REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: JR 1717-11

In the matter between:

CHICKEN MANAGEMENT SERVICES (PTY) LTD t/a KENTUCKY FRIED CHICKEN	**Applicant**
and	
THE BARGAINING COUNCIL FOR THE FOOD RETAIL, RESTAURANT, CATERING AND ALLIED TRADES	**First Respondent**
COMMISSIONER E MAREE (*N.O.*)	**Second Respondent**
CUSA obo VALLERY KOMANE	**Third Respondent**

Heard: **15 February 2013**

Delivered: **18 February 2030**

Summary: (Review –unopposed-dismissal for removal of staff meal-dismissal fair-dishonesty ignored by arbitrator-remission not appropriate where parties had agreed to argue sanction without evidence).

JUDGMENT

LAGRANGE, J

Background

[1] The employee in this matter was a member of a team working at a fast food outlet. The company provided 'staff meals' to employees, but the provision of these meals were subject to stringent conditions as it was clearly the intention that the employees should consume the meal whilst at work. The employee was charged with having a staff meal in her bag when going home at the end of her shift. This entailed a breach of two rules governing staff meals, namely:

> *"2.4 If an employee chooses not to eat the meal during their break, then that employee forfeits his right to their meal for that shift.*
>
> *2.5* ***No staff meals may be removed*** *from the company premises and may not be taken home after the end of a shift."*

(Original emphasis)

The Award

[2] It was common cause that the employee was guilty of the charge and the only question to be determined at the arbitration was whether the sanction of dismissal was appropriate. The arbitrator found that the sanction was too harsh and reinstated the employee retrospectively. From the award it is clear that the arbitrator was of the view that the offence amounted to non-compliance with company rules/procedures and in terms of the employer's code only warranted a written warning. Although it was clearly the arbitrator's intention to impose such a warning, she appears to have forgotten to have included this in the reinstatement order.

[3] In deciding that dismissal was inappropriate as a sanction, the arbitrator considered the employees five years service, the fact that she had a clean record for the purposes of the enquiry and that the employer itself did not

consider a first offence to be worthy of a warning. She also appears to have been mindful of the general level of unemployment in the country and was reluctant to add to that when a warning as per the code could have corrected the errant behaviour.

The review

[4] The employer has now brought the arbitrator's award on review. Strangely the application was unopposed, even though the employee was represented by a union and given that the employee had succeeded in the arbitration. The fundamental complaint the employer has with the award is that the Commissioner failed to appreciate that the misconduct entailed dishonesty warranting dismissal.

[5] In the argument made by the union representative, he voluntarily conceded that if rule 2.5 had been contravened that would have entailed dishonesty, but because it wasn't actually removed 2.5 had not been contravened. Unfortunately, because the matter was simply argued and there was no evidence, this only served to confirm the employer's argument that a breach of 2.5 was not merely a breach of the rules relating to staff meals but also was an active dishonesty on the employees part.

[6] Mr I Mahomed, who appeared for the employer argued that this case was practically indistinguishable from the facts in **Rainbow Farms (Pty) Ltd v CCMA & others [2011] 5 BLLR 451 (LAC)**. That case concerned an employee who had taken a litre of milk through the first exit point on his way home, though he still had to pass through a security checkpoint before he left the premises. The milk was issued free to employees to drink while on duty. The court found that the fact that he was in possession of the milk and was in the course of leaving the premises was sufficient to establish that he was guilty of an authorised possession. Waglay JA, as he then was, writing for the Court stated:

> *"I am minded to agree with the submission because once Ngubane had left the kitchen and the internal security gates, he had the necessary intention to remove the milk from the premises*

of the appellant which would be sufficient to constitute unauthorised removal of the milk."[1]

[7] Further, the LAC clearly construed the employee's intention to remove the property as a dishonest act in the absence of evidence that the employee was justified in believing that the practice of removing unused milk was an acceptable exception to the rule.[2] In this instance the arbitrator was reliant on the submissions of the parties, and the fact that the meal was in the employee's bag on the face of it indicates that she was not intending to disclose that she was taking it home with her. It is also plain that the arbitrator failed to have regard to the fact that both the firm and the union were in agreement that a breach of rule 2.5 would entailed dishonesty.

[8] Since dishonesty has always been accepted as a sound justification for a fair dismissal, I have little alternative but to follow the principle set down in the *Rainbow* decision, despite some misgivings about whether the employee realised that breaching rule 2.5 would lead to dismissal. However, as mentioned the absence of testimony by the employee on what she believed when she put the meal in her bag, or what she believed would follow on an infraction of the rule, I must accept that it was common cause between the parties that her intent was dishonest.

[9] In the circumstances, the arbitrator overlooked an important, and in this case decisive, issue material to the question of determining the appropriateness of the sanction of dismissal, and the award must be set aside and substituted with a finding that the dismissal was substantively justified. This would not be an appropriate case for remission because the parties had agreed not to lead evidence on the question of sanction, but merely to argue it, and to remit it for a fresh hearing on this issue, might undermine that agreement.

Order

[10] The arbitration award of the second respondent issued on 27 June 2011 under case number of PC 4023-2011 is reviewed and set aside.

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[1] At 450,[25].

[2] At 450-1,[37]-[38].

[11] No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCE

APPLICANT: Mr I Mahomed of Routledge Modise t/a Eversheds

FIRST RESPONDENT: