

SOUTH AFRICA / JUDGMENT

Cadema Industries (Pty) Ltd v Commission for Conciliation Mediation and Arbitration (Western Cape Region) and Others (CA1/01) [2001] ZALAC 26 (29 June 2001)

[2001] ZALAC 26

COURT

Labour Appeal Court

BEFORE

R.G Comrie, RMM Zondo, K. van Dijkhorst

CASE / FILE NUMBER

CA1/01

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IN THE LABOUR APPEAL COURT OF
SOUTH AFRICA
HELD
AT CAPE TOWN
Case no: CA1/01
In

the matter between:

CADEMA
INDUSTRIES (PTY) LTD Appellant
(Applicant)
and
COMMISSION
FOR CONCILIATION, First Respondent
MEDIATION
& ARBITRATION (First Respondent)
(WESTERN
CAPE REGION)
ALEX
TWIGG N.O. Second Respondent
(Second Respondent)
SOUTH
AFRICAN CLOTHING & TEXTILE Third Respondent
WORKERS
UNION (Third Respondent)
JUDITH
HENN Fourth Respondent
(Fourth Respondent)

JUDGMENT

COMRIE A.J.A:

1. Judith Henn, the fourth respondent, was employed by the appellant company as a machinist in its clothing factory. She was also a member of the third respondent trade union and a senior shop steward. On 15 December 1998 an incident occurred during which she swore at the appellant's production manager, Mr Dave Evans. On 14 January 1999, following upon an internal disciplinary enquiry, Ms. Henn was found guilty of : "Insolence-Swearing at senior management". On 25 January 1999 Ms. Henn was dismissed on this ground.
2. Conciliation failed and the matter proceeded to arbitration before the CCMA (the first respondent). The commissioner who conducted the arbitration, the second respondent herein, found Ms Henn guilty, but held that dismissal was not an appropriate sanction. He ordered she be re-instated with loss of back pay. He further directed that she publicly apologise to Mr Evans in front of the staff who were present when she swore at him. And he authorised the appellant to issue a final written warning to her for insolence.
3. The appellant brought the award of the commissioner on review in the Court below. Although the primary relief sought by the appellant was the setting aside of the award, it is apparent from the review papers that the real complaint was that the commissioner had interfered with the sanction of dismissal. The third and the fourth respondents opposed the review.

It is relevant to note that in the opposing affidavit, they did not contend that the finding of misconduct was wrong.

4. The review application was dismissed by Stelzner A.J. Her conclusion was that no grounds of review had been established. She indicated, however, that had she been the commissioner, she might well have confirmed the dismissal. With leave granted by the Court a quo, the appellant appeals to this Court.
5. Given the attitude taken by the third and fourth respondents to the commissioner's finding, I think that Stelzner A.J.'s succinct summary of the facts will largely suffice:

"4. The second respondent found on the evidence before him that the fourth respondent had correctly been found guilty of insolence (nor has this finding been disputed by any of the parties). He found that she had sworn (using explicit language) at Evans in circumstances which were not justifiable and in what amounted to an over- reaction on her part to what she had perceived as unacceptable conduct on the part of Evans. Evans had tried to control access to the sales room at applicant's factory. In order to do so he had closed the door to the room to stop people from entering which had caused the queue of people outside the door (including two pregnant women) to have to move backwards. No-one was injured. The second respondent found on the evidence that Evans had not provoked the fourth respondent in any way, in particular Evans had not at the fourth respondent (a version which the fourth respondent attempted to put forward at the arbitration proceedings for the first time).

(5). The second respondent also rejected the union's contention that the workplace rule against insolence had been inconsistently

applied because Krauss, the managing director, regularly used foul language and had established a culture at the workplace permissive of the use of foul language. The second respondent, while criticising the applicant for allowing the problem pertaining to Krauss's use of foul language in the workplace to persist, held that this does not mean that the rule had been inconsistently applied. Within the particular context of the incident with which he was concerned the second respondent was satisfied not only that Evans had not sworn at the fourth but that he had, in fact, done, nothing to warrant her outburst of swearing at him."

It should be added that Ms Henn appears to have initiated the contretemps which culminated in the swearing, and that her words to Mr. Evans were that he was "fucking rude" and a "fokken vark".

With regard to the sanction of dismissal, Ms. Henn had been in receipt of a number of previous warnings from the management. One such was a warning for insolence on 29 May 1998. It was stated to be valid for a period of four months from 29 May 1998, and had thus expired by December. Other warnings related to a failure to obey instructions and to failures to perform her duties correctly or satisfactorily. On 28 September 1998 Ms. Henn was issued with a letter signed by the managing director. Because of the importance which it has assumed in this case, I propose to quote the letter in full :

" Dear Judith Henn,

Due to the number of warnings of diverse nature which were issued to you during the past five months, it has become necessary to address the problem.

As in the past, management herewith once again appeal for your positive support and co-operation in order to create (and keep) a peaceful working environment. Due to amount of orders the company has at the moment (in contrast with other clothing factories) it is important that orders are produced and delivered on time and therefore team work is important. Negative attitudes such as displayed by you at times are not in the best interest of the company or your fellow employees. What important is your need to understand that this disruptive behaviour causes a loss in concentration by others around you and this directly effects the quality of the merchandise.

Quality is something management will and shall not sacrifice.

Please note that this is the management's final attempt to get you to do an honest days work to the best your ability for the good of the company and your fellow employees.

Your co-operation would be appreciated. Please note that no further contravention of any kind on your part would be tolerated. Further violations will result in the company taking strict disciplinary action against you which could result in dismissal."

7. The Court below pointed out that this letter, unlike other warnings which had been issued, was not entitled “Disciplinary Warning”. It carried no heading or title. It should be noted, however, that in the body of the letter there was reference to a “final attempt”; a warning that “no further contravention of any kind....would be tolerated”; and a warning that : “further violations will result in the company taking strict disciplinary action against you which could result in dismissal”.
8. The chairman of the disciplinary enquiry referred in his report to the recurrence of warnings and to the letter of 28 September 1998. Later in the report he wrote:

“I also have to take in account the fact that the warnings issued to her during the last number of months must have certainly made her aware of the implications of further similar misconduct. The Employee is not an ignorant person and having been the senior shop steward for some time, she should have realised that she was on thin ice.”

As the shop steward she occupies a position of leadership and despite the assertion by Mr Williams that the problematic relationship between the Union and the employees on the one hand and management on the other hand should be attributed to the attitude of both sides, the Employee’s behaviour cannot be justified in my view.”

9. While not explicitly stated, it is a fair inference that the warnings generally, and the letter of 28 September 1998 in particular, played a significant role the chairman’s recommendation “that the Employee be given one week to provide reasons as to why her services should not be terminated”.

I interpose that Ms . Henn did not avail herself of that opportunity.

10. The commissioner’s view of the matter is to be found in this passage from the award:

“I do however find that dismissal was not the appropriate sanction. Henn’s previous warning had lapsed at the time of the present offence although her warning for a refusal to obey instructions dated 1 September 1998 was current at the time of the incident in question. Henn was

charged with insolence and not with insubordination. While insolence might be a constituent party of an allegation of insubordination in certain instances this was not the company’s case. Krauss’s letter to Henn on 28 September 1998 arose out of her failure to perform her duties. There was no contention that in this case that she failed to perform her duties or that she was insubordinate.

Some sanction short of dismissal was the only appropriate disciplinary step that the company could take in the circumstances”.

11. It is fair comment on the foregoing passage, which speaks for itself, that the commissioner did not consider the letter of the 28 September 1998 to be a warning, or final warning, for insolence; nor did he consider the letter to be of material significance to the assessment of an appropriate sanction.

This narrow view seems to explain his decision to interfere with the dismissal.

12. I turn to appeal. There was some debate before us as to whether Mr. Nieuwoudt, who appeared for the appellant, was advancing a “new point” for the first time on appeal. In at least one critical respect I do not think this is so. It is apparent from the review papers that the gravamen of the appellant’s case was that the commissioner had improperly “downgraded” the letter of 28 September 1998, and had consequently approached the sanction on a false basis. This remains the principal contention on appeal. Mr Steenkamp, who appeared for the third and fourth respondents, correctly accepted that all facts were before the Court, and his opposition to a new point being argued, if such it be, was no more than nominal. NUM V Greenside Colliery [1995] 4 BLLR 29 [LAC].

13 The statutory grounds for reviewing the commissioner’s award are to be found in s. 145 of the Labour Relations Act 66 of 1995. I am satisfied, for the reasons which follow, that the commissioner erred fundamentally, and reviewably, on grounds which fall fairly and squarely within the ambit of the section.

14 The realistic starting point is Ms. Henn’s course of conduct during the five months preceding 28 September 1998. It is apparent from the evidence that she was a troublesome employee, given to repeated disruptive behaviour and, on her own admission, possessed of a foul tongue. By September 1998 management’s patience was wearing thin. The letter of the 28th was not simply handed to Ms Henn, she was called in and the position was discussed with her. The letter itself was a final warning in substance. It is not reasonably possible to construe it otherwise. Furthermore the final paragraph was in the widest terms: “no further contravention of any kind”.

The letter plainly extended in my view to insolence, which is a species of disruptive behaviour and for which she had been warned in May, within the five month period. On receipt of the letter, pursuant to the accompanying discussion, Ms. Henn could not have been under any illusion as to where she stood on either score. Nor did she claim to be. Her defences were (i) a form of justification (Mr. Evans’ alleged conduct); and (ii) inconsistency of a rule in the work place, possibly implied (Krauss’ propensity for swearing). Both defences were rightly rejected. It was not Miss Henn’s

case that she misunderstood the letter, or its purport, or that she was misled into believing that the letter meant something other than it plainly said.

15 Mr Steenkamp argued that it was not permissible for the appellant to resurrect or extend the May warning for insolence, which lapsed at about the time when the letter was written. I shall assume that to be so. In my view it was not intended to resurrect such warning. But this does not mean that an employer, exasperated by a general pattern of disruptive conduct, is precluded from admonishing the employee to desist and informing her that she had reached the end of her tether, and that persistence may lead to dismissal. This is what the letter and the concomitant discussion did. The correct and only factual position on the evidence before the commissioner was therefore that from 28 September Ms Henn was on warning, conveyed in writing, in respect of a category of offences which included insolence.

16. It was not open to the commissioner in the circumstances to ignore the evidence or its effect, which it seems to me is precisely what he did. I have set forth his full reasoning at paragraph 0] above. It can be seen that he dismembered the letter of 28 September and, in so doing, robbed it off all its efficacy, which explains the decision to reduce the sanction. But the commissioner's approach was not supported by the evidence, and his findings with regard to the letter, were not findings to which the evidence was reasonably susceptible. This appears to me accordingly to be a clear instance of a latent gross irregularity as that concept was explained by Schreiner J in *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551 at 560. In terms of s145 a "gross irregularity" is a "defect" which may found review proceedings.
17. It follows that the Court below should have set aside the award. As all the facts were before that Court and as it should in terms of s.145(4)(a) have determine the dispute in the manner which it considered appropriate, that task now falls to this Court.

18 There is no doubt in my mind that the fair and appropriate sanction was a dismissal. As the senior shop steward, Ms Henn occupied a position of leadership. She was seriously insolent to a member of senior management without any provocation whatsoever. From the decision and letter of 28 September she knew she was at risk of dismissal. She failed to apologise or otherwise make amends either before or during the disciplinary hearing or in the week following it. By her own conduct Ms . Henn undermined and eventually ruined a tolerable relationship between employer and employee. The appellant could not reasonably and fairly be expected to retain her in its employ. The dismissal must therefore be confirmed and the commissioner's award as well as the order of the Court a quo set aside.

19 The Court below ordered the appellant to pay the costs of the third and fourth respondents. That order falls away in view of the outcome on appeal I consider it to be fair that the costs a quo and on appeal should follow the result.

20 The order is as follows:

The appeal is upheld with costs.

The order made by the Court a quo is set aside and replaced by the following:

"1. The application is granted with costs;

The second respondent's award in case no. WE 20881 is set aside;

It is declared that the dismissal of the fourth respondent by the applicant was both substantively and procedurally fair".

All costs referred to in (a) and (b) above are payable by the third and fourth respondents jointly and severally, the one paying, the other to be absolved.

R.G. Comrie

Acting Judge Of Appeal

I agree

RMM Zondo

Judge President

K. van Dijkhorst

Acting Judge of Appeal

For the Appellant: Mr H. Nieuwoudt of Deneys Reitz Inc., Cape Town

For the third and fourth Respondent: Mr A. Steenkamp of Cheadle Thompson & Hayson Inc.,
Cape Town

Date of Argument: 22 May 2001

Date of Judgment:

[19] There is no doubt in my mind that the fair and appropriate sanction was a dismissal. Ms . Henn had been repeatedly warned for disruptive behaviour, which included a warning for insolence; on 28 September she was warned finally; less than three month later she was seriously insolent to the production manager without any warrant whatsoever. She made no attempt to apologise or otherwise or make amends either before or during the disciplinary hearing or in the week following it.

[20] Costs remain for determination. The Court below ordered the appellant to pay the costs of the third and fourth respondents. That order must be set aside in view of the outcome on appeal. Mr .Nienwoudt submitted that the appellant should have its costs at first instance and on appeal unless its success depend on the so called

“new point” in which case there should be no costs orders. Mr. Steenkamp argued with tis submission. I have already question whether in the critical respect there was a new point. While it must be conceded

that the appellant could have spelled out its grounds for review with greater clarity, on the other hand the review always “hinged”

(as I have put it) on the letter of the 28 September and on what the commissioner did with it. I infer that the argument for the

appellant was presented differently in the two Courts, so that Stelzner A.J's mind may not have been attuned to the particular point on which on which the appeal had succeeded.

Nevertheless, it is sufficiently close and to go by her reason, I think that the new argument would have failed. All in all I consider it to be fair that costs a quo and on appeal follow the result. I propose the following order :

(A) The appeal succeeds with costs. The order made by the Court a quo is set aside and replaced by the following :

"1.The application succeeds with costs;

2. The second respondent's award in case no we 20881 is set aside;
3. It is declared that the dismissal of the fourth respondent by the applicant was both substantially and procedurally unfair".

(B) The costs referred to in (A) above are payable by the third and fourth respondents jointly and severally, the one paying the other to be absolved.

R.G COMRIE

JUDGE.

Date of Judgment: 29 June 2001

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