

**IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN**

Case No: D620/2019

Not Reportable

In the matter between

GUD HOLDINGS (PTY) LTD

Applicant

And

DISPUTE RESOLUTION CENTRE

First Respondent

COMMISSIONER R SHANKER

Second Respondent

ANESH SINGH

Third Respondent

Heard: 25 June 2020

Delivered: 26 August 2020

Summary: Review – commissioner to properly evaluate evidence – missed important evidence – such evidence enough to return guilty verdict on charges 3 and 4. All three charges interrelated – to be treated as one for sentence - written warning for other misconduct issued after subsequent misconduct committed - not to serve as previous conviction.

JUDGMENT

CELE J

Introduction

- [1] The Applicant seeks to review the arbitration award dated 13 March 2019 issued in this matter by the second respondent. None of the respondents opposed this application.

Factual Overview

- [2] Third Respondent was employed at the Applicant since 1 February 2011 in the manufacture of filters for the automotive industry. He worked under the supervision of Mr Jayson Apsey. The company Director was Mr Blink. The employees were made responsible for endorsing any leave they took into the computer system meant for this purpose, known as the ESS system. If no leave is taken, the system shows blank entries. Such blank entries are used to pay employees as it suggests that no leave was taken for that period. While the Executive Secretary, Ms Kerry Grady, is responsible for the final check of the leave system, employees remain responsible, as she cannot check every employee.
- [3] On 24 January and on 28 February 2018, Ms Grady issued email correspondence to the staff, reminding them to update their leave standing in the system. The applicant checked the leave register and decided to charge the third respondent with five acts of misconduct. An internal disciplinary hearing took place on 11 June 2018. He was found not guilty of charge 1 and guilty of the other four charges and a sanction of dismissal was imposed. He was not successful in the internal appeal. On 25 June 2018, the applicant finally dismissed him.
- [4] His matter went to arbitration before the Second Respondent who found his dismissal substantively unfair as the charge that the Second Respondent

found him guilty of was not the same or similar to offences in the Final Written Warning on his file. There were four charges before Second Respondent which only charges 3, 4 and 5 were continued with. The second charge was abandoned. The Second Respondent found Third Respondent not guilty on Charges 3 and 4 but guilty of charge 5. The Second Respondent awarded 4 months compensation to Third Respondent in the amount of R129 388.00 as he earned R32 347.00 per month. Procedural fairness was not in dispute. It remained common cause that the third respondent had a final written warning issued on 8 February 2018 for three charges. The warning was valid for twelve months from the date of issue. The Applicant takes issue with the Arbitration Award. The main issue is whether in February 2018 and June 2018 Mr Apsey spoke to the third respondent, advising him to update his leave record.

[5] The three charges arbitrated on were described as:

“Charge 3: failure to obey or carry out a reasonable and lawful instruction by not submitting a request for unpaid leave despite being asked twice to do so. This for not appearing for work the day after being found to be under the influence of alcohol. 06/02/18

Charge 4: misconduct/dishonesty for not submitting a request for unpaid leave after being found to be under the influence of alcohol. 05/02/2018.

Charge 5 misconduct for no clocking in or out of work and/or not submitting an annual leave/sick leave request in accordance with company policy, company rule and/or regulations 06/12/2017, 04/01/2018 and 05/01/2018”

Analysis

[6] The commissioner was here called upon to conduct a proper enquiry, to evaluate the evidence properly and to reach a decision, which a reasonable

decision maker could reach. The commissioner correctly assessed the overriding reason for dismissal as being pegged on previous convictions and therefore the existence of a final written warning. If it were not for the final written warning, the misconduct in charges 3, 4 and 5 would not attract a sanction of dismissal. The third respondent would be entitled to progressive discipline. Very importantly, the commissioner found that the final written warning was issued on 8 February 2018. Necessarily therefore, the charges for which the third respondent should be dismissed, must have been committed after 8 February 2018. The charges in count 3 and 4 are dated 06 February 2018 and 05 February 2018 respectively. The final written warning was issued after the charges were committed. The final written warning is accordingly not a previous conviction to these charges. The warning has a purpose of deterring the employee from re-offending. As he had committed the misconducts, assuming he was guilty of the 3rd and 4th charges, when the warning was issued, the warning could not stop him from committing these charges. Put differently, after the issue of the final written warning, the third respondent did not commit any misconduct for which he was charged and dismissed.

[7] The applicant suggests that the third respondent should have been found guilty of charges 3 and 4 as well. As with count 5 these charges relate to a failure to submit a request for unpaid leave. Even if he were guilty of these charges, they are so closely related to one another that they would have to be treated as one for sentence purposes. The enquiry whether he is guilty of them can only serve an academic purpose. The sanction would not change. Accordingly, the decision, which the commissioner arrived at, is the decision that a reasonable decision maker could reach.

[8] Academic as I have found the enquiry to be, about the 3rd and 4th charges, it is often said erring on the side of caution is recommended. In his evidence, the Third Respondent conceded that Mr Apsey spoke to him in around

February. He did not suggest what else, other than a reminder to update his leave standing; Mr Apsey could have spoken to him about. The commissioner missed this part of the evidence. Had he not missed it, he would have found that the Third Respondent was reminded of his obligation to update the leave register. In addition, it remained undisputed that the employees had an obligation, on their own to update the register. They did not have to rely on reminders, which they nevertheless received from time to time. Further, the Third Respondent tested positive of liquor on 5 February 2018 and was sent home. He had to include this day in his seek leave. The result is that at arbitration, the applicant proved the Third Respondent to be guilty of charges 3 and 4. For charge 4, only misconduct and not dishonesty was proved as failure to submit a request for unpaid leave was proved, with no underlying act of dishonesty. As already alluded to, all three charges are very similar in nature. They emanate from the same set of facts and ought to have been treated as one for sentence purposes.

[9] I am accordingly bound to issue the following order:

1. The arbitration award in this matter is reviewed and corrected.
 2. The third Respondent was also guilty of charges 3 and 4, in addition to the 5th charge. These charges did not justify a dismissal sanction. Therefore, the dismissal of the Third Respondent was unfair.
 3. The sanction of compensation imposed was, in the circumstances, fair.
 4. No costs order is made.
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Cele J.

Judge of the Labour Court of South Africa.

APPEARANCE:

For the Applicant: Mr C Hufkie

Instructed by McGregor Erasmus Attorneys.

For the Respondent: No Appearance.

LABOUR COURT