did not agree with.

[14] Further, the arbitrator found that the applicant must have realized that her defiant refusal to carry out the instruction even when it was issued a number of times was putting her job at risk. She could easily have complied. It was not merely a failure to carry out a reasonable instruction but her deliberate and persistent challenge to Jacobs' authority to issue such an instruction which took place in full view of customers and other staff members and intentionally undermined company discipline. The applicant also admitted shouting at the manager in the store manager's office and refusing to follow his instructions to remove the hairpin.

[15] The arbitrator found that the applicant's expectation that she would only receive a final written warning because she only had a written warning for previous insolence misconceived the seriousness of her insubordination: her defiance was serious persistent and deliberate and the employer could not be expected to tolerate it.

[16] In considering the fact that the applicant was a breadwinner, the arbitrator found that her misconduct was serious enough to justify her dismissal. As the arbitrator expressed it,

> '[40] … The applicant's refusal to carry out a very simple instruction shows her defiant attitude to the authority of her manager, which she repeats when the store manager instructs her to remove the hairpin. This was preceded by her written warning for being insolence to a different manager that same month. The applicant remained obstinate and argumentative at the disciplinary inquiry and at arbitration never once conceding that she may have been in breach of the company's uniform policy.
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> [41] To have been so recklessly insubordinate while on a written warning for insolence towards another manager, suggests an entrenched pattern of defiant behaviour towards management, which, from the company's point of view makes a continued employment untenable.'

The review proceedings and grounds of review

[17] The applicant only sent out the grounds of review in the broadest terms and provided no factual detail for the grounds she relies on. In short, the applicant feels the award should be set aside because the arbitrator did not state her side of the story and that some of the things stated in the award she never said, nor is there any proof that she said those things. Expressed differently, the applicant is contending that the arbitrator misconstrued the evidence and, or alternatively, accepted that she did say certain things when there was no evidence to justify that. However, in her founding affidavit, the applicant did not provide any detail about what she was referring to.

[18] In the absence of such detail, PnP presented a detailed defence of the arbitrator's reasoning in an attempt to cover all possible claims the applicant could make in support of the grounds of review she mentions.

[19] The applicant has conducted the review application herself and a certain allowance must be made for the way she has articulated her grounds of review, which would not be acceptable if she were legally trained. *Mr Bell*, who appeared for PnP was agreeable to allowing the applicant to expand on the missing detail in her grounds of review at the hearing, even though PnP could simply have asked the court to set aside the review application because insufficient factual details of the grounds of review were set out in the applicant's founding affidavit.[1]

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[1] *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others* 2007 (5) SA 146 (SCA ) at 175, para [98] and more particularly *Comtech (Pty) Ltd v Commissioner S Moloney and others* (DA 12/05 dated 21 December 2007, unreported), where the LAC emphasised the importance of setting out the factual basis of the review in the founding papers:

> '[15] The difficulty with the appellant's case in this regard relates to whether the founding affidavit contains the factual grounds required by Rule 7A(2)(c) of the Rules of the Labour Court. Rule 7A(2)(c) of the Rules of the Labour Court requires a party who applies for a review, such as the appellant in this matter, to deliver a notice of motion that must be supported by "an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside." Rule 7A requires the notice of motion to call upon, in this case, the commissioner "to show cause why the decision or proceeding should not be reviewed and corrected or set aside."'

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[20] In court, the applicant advanced the following more detailed basis for her grounds of review, which may be summarised as:

20.1 The arbitrator failed to consider that the induction document concerning the uniform policy of PnP was only used for the first time in the arbitration proceeding and she queried its validity.

20.2 The arbitrator failed to consider that she was allegedly dismissed just for wearing the wrong hairpin.

20.3 The arbitrator failed to consider that PnP had allegedly been inconsistent in enforcing the dress code relating to scarves and hairpins.

20.4 The arbitrator failed to deal with her claim that she was victimized for querying the use of cashiers' passwords by the supervisors.

20.5 She ought not to have been dismissed for a first offense of disobeying the dress code.

20.6 The arbitrator failed to consider that the altercation between her supervisor, Ms Jacobs, allegedly did not take place in front of other staff and customers.

20.7 Lastly, the arbitrator failed to consider that she had a young child to support.

[21] Abandoning his heads of argument, which were far more extensive in covering issues not even raised by the applicant, *Mr Bell* addressed his argument to the points raised by the applicant in court.

[22] In relation to the induction document, he pointed out that the applicant had effectively conceded that she knew of the rule about the required colour of hairpins by removing a hairpin which was the incorrect colour on a previous occasion, without question. Moreover, when the incident between her and Jacobs occurred, she did not challenge the instruction to remove it on the basis that she was unaware of such a rule, but because she felt the rule was not enforced consistently against other staff. In the circumstances, even if the induction document had not been introduced at the arbitration, the arbitrator was justified in concluding that the rule existed and that the applicant knew what the rule was. It should be mentioned that nothing

prevents an employer from raising evidence in an arbitration hearing for the first time, which it did not raise in the initial disciplinary inquiry, because the arbitration hearing is considered to be a fresh inquiry.[2]

[23] On the question of the reason for the dismissal, the arbitrator repeatedly emphasized that the misconduct the applicant was dismissed for was serious, persistent and deliberate insubordination. It was not about wearing the incorrect hairpin, but about refusing to remove its despite being requested repeatedly to do so and challenging Jacobs' authority in front of other staff and persisting even when the store manager instructed her to comply with the policy. In short, it was the applicant who made a mountain out of a mole hill by deciding to take a stand against complying with the rule. If she had simply removed the hairpin that she had on a previous occasion, the matter would in all probability have ended there without any disciplinary action being taken. Regrettably when the applicant had an opportunity to back down when the store manager repeated the instruction, she would not do so. Even at the arbitration, the applicant made it clear she would do the same thing again.

[24] In relation to the issue of inconsistent treatment, it is readily apparent that the arbitrator did not ignore this issue, but accepted that the dress code could not be rigidly policed every minute of the day. Jacobs also did not take disciplinary action when she noticed an infringement, but simply told the employee in question to remove the item worn.

[25] To the extent that the applicant believes that she was being singled out by Jacobs, the arbitrator also dealt with this in her award. Firstly, the arbitrator found, which was not disputed in the proceedings, that Jacobs and the applicant had a good working relationship until the incident. Secondly, Jacobs was not involved in the incidents that led to the applicant being issued with her first warning for insolence. That arose in relation to another manager. At the review hearing was, the applicant repeated what she had said in the arbitration, namely that it was after she was issued with this warning, which arose from her querying the use of cashiers' passwords by

[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at 34, para [18].

supervisors, that Jacobs' attitude towards her changed. The arbitrator did not specifically refer to this except to say that if the applicant believed she was being victimized she could have lodged a grievance. However, in any event, it was only when the applicant testified that she made the claim about Jacobs' alleged change in attitude towards her. She never gave Jacobs the opportunity to dispute this claim when she questioned Jacobs. Accordingly, the arbitrator could not have attached much weight, if any, to this evidence of the applicant, which was not tested with Jacobs. The arbitrator's observation is worth recording in relation to the claim of victimisation:

> 'It appears that the applicant had less of a problem with Jacobs' management style but with a rule she did not agree with and which she regarded as unenforceable against her.'

[26] The arbitrator also dealt with the applicant's expectation that she would only get a warning for not complying with the dress code. As mentioned, above the misconduct she was charged with concerned her defiant refusal not merely to comply with the code but to comply with repeated instructions from managers to do so and the circumstances in which that refusal was expressed.

[27] On the question of where the altercation took place, the applicant's own version was that Jacobs had shouted at her to remove the hairpin and that was one of the reasons she refused to do so. Jacobs denied this but agreed that an altercation had arisen after the applicant did not comply with her request to remove the hairpin. Jacobs' evidence that this had taken place in the hearing of other staff and customers was not disputed during the arbitration hearing. Nor was the evidence that it was the altercation between the two of them that attracted the store manager's attention. There was more than adequate evidence for the arbitrator to believe that the confrontation between Jacobs and the applicant did take place in the presence of employees and customers. It must also be mentioned that when the applicant gave her evidence at the arbitration she claimed that the reason she had not removed the pin was that Jacobs had shouted at her and had not approached her nicely, which amounted to a new and different explanation for her conduct, which was never raised at the disciplinary inquiry. The applicant's explanation for this was simply that the issue of

shouting had not come up at the disciplinary inquiry, but clearly she could have raised it if it was something that she relied on to explain why she had adopted a challenging attitude towards Jacobs on that occasion.

[28] The arbitrator specifically mentioned the fact that the applicant had dependents in concluding her award. It is clear from this and other references in the award that she was fully aware of the applicant's situation. What clearly outweighed this, in the arbitrator's mind, was the fact that the applicant remained obstinate in her belief that she was entitled to question the right of her supervisor to give her such an instruction and that she had a defiant attitude towards her manager, which she still maintained. It was plainly the seriousness of her defiance and the fact that she remained convinced that she was entitled to behave the way she did that persuaded the arbitrator that dismissal was an appropriate sanction.

[29] The court on review does not decide if it would have made the same decision as the arbitrator, but simply whether an arbitrator could reasonably have reached the findings that are contained in the award, on the evidence that was before the arbitrator.

[30] In this case, I am not persuaded that the arbitrator's conclusion that the dismissal of the applicant was fair was not a conclusion any arbitrator could reach on the evidence before her.

[31] In the circumstances the review application must fail.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

**Lagrange J**
**Judge of the Labour Court of South Africa**

**Representatives -**

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| **For the Applicant:** | In person |
| **For the Third Respondent:** | L Bell of C & A Friedlander Inc |