IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 1864-09

In the matter between

SETCOM (PTY) LTD **Applicant**

and

BRONWYN DOS SANTOS **1st Respondent**

COMMISSION FOR CONCILIATION, MEDIATION, ARBITRATION` **2nd Respondent**

COMMISSIONER SIBUSISO MAGWAZA **3rd Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. The applicant has brought in a review application to set aside an award issued by the third respondent, a commissioner of the second respondent. The commissioner had found the dismissal of the first respondent was both procedurally and substantively unfair and awarded her six months' remuneration as compensation.

2. The first respondent, Ms. Santos, had been employed as a business manager by the applicant, and had worked for the firm since February 2000. The arbitrator found that after she had been suspended by the employer her services were then terminated in writing. He also found that the employer had requested her to return to work failing which she would be deemed to have resigned. The letter of dismissal addressed to her was unambiguous, and she refused to return to work because of the manner and nature of her termination.

3. The arbitrator found that the dismissal was not for a fair reason, nor did it follow a fair procedure. According the commissioner, in the course of the employer's evidence it was conceded that it had dismissed the employee. It had also created unreasonable conditions which made it difficult for the employee to consider reemployment.

Grounds of review.

4. The first ground overview advanced by the applicant is that the arbitrator's finding that the applicant had been dismissed by it was not supported by the evidence presented to him, which in fact showed that the employee terminated her employment with the applicant herself. Accordingly, the conclusion that the applicant had dismissed her was an unreasonable one. In support of this submission, the applicant refers to a number of items of evidence which it claims the arbitrator ignored, and conclusions which the arbitrator reached for which it says there was no evidentiary support.

5. Two findings which the arbitrator made that the applicant contends were unsupported by evidence were the findings that the employee services had been terminated in writing and that the applicant's chief witness conceded during evidence in chief that it had dismissed her.

6. In relation to the second point, it must immediately be pointed out the first respondent agrees that there was no evidence that the applicant's managing director conceded that the applicant had dismissed the first respondent, but she argues that to the extent that there was other evidence before the arbitrator on the basis of which it could still be concluded that the applicant did in fact dismiss the first respondent, that finding ought not to be set aside following the reasoning of the Labour Appeal Court in its judgment in **Fidelity Cash**

Management Service v CCMA & others (2008) 29 ILJ 964 (LAC) at 997, paras [102] to [103].

7. The applicant also points out that it tendered evidence that it suspended the employee on 5 February 2009 and uplifted the suspension on 11 February 2009, and when the first respondent was cross-examined on the fact that the e-mail from the employer, which she relied on as a written confirmation of her dismissal, she had to concede that it did not state in so many words that she had been dismissed. The applicant also believes the arbitrator ignored the fact that it notified the employee of the upliftment of her suspension and continued to pay her salary until 3 March 2009. It further claims he ignored the fact that there was testimony to the effect that even if the applicant had an intention of terminating the employment relationship, that was to be done by way of settlement negotiations, and it not did intend terminating the employment relationship on 6 February 2009. The applicant argues that the arbitrator ignored all of this evidence in coming to the conclusions he did.

8. The second finding of the Commissioner which the applicant attacks is the finding he made that the employer's witness conceded in his evidence in chief that the applicant had "*created unreasonable conditions that made even the employee difficult to consider*" (*sic*). The applicant denies that there was any evidence to substantiate this finding. On the contrary, it claims that its evidence was that when the employee was called back to work on 11 February and 2 March 2009 she would have been placed in the same position she occupied before her suspension and no conditions attached to her returning to work. The applicant points out that the employee herself agreed under cross-examination that she understood that nothing would have changed in the terms of her employment had she returned to work, yet the Commissioner appeared not to have considered this evidence.

9. Lastly, the applicant attacks the award of compensation made in favor of the first respondent. The basis of this ground overview is that even if the arbitrator was correct that the applicant did in fact dismiss the first respondent, there was no basis for making an award of compensation in her favour, in circumstances where the employee had failed to advance any satisfactory reason why she had rejected the offer of reinstatement of 11 February 2009.

10. In this regard, the applicant makes much of the first respondent's evidence that she believed the company tried to recast her dismissal as a suspension only once it had consulted with lawyers, and that this was an effort to undo the fact that it had dismissed her, which she did not believe it was entitled to do. It is also clear from her evidence that she believed the company's change of tack was simply a ruse to get her to return to work so that it could proceed with her dismissal.

The salient evidence

11. At 15h00 on 5 February 2009, the applicant's managing director, Mr. D. Liu sent an email to the first respondent, advising her she was suspended on full pay without further notice.

12. That evening the first respondent replied, stating she was completely shocked and expressing the hope that matters could be resolved speedily and amicably.

13. The next day, Liu followed up his first email with this one, which the first respondent received at 06h17 that morning:

> "*Dear Bronwyn.*
>
> *Yesterday, instead of speaking directly to me you have been cited or the staff to rebel against me. For that I can no longer trust you and you cannot work for me. You have done what Renard did.*
>
> *This will be last communication with me, going forward we are asking our company lawyer to contact you and arrange an amicable resolution.*
>
> *I encourage you not to communicate with any of the company staff.*
>
> *Regards.*
>
> *Dave*"
>
> (emphasis added)

14. On the same day, the managing director also sent an e-mail to the applicant's other employees, the first paragraph of which read :.

> "*Bronwyn will no longer work for Setcom. I've instructed the company lawyers to arrange an amicable settlement with her so that we can pay her out for her services to the company. The sooner you come to grips with this the better it will for you . It is business as usual.*"

15. When asked to comment on this part of his e-mail, Mr. Liu said. "*I was informing them that Bronwyn will no longer work for Setcom okay and the company [indistinct] arrange an amicable settlement.*" He further testified that if an amicable settlement could not be reached, then the first respondent would still be an employee of the company.

16. At the arbitration hearing, the first respondent testified that Liu had an intense hatred for Renard. When he compared her to him, she understood it to mean that his dislike for her was very intense as well. Mr. Liu testified that in the e-mail of 6 February 2009, he *"... was communicating in fact that I cannot trust her and my intentions are the years she cannot work for me and that I will ask the company lawyer to contact her to arrange an amicable resolution*" (emphasis added). Mr Liu further elaborated that he did not intend to advise the first respondent of her dismissal by means of the e-mail and that his intention of having the company lawyer communicate with her was "*... to arrange an amicable resolution so that we can part ways.*" (emphasis added).

17. When he was asked during his evidence in chief about his working relationship with the first respondent after the incident, Mr. Liu replied as follows : "*…well on 6 February I was very angry because that was the day after she on purpose did not obey my order. So at that time my intention was that now I do not want to work with her okay that you need to read that now, this was in, the intention was future change. It is not immediate and that is why if you refer to page 9, which is 11 February okay but then I had time to calm down and be able to, by then I was not angry only okay, then I asked that she come back and we had a meeting with me so I can hear her side of the story*" (emphasis added).

18. Liu further tried to explain that although harm had been done to the relationship, he would not say it was impossible to work with her because his own views had obviously changed by that time and he asked her to come back. However, when he was under cross-examination, it was clear that he was still of the view that the first respondent had undermined his authority at the time the arbitration hearing took place.

19. The incident which apparently sparked Mr Liu's peremptory action was an alleged communication the first respondent had made to staff during the morning of 5 February 2009 to the effect that staff need not concern themselves about an instruction Liu had issued to all employees regarding enforcement of contractual working hours. Liu accused the first respondent of undermining the applicant's authority and of being insubordinate. The first time this complaint was articulated was in a letter from the firm's attorneys on 11 February 2009, issued after Liu had consulted with them. The first respondent could not understand why Liu could not discuss the matter with her if he had a problem with what she had done, especially given that she had been employed with the company nine years.

20. The attorneys' letter also announced: "*3. Our client will be uplifting your suspension and you are required to return to work tomorrow, 12 February 2009. However you will be expected to attend a meeting with David at 1500 hrs on 12 February 2009 to discuss your above conduct so that our client can determine whether or not to impose any disciplinary measures in respect thereof.*" Mr. Liu in his evidence said that the purpose after the meeting would have been so that "... *we can sort out the issues, so that we can talk face-to-face*."

21. On 12 February 2009, at a stage when the applicant maintains the first respondent was still on suspension despite not returning to work to meet with Liu as requested, the applicant also created an automatic e-mail response on the firs respondent's company e-mail address, which stated:

> "*Thanks for your e-mail.*
>
> *<u>I am no longer with Setcom</u> and do not have access to this e-mail. For assistance please contact the office on code on...* " (emphasis added)

22. The first respondent replied to the attorneys' letter on 12 February 2009. In response to the excerpt from the letter mentioned above, she replied thus: "*4. As regard to point 3 in the second mail, it will now be obvious that I'm not prepared to meet with your client for the purpose stated as I have already been dismissed. David Liu's conduct and the manner applied in unfairly dismissing me was reprehensible and totally unacceptable. He has irreconcilably damaged the trust relationship by his actions.* "

23. In the same letter, the first respondent makes it clear that she believed she was unfairly dismissed as a result of the email of 6 February 2009, as confirmed by the email sent to all other staff the same day at 09h42. She refused to return to work for the purpose of meeting with Liu in the light of this, but expressed her willingness to meet for the purposes of trying to settle the matter.

Analysis

First and second grounds of review

24. As previously mentioned it is common cause that Liu did not concede in his evidence that he had dismissed the first respondent. The arbitrator emphasized this piece of evidence in arriving at his finding that the first respondent had been dismissed. Since it seems to be a pillar of the arbitrator's reasoning it is difficult to characterize his conclusion as reasonable if that evidentiary support did not exist. I will consider the first respondent's alternative argument for sustaining the arbitrator's finding below.

25. The arbitrator also concluded that the applicant had created unreasonable conditions for the first respondent's return whereas the evidence tended to show that her conditions of employment would not be altered. There is certainly no evidence supporting the arbitrator's conclusion, in so far as his finding can be construed as referring to the first respondent's terms and conditions of employment, and to that extent this ground of review is well founded. A possible explanation for this finding is that the arbitrator was in fact referring to the requirement that the first respondent had to meet with Liu for the purposes of deciding if disciplinary measures would be taken. However, the failure of the arbitrator to explain what he was referring to makes it difficult to know if this was indeed the case, and this finding

must also be set aside for lack of sufficient evidentiary support that would make it a reasonable one.

26. The first respondent argued that even if the arbitrator's conclusions, and in particular his finding that she had been dismissed, could not be sustained on the reasons he advanced, if there was sufficient evidence before him that could have supported his findings, then his findings should not be set aside. There is good authority for such an approach in the LAC judgment in the case of *Fidelity* case (see above), though it does not seem very dissimilar to the approach of a court of appeal when considering whether to uphold a judgment for reasons other than those given by the judge in the court *a quo*. Alternatively to the approach in *Fidelity*, if the findings of the arbitrator are not sustainable on the evidence she or he relies on, the award might be set aside on review, but on a fresh consideration of the evidence by the court of review, it could yet find that the evidence before the arbitrator actually could support one or more of the findings in the award but for different reasons. In the end, the result of following the *Fidelity* approach or of setting aside the award but substituting it with an award which reaches similar conclusions but on a sounder footing might be the same, though I think the second approach might have a practical advantage of focusing the review court's enquiry on the soundness of the arbitrator's own reasoning in relation to the evidence before the arbitration.

27. Following the *Fidelity* approach, I am persuaded that even though the central piece of evidence relied on by the arbitrator could not sustain his finding that the first respondent was dismissed, there is more than ample other evidence to sustain that conclusion. It is true that the first respondent was placed on immediate suspension on 5 February 2010, but the employer's actions the following day as evidenced in its email to her and to other staff, could have left no doubt in a reasonable person's mind that the employer was terminating the employment relationship, but was willing to discuss terms of severance. The fact that the email of 6 February 2010 does not refer expressly to the first respondent's dismissal is not significant in my view. It was not necessary to use the word 'dismissal': the emphasised portions of the emails sent on that day, unequivocally conveyed that the employer was ending the employment relationship. Liu's evidence in the arbitration does not change my view. He clearly believed that he could not trust the first respondent and could not work with

her, and that they had to part ways - even if he was prepared to pay her out. His claim that she would have remained employed if terms of terminating the relationship could not be agreed on, rings hollow in the face of his other evidence and the written communications.

28. It is apparent too that it was only after the employer consulted its attorneys that it attempted to resurrect the applicant's initial suspended status. It is true that the employer continued to pay the applicant from the date of her initial suspension, but it is hard to place too much reliance on this as an indication of its intentions as her dismissal occurred early in the month and the employer already changed tack by seeking to characterize her situation as one of suspension by 11 February 2009. Moreover, despite the attorneys' letter of 16 February 2009 in which the employer reasserted the applicant's continued suspended status, the employer still took the step of altering the first respondent' automated e-mail response to reflect that she was no longer with the firm.

29. The remaining question is whether or not the fact that the applicant asked the first respondent to return to work meant that the arbitrator ought not to have awarded her any compensation as the employer had effectively tried to 'right the wrong of her dismissal' by so doing. Although the applicant referred to the LAC decision in the case of ***Kemp t/a Centralmed v Rawlins*** **(2009) 30 *ILJ* 2677 (LAC)**, the parties were unaware of the decision of the SCA in this matter at the time of the hearing. Accordingly, when I became aware of it I gave the parties an opportunity to make additional submissions relating to the latter judgment.

30. The SCA reaffirmed the principle enunciated by the LAC that where an employer unfairly dismisses an employee, but takes timeous action to rectify the 'wrong' of the employee's unfair dismissal by offering the employee re-instatement, the employer should not be held liable to pay the employee compensation, if the employee refuses the employer's offer and successfully challenges the fairness of the dismissal.

31. In *Kemp's* case the employee's dismissal came about in the following circumstances, as described by the SCA:

"[5] In about June 1997 Dr Rawlins informed Dr Kemp that she was pregnant. They agreed that she would take maternity leave for two months with effect from 1 February 1998. She would be paid for two weeks of her maternity leave and the balance would be taken as unpaid leave. Shortly before her leave commenced Dr Kemp suggested to Dr Rawlins that she should take the opportunity to look for alternative employment in view of the financial difficulty of the practice. According to Dr Kemp he hoped to find a more junior doctor who would be willing to run the satellite practice at a lower salary.

[6] Dr Rawlins took the suggestion to mean that she was being dismissed. She informed her husband who immediately telephoned Dr Kemp and demanded a letter advising Dr Rawlins that she had been dismissed. There was some acrimony between the parties at that time but the detail is not important. Suffice it to say that although Dr Kemp maintained that he had not intended to dismiss Dr Rawlins he nonetheless, unaccountably, furnished Dr Rawlins with a letter informing her that she was dismissed with effect from the end of February 1998 on account of the financial difficulties of the practice."

32. A month after dismissing Dr Rawlins, Dr Kemp sought to rectify the dismissal after taking advice. The SCA described his efforts in the following terms:

"*[8] Counsel for Dr Kemp told us frankly that we can accept that Dr Kemp behaved poorly towards Dr Rawlins at the time that he dismissed her and no doubt she was entitled to feel aggrieved. But within a month, on 12 March 1998, Dr Kemp acted sensibly when, on the advice of his attorney, he offered to reinstate Dr Rawlins, alternatively, to pay her one month's salary in lieu of notice, severance pay of one week's salary for each completed year of service, and unspecified compensation for the period 1 February 1998 to 12 March 1998. It was accepted by counsel for Dr Rawlins that the offer of reinstatement was made genuinely and in good faith. At first there was no response to the offer but it was repeated in the course of attempts at conciliation on 17 March 1998 and was summarily rejected. It is apparent the arbitrator did not consider this principle at all, and accordingly his finding on compensation ought to be set aside on this basis.*"

33. Dr Rawlins persisted with a claim that she had been dismissed on account of her pregnancy which was automatically unfair, despite Dr Kemp repeating the offer of reinstatement before

the matter came to trial. The labour court dismissed Dr Rawlins claim of automatically unfair dismissal but nonetheless found her dismissal was unfair, a finding that Dr Kemp did not dispute, and went on to find that Dr Rawlins' refusal of the offer of reinstatement had been reasonable awarded compensation of twelve months' remuneration in the light of the manner in which he went about dismissing Dr Rawlins and his timing, which the court found deserving of censure.

34. The LAC found that:

> *"[Dr Kemp] may have treated [Dr Rawlins] the respondent unfairly when he dismissed her in the manner in which he did but he had "a right to seek to right the wrong" that he had committed by offering to put the respondent back in the position in which she would have been had she never been dismissed. It is what I call an employer's "right to right a wrong". And, if the offer was genuine and reasonable, as it has been conceded on behalf of [Dr Rawlins] it was, I cannot see why [Dr Kemp] must be ordered to pay her compensation which would not have arisen if the respondent had accepted the offer of reinstatement. In my view it is very important to affirm the employer's "right to right a wrong" that he or she has made in these kinds of circumstances. If an employer unfairly dismisses an employee and he wishes to reverse that decision, he must be able to do so, and if the employee fails to accept that offer for no valid reason, the employer has a strong case in support of an order denying the employee compensation."*

35. The SCA concurred with the majority of the bench in the LAC and held:

> *"Whatever view we might have taken on the matter it seems to me that we would be remiss if we were not to defer to that court's value judgment in a matter of this kind. In any event I agree with the conclusion of the majority. No doubt Dr Rawlins genuinely felt that there had been a breach of trust. But these are two professional people who might be expected to resolve any acrimony that might earlier have existed. No objective grounds were advanced why any perceived breach of trust between them was not capable of being restored. Dr Rawlins chose not even to explore that possibility but rejected it out of hand. That is not how labour relations should be conducted and I agree that the rejection of the repeated*

offers of reinstatement was unreasonable and she has only herself to blame for her financial loss." [1]

36. Obviously there is a similarity between the *Kemp* matter and this one, in that the employer changed its stance regarding the employee's dismissal and sought to persuade the employee to return to work. However, there are also some important differences. In this instance, the employer never acknowledged it had dismissed the employee. It was also at its own instance that it characterized its initial action as a dismissal, rather than at the prompting of the employee. The applicant did not offer reinstatement to restore the *status quo* before the dismissal, but contrived to portray its actions as an upliftment of a suspension in order to allow it to pursue a disciplinary enquiry. There was also no acknowledgment by the employer that it had dismissed the employee, nor that it had done so wrongly, and that it was now trying to rectify the situation. On the contrary, it sought to portray events as if it had never dismissed her, which was a stance it persisted with in the review proceeding, except to put it forward in the alternative.

37. The situation confronting the employee in this instance at the time of the purported upliftment of her 'suspension', was not one of an employer that recognized its wrongdoing and was seeking to rectify matters, but of an employer that was attempting to disguise its actions to avoid them being characterized as an unfair dismissal. Under such circumstances, it is perfectly understandable for the employee to have rejected the upliftment of the suspension as a stategem, rather than a bona fide attempt to make amends and to restore the relationship. It does not matter that the upliftment of the suspension was not conditional on her accepting a variation of her terms and conditions of employment: what was being proposed by the employer was an arrangement that entailed no acknowledgment of any wrongdoing and no undertaking to make redress, to which the employee would be acquiescing had she returned to work. In such circumstances, the employee can hardly have been said to have unreasonably rejected a *bona fide* offer of reinstatement, because there was none. The reasonableness of the employee's response must be assessed in relation to what

[1] At par [18] of the SCA judgment

was actually presented to her at the time, namely a disingenuous pretence that the employer was uplifting her suspension, whereas it had summarily dismissed her.

38. For this reason, I believe the facts of this matter are distinguishable from those in the *Kemp* case, and accordingly the arbitrator did not err in making an award of compensation. However, it is also clear that in determining the order of compensation no evidence of the employee's financial loss resulting from her dismissal was considered, which the arbitrator ought to have done, and his award of compensation must be set aside on this basis and referred back for reconsideration after hearing further evidence on the issue.

Order

39. In the light of the reasoning above,

    39.1. the application to review and set aside the third respondent's finding that first respondent's dismissal was procedurally and substantively unfair is dismissed;

    39.2. the third respondent's award of compensation is reviewed and set aside;

    39.3. the second respondent is ordered to set the matter down again before the third respondent to reconsider what compensation, if any, should be awarded to the first respondent after hearing evidence on the quantum of her financial loss following her dismissal and after considering any submissions the parties may wish to make on the issue of compensation, and

    39.4. no order is made as to costs.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing : 3 November 2010

Date of judgment: 15 December 2010

Appearances:

For the applicant: J Campenella instructed by Dewey de Sousa Attorneys

For the first respondent: B L Roode instructed by Bester & Rhoodie Attorneys