



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: PR 174/2013

In the matter between:

CECIL NURSE (PTY) LTD

APPLICANT

and

B BUSAKWE NO

FIRST RESPONDENT

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

SECOND RESPONDENT

TELA, NE

THIRD RESPONDENT

Heard: 24 April 2015

Delivered: 29 April 2015

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the first respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner held that the third respondent, the applicant in the arbitration proceedings under review, had been unfairly dismissed. The commissioner awarded compensation amounting to the equivalent of three months' remuneration.
- [2] The award was issued after the third respondent had challenged her dismissal by the applicant on charges of dishonesty and gross negligence. At the arbitration hearing, the branch manager of the applicant testified as to the applicant's policy on the use of the telephone. Employees have a monthly allowance of R25 for private calls. Any private calls over and above this amount would be paid for by employees. The system depended on honesty – employees were provided with a computer printout and were required to mark their private phone calls. Any amount in excess of the monthly allowance would then be deducted from each employee's salary. In the third respondent's case, on or about 1 July the applicant submitted her disclosure of private phone calls made in June 2013. She failed to disclose two private calls. On 23 July 2013 she was requested to recheck the telephone record sheet, which she confirmed as correct. The private calls that she omitted to mark as private comprised one of 14 minutes duration, the other 2 hours and 16 minutes. The value of the calls amounted to some R130. The witness also testified that on 18 July 2013, the applicant was instructed to deal with the submission of tender documents with a deadline of the afternoon of 22 July 2013. The applicant failed to complete the tender document, with serious consequences for the applicant.

- [3] It is not disputed that during April 2013, the applicant had been counselled for the same offence and advised specifically that in the event of a repetition, action would be taken against in terms of the disciplinary code.
- [4] The third respondent also testified and sought to explain the circumstances that surrounded to inability to meet the deadline for the submission of the tender. In regard to the charge relating to the use of the telephone, the third respondent admitted to having abused the telephone policy, but denied that she had been dishonest.
- [5] In his analysis of the evidence, the commissioner accepted that all of the charges except that relating to the use of the telephone ought properly to have been the subject of progressive discipline (on the basis that the third respondent had not acted negligently or deliberately refuse to follow an instruction) but that the one charge that potentially attracted the penalty of dismissal, even for a first offence, was that of dishonesty. In this regard, the commissioner came the following conclusion
19. I accept that the failure of the applicant to submit an accurate telephone record amounts to dishonesty. The record she submitted was not truthful. However, I do not believe that under the circumstances dismissal should have followed. The applicant conceded that the record was inaccurate. She pleaded guilty to the charge. She had remorse in my view. It would be unfair under the circumstances to follow the counselling 15 April 2013 with dismissal.
- [6] At the hearing of the present application, the primary ground for review advanced by the applicant was that the commissioner committed a gross irregularity and/or acted unreasonably insofar as he found that notwithstanding that the third respondent had committed an act of dishonesty, a sanction less than dismissal was fair in the circumstances. This is particularly so, contended the applicant, in circumstances where as in the present instance the employee had admitted that the employment relationship had been irreparably broken down on account of her conduct and where the applicant's disciplinary code, providing

as it does a penalty of dismissal for dishonesty, was ignored by the commissioner. Further, the applicant contends that the commissioner failed to take into account the fact that the third respondent occupied a position of trust where she dealt with cash and tenders and that she had been employed by the applicant, as the commissioner records, for 'a very short period'.

- [7] In the assessment of an appropriate sanction for misconduct that is either admitted or found to exist, the approach to be adopted by commissioners was affirmed in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) BCLR 158 (CC), where the Constitutional Court said the following:

[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 pays 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, with 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. The commissioner has 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 they commissioner is not required to defer to the decision of the employer. What is required is that he was she must consider all relevant circumstances.

- [8] In the present instance, in determining that a penalty short of dismissal was warranted for the third respondent's dishonesty, the commissioner appears to have taken into account the fact that the third respondent pleaded guilty to the charge of dishonesty, that she showed remorse and that the telephone records were only brought to her attention some two weeks after the incident involving the tender. The commissioner goes on to conclude, as indicated above, that 'In

view of these factors are found that the sanction of dismissal imposed on the applicant was harsh'.

- [9] The commissioner's reasoning does not represent an accurate reflection of the evidence before him. The third respondent's evidence was that she 'eventually admitted', prior to the disciplinary hearing and in the face of an initial denial, that the two phone calls were private. Her main contention at the hearing was that the applicant ought to have afforded her a further warning. The delay of some two weeks between the availability of the print out of telephone calls made and the charge brought against the third respondent was not significant and there is no basis on the evidence to read in, as the commissioner appears to have done, some conspiracy against the third respondent that linked the telephone incident with that of the tender. There can be no doubt from the material before the commissioner that the third respondent was aware that she was required to mark all private calls, and that she failed to mark the calls in question. It is also not disputed that the third respondent was counselled for the same offence during April, and that she was aware that the consequence of committing the same offence would be disciplinary action.
- [10] More fundamentally though, it is apparent from the terms of the award that the commissioner failed to consider any of the applicant's interests, as he was obliged to do. Nor is there any indication that he considered the long established rule applied in this court and by the Labour Appeal Court, i.e. that the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, such as long service and a clean record, against the sanction of dismissal in cases of dishonesty. (See, for example, *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 9 BLLR 838 (LAC), where the LAC referred with approval to and applied *Standard Bank SA Limited v CCMA and others* [1998] 6 BLLR 622 (LC):

It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee...A breach of this trust in the form

of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it.’

- [11] The applicable test requires a commissioner to act impartially and to consider all of the relevant facts and circumstances; those that serve to aggravate as well as those that serve to mitigate. In this way, the balancing of interests as between employer and employee reflected in the *Sidumo* approach, and the fairness to both that it requires, can be achieved. In the present instance, the commissioner patently failed to identify and balance any interests other than those that served to advance the third respondent’s case and thus in my view, committed a reviewable irregularity. His limited and ultimately partial enquiry had the result of a decision to which a reasonable decision-maker could come on the available evidence.
- [12] There is little point in remitting the matter for rehearing. The record is complete and the court is in as good a position as any other commissioner to make a ruling on the merits. Having regard to the third respondent’s short period of service, the gravity of the offence, the third respondents admission that the relationship between her and her employer was irreparable and given particularly the fact that she had been warned some three months prior to the incident that a repeat offence would attract disciplinary action, the commissioner’s decision should be substituted with one to the effect that the third respondent’s dismissal was substantively fair. Also relevant is the approach to be adopted in the case of offences involving dishonesty, to which I have referred above. The applicant did not pursue the issue of costs and in those circumstances, I intend to make no order as to costs.

For the above reasons, I make the following order:

1. The arbitration award issued by the first respondent under case number ECPE 3764 – 13 dated 7 October 2013 is reviewed and set aside.
2. The award is substituted by the following:
‘The applicant’s dismissal was substantively and procedurally fair’
3. There is no order as to costs.

Andre van Niekerk

Judge

REPRESENTATION

For the applicant: Adv F Venter, instructed by Ferreira Attorneys

For the third respondent: Ms E van Staden, Legal Aid SA