IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 2268/09

In the matter between

SOUTH AFRICAN POLICE SERVICES	**Applicant**
and	
SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	**1ST Respondent**
F J VAN DER MERWE (NO)	**2ND Respondent**
V M MALI	**3rd Respondent**

JUDGMENT

LAGRANGE, J

1. The applicant seeks to review the arbitration award of the second respondent in which he found the dismissal of the third respondent for not reporting his

missing firearm to have been too harsh a sanction. He ordered the third respondent's reinstatement and replaced the sanction with a final written warning. The third respondent was also awarded 12 months' salary as compensation which effectively meant the applicants reinstatement was not fully retrospective.

Background

2. The third respondent had been on duty in Durban. After work one day he went to the beachfront and had something to eat in his car. He placed his firearm under his car seat and at some stage dozed off. On waking he drove back to his hotel and later returned to his car to retrieve his firearm, which turned out to be missing. He surmises it might have been taken from the car when he was asleep as his car door was slightly open. He was clearly in a state of panic when he realized what must have happened and wrestled with how he was going to deal with the problem. A few weeks' later his firearm was recovered from two individuals, who were searched by polices, and he then explained what had happened to his superior.

3. He was charged with negligently losing the firearm in terms of Regulation 20(d) and with failing to report its loss under Regulation 20(a). He admitted guilt in respect of the latter offence and was dismissed for this. Until that stage he had an exemplary service record of 12 years.

Grounds of Review

4. The applicant raises a number of grounds of review. The main thrust of its attack is the reasoning of the arbitrator on the question of consistent treatment. The arbitration took place over two days. The only question for the arbitrator to decide was the whether the sanction of dismissal was fair or not. The parties agreed that the third respondent would present evidence of the circumstances of the offence and the applicant would provide statistics of how conduct of the same nature was dealt with in Gauteng province. On the second day no evidence was produced by the employer.

5. The third respondent's representative at the arbitration hearing, Mr Moabelo, raised the issue of inconsistent treatment, in the course of which he mentioned

that the employer's representative at the arbitration had himself presided in cases where he had not dismissed the members concerned but had ordered them to pay fines, or suspended them for some months and ordered them to repay the cost of the missing firearms. In reply, the employer's representative did not dispute any of the representations made by Mr Moabelo about the sanctions handed down in such cases, but simply asked that the matter be decided on the merits of the case as it was presented.

6. The arbitrator held that:

> *"During the course of the proceedings there was discussion concerning the appropriateness of dismissal as a penalty. Although no specific evidence in this regard was led, it appeared to be common cause that employees of SAPS were not routinely dismissed for misconduct of this nature. The respondent did not deny that this kind of misconduct does occur and there have been instances where employees were not dismissed and were for example given the opportunity to reimburse the value of the lost firearm."*[1]

7. In concluding his analysis he also found, among other things, that:

> "*I am unconvinced that in this particular case the penalty of dismissal is appropriate and fair. Bearing in mind that the respondent could not show that it was policy or practice to dismiss an employee for this kind of conduct, the applicant's service record, and his personal circumstances, I am of the view that dismissal as a penalty is too severe and unfair. In my view this is a situation where a warning or a final written warning would be more appropriate, which would also be in line with the generally accepted principle in our labour law should preferably be corrective in nature (of course there are exceptions)."*

8. The applicant attacks the arbitrator on the basis that he simply 'assumed' that it did not dismiss members for similar misconduct, and that there was no evidence to support this finding. However, in failing to put up any evidence on the standard of sanctions normally applied to such cases, the employer not only failed to address the issue of consistency, but failed to lay any factual basis for

[1] Par [14] of the award.

the norm it sought to assert, namely that in terms of the employer's standards it was the appropriate sanction for the misconduct in question.

9. It is worth reiterating in this regard that the onus lies on the employer to prove the substantive and procedural fairness of a dismissal[2], and that anyone considering whether or not the reasons is fair is obliged to take into account relevant codes of good practice.[3] In this case, the relevant code is Schedule 8 to the LRA, of which the pertinent provisions for present purposes are Items 3(5) and 7(2)(b) of the Code which state:

3(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

…

7Any person who is determining whether a dismissal for misconduct is unfair should consider … (b)if a rule or standard was contravened, whether or not -…

(iii) the rule or standard has been consistently applied by the employer;

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

[2] Section 188(1) of the Labour Relations Act, 66 of 1995 ('the LRA')

[3] Section 188(2) of the LRA.

10. Once the employee has pertinently put the issue of consistent treatment in issue, the employer has a duty to rebut such allegations. In the context of a case in which evidence was led by the employee of inconsistent treatment, Landman J held in ***Sappi Fine Papers (Pty) Ltd t/a Adamas Mill v Lallie & Others*** **(1999) 20 *ILJ* 645 (LC)** at 647, [5]:

> *"As regards the onus, the onus of proving that the dismissal was fair, and thus of rebutting the allegation of inconsistency, is one which rests squarely on the employer.***"**

11. It is true that in this instance neither party led oral evidence as such on the issue of whether or not the employer acted consistently when imposing sanctions in cases of this nature. In this regard, the employer failed to introduce the promised evidence of how previous cases had been dealt with in Gauteng province. It is noteworthy that there was an interval of several months between the first and second days of the arbitration hearing which ought to have afforded the applicant more than ample opportunity to obtain evidence in support of its claim of having a consistent policy in such cases. The employee also did not raise in his evidence specific instances of inconsistent treatment of such misconduct. However, his representative pertinently alluded to an inconsistent practice on the part of the applicant in determining sanctions in such cases, and referred to his opponent's own personal knowledge of the same as a presiding officer in such matters. The applicant's representative did not contest the claim made by Mr Moabelo nor did he dispute that he had chaired similar enquiries, both of which he could have done.

12. Mr Pio, who was briefed late in the day to appear for the applicant, sought to discount the significance of the employer's failure to adduce evidence on the other cases, by suggesting that it was irrelevant because that evidence related to the loss of firearms, whereas this case concerned a failure to report the loss. However, the record does not suggest that the evidence that was supposed to have been produced would not have concerned cases like the one before us. The employer's representative referred to the information that was promised as

"…stats on prior cases where members were dismissed and similar sanctions given for similar misconduct." Nothing suggests that he only had in mind cases where the employees were disciplined only for losing firearms and not for the related misconduct of failing to report the loss.

13. In the circumstances, the arbitrator's conclusion that '…it appeared to be common cause that employees of SAPS were not routinely dismissed for misconduct of this nature', does not seem to be without any basis and cannot be said to be an unreasonable inference to draw. He then went on to assess the sanction on the merits of the case as it was presented, which is exactly what the applicant's representative invited him to do.

14. The applicant also attacked the arbitrator's findings on the basis that he substituted his own opinion of what was a fair sanction for that of the employer. This attack seems to be an echo of the law before the decision in ***Sidumo& Another v Rustenburg Platinum Mines Ltd & Others*** **(2007) 28 *ILJ* 2405 (CC)**, in which the Constitutional Court stated :

> "… (*T)he decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view.*"[4]

15. The Constitutional court also outlined the approach a commissioner should adopt when determining the sanction, as follows:

> *"[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 imposed the*

[4] Per Navsa AJ, at 2432,[75]

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, whether 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. A commissioner is 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 a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."[5]

16. In this instance, the arbitrator took account of the employee's service record, his personal circumstances (the fact that he had four children - three of whom he still supported), and the fact that there was no evidence that it was the employer's policy ordinarily to dismiss an employee for this kind of misconduct. He also considered that this was a case in which there was no reason to suppose that corrective discipline would not work if a lesser sanction than dismissal was imposed, and expressed the view that a final written warning or warning would have been more appropriate. In this regard, it must be mentioned that it appears that the arbitrator then omitted to specifically include such a sanction in his award and that this was a patent error on his part, which can be corrected by requesting him to vary his award. This is addressed in the order below.

17. He found, in considering these factors, that the third respondent had shown remorse. This is a finding which the applicant disputes the correctness of on the

[5] Ibid, at 2432-3

basis that it was only after the missing firearm had been discovered that the applicant reported its loss and submitted that there had been no evidence of remorse. Apart from the fact that it seems the third respondent did not contest his guilt on the charge for which he was dismissed, it must be said the evidence on the record supporting a conclusion that he was remorseful is slender. There is only an acknowledgement on his part that he made a grievous mistake in not reporting the firearm's loss. Accordingly, the arbitrator's finding on the question of remorse would seem to have been unwarranted. However, given the other considerations the arbitrator had regard to, it seems unlikely he would have upheld the fairness of dismissal simply because there was no overt expression of remorse, when the third respondent has accepted that he was guilty of the misconduct. Thus, while it was a consideration which has little evidence to support it, I do not believe it would have altered the final outcome of the award, if the arbitrator found instead that the third respondent had not expressly shown remorse but had still admitted he was guilty of the misconduct.

18. Lastly, the applicant criticizes the arbitrator for allegedly not considering the fact that he did not report the loss of the weapon as an aggravating factor. I have some difficulty with this ground as it appears to be misplaced. It is the very essence of the charge for which the third respondent was dismissed. It is difficult to see how the fact that an employee is guilty of the charge against him can be recast as an aggravating factor in relation to the charge itself. Mr Pio sought to recast this as a ground of review based on the arbitrator's failure to consider the employee's honesty, even though the ground of review in question had not been articulated in this way in the founding affidavit. However, even if such a fresh slant on the stated grounds of review could be argued, the employer would still have a difficulty in view of its failure to lead any evidence whatsoever about the loss of trust it suffered in the third respondent given his misconduct. Accordingly this ground of review must also be dismissed.

Order

19. In the circumstances, the applicant's grounds of review must fail and the application is dismissed with costs.

20. Accordingly, the applicant must give effect to the award, subject to any variation of it by the Second Respondent under section 144(b) of the Labour Relations Act, 66 of 1995, to correct the obvious error he made in failing to impose an alternative appropriate sanction, which he clearly had intended to do.

21. The third respondent must be reinstated in terms of the award within 14 days of the date of this judgment.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 21 September 2010

Date of order: 22 September

Appearances:

For the applicant:

Mr P C Pio

Instructed by the State Attorney

For the third respondent:

Mr W P Bekker

Instructed by Ngwenya Attorneys