

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1153/08

In the matter between:

MUNNIK BASSON DAGAMA ATTORNEYS

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION

First
Respondent

ROBERT MUDAU N.O.

Second
Respondent

BIANCA PADAYCHEE

Third
Respondent

JUDGMENT

FRANCIS J

Introduction

1. The third respondent was employed by the applicant. After she was dismissed, she referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and arbitration. The second respondent (the commissioner) found that her dismissal was substantively fair but procedurally unfair and awarded her three months' compensation.
2. The applicant brought an application to review the commissioner's finding that the dismissal was procedurally unfair. The third respondent brought a condonation and review application to review the commissioner's finding that the dismissal was substantively fair. Her condonation application was dismissed by Molahlehi J.

3. This judgment deals with the applicant's application for review which was opposed by the third respondent.

The background facts

4. The applicant conducts business as a debt collection agency. The third respondent was employed by the applicant as a letter administrator on 1 March 2007. On 7 September 2007 she was charged with the following misconduct:

“ NATURE OF COMPLAINT

1. *failed to activate the letters for ASC WW VISA 2 (498) and ASC Homechoice (499);*
 2. *failed to correct the PTP due date on a Metropolitan PTP letter;*
 3. *failed to approve the test data letter samples provided by Laser Facilities facility proofs on the 7th and 8th August 2007;*
 4. *failed to identify and rectify the errors in the Botswana letterhead.”*
5. The disciplinary hearing proceeded before the chairperson for three days. At the commencement of the second day, the applicant's representative brought an application to amend the charge sheet by categorising the four counts of alleged misconduct as gross negligence. The representative said that an error had occurred in the preparation of the notice to attend the disciplinary enquiry in that the nature of the charges had not been fully described. The charges were not described as 'gross negligence. She requested the chairperson to supplement the description of the charges by inserting the following line above the specific charges: *“You are charged with gross negligence in that you ...”*. The

third respondent objected to the proposed amendment. The chairperson granted the amendment to the charge sheet since the previous evidence had dealt with the particular allegations of a failure to perform certain tasks, and the evidence would probably not have differed had the charge sheet labelled the failures as ‘gross negligence’ from the outset. He offered both parties an adjournment to consider their position, and if necessary to present any further evidence that may have become relevant due to the labelling of the charges as gross negligence. Both parties elected not to adjourn but to continue with the hearing. Further evidence was then presented. The hearing continued, and eventually the third respondent was found guilty of the four charges of misconduct. After considering aggravating and mitigating circumstances the chairperson dismissed the third respondent on two weeks notice.

6. The third respondent thereafter referred an unfair dismissal dispute to the CCMA. After evidence was heard, the commissioner issued an award and found that the dismissal was substantively fair but procedurally unfair and awarded her three months compensation.

The grounds of review

7. The applicant felt aggrieved with the commissioner’s finding on procedural unfairness and brought this application. The applicant contended that the award is defective since it contains a finding of procedural unfairness and this portion stands to be reviewed and set aside in terms of section 145 of the Labour Relations Act 66 of 1995 (the Act) on one or more of the following grounds:

- 7.1 the commissioner’s finding of procedural unfairness is not rationally justifiable, having regard to the evidence placed before him at the arbitration and the reasons

contained in his award; and/or

- 7.2 the commissioner committed a gross irregularity in his capacity as commissioner *inter alia* in that he failed to apply his mind to the evidence before him; and/or
- 7.3 the commissioner exceeded his powers by awarding the third respondent three months' remuneration as compensation in circumstances where the award of such compensation was neither just nor equitable.

Analysis of the evidence and arguments raised

8. The main issue to be decided on review is whether the commissioner's finding that the change of the charge sheet rendered the dismissal procedurally unfair, is reviewable. The third respondent contended that the commissioner did not commit any reviewable irregularity and did not exceed his powers as alleged by the applicant. Further that the chairperson of the disciplinary hearing was impartial.
9. It is trite that in civil proceedings, amendments to pleadings and documents can be sought at any stage of the proceedings. An amendment may also be granted at any stage before judgment on such other terms as to costs or other matters as the court deems fit. An amendment may also be allowed on appeal where no prejudice would thereby be occasioned for instance where the issues sought to be introduced by the amendment have been fully canvassed at the trial. In this regard see *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 408; *David Hersch Organisation v Absa Insurance Brokers* 1998 (4) SA 783 (T) at 787 and *Tolstrup NO v Kwapa NO* 2002 (5) SA 73 (W) at 77-78. The granting or refusal of an application for an amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and

circumstances before it. An amendment will be allowed where this can be done without prejudice to the other party. In this regard see *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T) at 222B-D and *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE) at 598I-J.

10. The principles referred to in paragraph 9 above applies equally in labour matters. Nothing prevents an employer to amend the charge sheet before a finding is made. The amendment sought and granted by the chairperson of the disciplinary hearing was to categorise the charges as gross negligent. The commissioner in the award did not find that the correction of the error in the notice of enquiry changed the enquiry, severity and seriousness of the charges against the third respondent. He found that the dismissal was procedurally unfair on the following basis:

“3.3 The next question to deal with is that of procedure. That is whether or not the dismissal was effected in accordance with a fair procedure. The applicant argued that the amendment of the charges after the evidence was led by both parties rendered the disciplinary hearing to be procedurally defective. I share the same view. This action by the chairperson seems to confirm the applicant’s submission that he was not impartial.”

11. I share the sentiments expressed by Van Niekerk AJ (as he then was) in *Avril Elizabeth Homes for the Mentally Handicapped v CCMA & others* (2006) 27 ILJ 1644 (LC) at 1651-1652:

“.....

The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The

memorandum stated the following:

‘The draft Bill requires a fair, but brief, pre-dismissal procedure

[It] opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee.

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex ‘charge-sheets’, requests for particulars, the application of the rules of evidence, legal arguments, and the like.”

12. It is clear from the evidence led at the arbitration proceedings that the applicant had on the second day of the disciplinary proceedings brought an application to amend the charge sheet. The applicant’s representative explained how the error came about. It centred around a categorisation of the charge sheet to read ‘gross negligence’. The third respondent had objected and after arguments were heard, the amendment was allowed. The labelling of particular charges of misconduct as gross negligence did not in any way add to the complexity or substance of the charges. The focus must always be in the factual allegations in the charge sheet, and not their categorisation. The chairperson of the disciplinary hearing afforded both parties an opportunity to address him on the proposed amendment. He allowed them to adjourn to consider their position and to present any further evidence should they wish to do so, following the amendment to the charge sheet. The position would have been different if the chairperson did not allow the parties to make representation or to lead further evidence.

13. It is clear that the finding by the commissioner that the amendment to the charge sheet caused procedural unfairness, suggests that he misunderstood the test for procedural fairness in the disciplinary hearing and amounts to a material error of law which constitutes a reviewable irregularity and has exceeded his power. In this regard see *Telcordia Technologies Inc v Telkom Sa Ltd* (2007) (3) SA 266 SCA at paragraphs 72-73.
14. The test on review is whether the decision made by the commissioner is one that a reasonable decision-maker could not reach. No reasonable commissioner could have found that the amendment to the charge sheet was procedurally unfair. In addition, the second respondent clearly misconstrued the legal standard against which procedural fairness must be measured, and thereby committed a gross irregularity in the proceedings. The commissioner's remark in the award that the actions of the chairperson in amending the charge sheet '*seem to confirm the applicant's submission that he was not impartial*' shows that he failed to properly apply his mind to the issue of procedural fairness.
15. It follows that the portion of the award which the commissioner found that the third respondent's dismissal was procedurally unfair, should be reviewed and set aside. No purpose will be served to refer the dispute to the CCMA since this Court is an excellent position to make a finding about the procedural fairness of the dismissal.
16. It is clear from the evidence led that the dismissal was procedurally fair. The third respondent was informed of the charges against her, she was provided with an ample

opportunity to state her case, and the matter was heard by an impartial chairperson. She was given an opportunity to make representation about the amendment, allowed an opportunity to consider her position and to lead further evidence etc. The dismissal was procedurally fair.

17. I do not believe that this is a matter where costs should follow the result.

18. In the circumstances I make the following order:

18.1 The finding of procedural unfairness and the award of three months' compensation in the arbitration award made by the second respondent on 2 April 2008 under case number GAJB32185-07 is reviewed and set aside and is replaced with an order that the third respondent's dismissal was procedurally fair.

18.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : G FOURIE INSTRUCTED BY EDWARD
NATHAN SONNENBERGS

FOR THIRD RESPONDENT : ATTORNEY N P VOYI of Ndumis P. Voyi
Attorneys

DATE OF HEARING : 27 OCTOBER 2010

DATE OF JUDGMENT : 3 DECEMBER 2010