

SOUTH AFRICA / JUDGMENT

Vitale v Transdeco GTHMH (Pty) Ltd and Others (JR1061/06) [2007] ZALCJHB 21 (16 November 2007) [2007] ZALCJHB 21

COURT

Labour Court Johannesburg

BEFORE

Francis

CASE / FILE NUMBER

JR1061/06

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IN

THE LABOUR COURT OF SOUTH AFRICA

HELD AT

JOHANNESBURG

CASE

NO: JR1061/06

In

the matter between:

VINCENZO
VITALE
Applicant
and
TRANSDECO
GTHMH (PTY)
LTD 1st
Respondent
COMMISSIONER
K KLEINOT
N.O. 2nd
Respondent
THE
METAL ENGINEERING INDUSTRIES
BARGAINING
COUNCIL
3rd
Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award made by the second respondent (the commissioner) in terms of which he upheld the applicant's dismissal and awarded him compensation of one month and two weeks.
2. The application was opposed by the first respondent.

The background

facts

3. The applicant at the time of his dismissal in September 2003 had worked for the first respondent for 22 years. He was charged

with the following misconduct:

3.1 You have become incompatible with the manner in which the Company is desirous of carrying out its business. In this regard, you have, over a lengthy period of time, not been able to properly communicate and/or work together with your supervisor, Mr Barberini

("Barberini") and despite numerous counselling sessions convened with you in an attempt to rectify this apparent situation,

regrettably you have not been able to convince the Company that you are able to indeed willing to work in a harmonious environment with Barberini;

3.2 You have committed gross insubordination in that over a period of time, and particularly over the preceding four to six weeks, you have acted in a grossly insubordinate manner towards Barberini by, inter alia, making childlike sounds when answering him, and in addition thereto, refusing to obey lawful and reasonable instructions furnished to you by Barberini in numerous areas of performance of the carrying out of your duties;

3.3 Gross misconduct in that you have allegedly, deliberately incited co-workers to slow down production, thereby detrimentally affecting the output and performances of the Company.

4. The applicant appeared at a disciplinary hearing, was found guilty and was dismissed. He referred a dispute to the third

respondent. The first respondent called four witnesses to testify on its behalf. They were Chris Steenkamp, Guiseppe Barberini,

Stephen Magwete and Godfrey Sibiya. The applicant testified and called Alfredo Filisetti as his witness. The commissioner

awarded the applicant compensation of one month and two weeks. The applicant was unhappy with the award and brought the review

application.

The commissioner's award

5. The commissioner has set out in his award the evidence led at the arbitration proceedings. I do not deem it necessary to repeat those. The commissioner recorded that the issue before him was whether the dismissal was fair. He was charged with incompatibility in that communication between the applicant and Barberini had broken down, gross insubordination in that he refused to obey lawful instructions and gross misconduct in that he deliberately incited co-workers to slow down production.
6. The commissioner said that in cases of alleged incompatibility with other members of the first respondent's management staff the employer must act cautiously ensuring that the alleged incompatibility gave rise to concrete managerial problems or disruption. In instances of incompatibility warning and counselling is required. The evidence shows that the relationship between Barberini and the applicant had been deteriorating over a number of years. It appears that during 2002 and 2003 the relationship broke down. The evidence of Steenkamp and Sibiya supported this conclusion. Both stated that the relationship was poor. Sibiya stated that he attempted to resolve the situation during 2002 with both parties.
7. The commissioner said that both the applicant and Barberini testified that they complained to management and felt that their concerns were not being addressed. The evidence shows that Barberini sent three letters of complaint to the first respondent. The evidence shows that the applicant sent one letter of complaint after the meeting on the 2nd of June 2003. This dealt with the hiring of staff and not per se the relationship between the applicant and Barberini. Both the applicant and Barberini agreed that communications between them had indeed broken down. The evidence shows that other staff members observed this and it directly impacted on the production of work. He accepted Barberini's evidence that tonnage dropped.
8. The commissioner said that it was common cause that the parts list was locked away. This indicated that information concerning the output and remaining deliverables were not known and the inference that may be drawn is that it impacted on production.

Furthermore, the applicant conceded that he was asked for the amount of work that had been completed and he refused to do this. The inference that could be drawn is that the applicant refused to follow a reasonable and lawful instruction.

9. The commissioner said that the evidence was that Barberini is the senior manager and the applicant is his subordinate. It was unlikely and improbable that the applicant and employee with approximately 20 years of experience was unaware of the disciplinary

code. Moreover the applicant stated in his evidence that he was not aware of what was entailed in terms of being subordinate.

This is improbable as he managed his own team of employees whom he disciplined from time to time. Consequently to say that he was unaware of what was entailed in terms of being subordinate is wishful conjecture on his part.

10. The commissioner said that the applicant's evidence that he was not given sufficient staff to do his job there was little evidence to corroborate this version and as such was rejected. He also stated that there was very little work to do and as such he spread the work out. The inference that may be drawn was that as a result of the tense working relationship the applicant slowed work down and this was indicative of disrespectful for Barberini and the first respondent. It is in this way that the applicant's behaviour had a direct impact on the first respondent's business. This is also a serious misconduct in that it flies in the face of the employment relationship. One aspect of the employment relationship is that the employee should act in the best interest of the employer in furthering the employer's business. The applicant's actions of slowing down work could not be regarded as falling within the best interests of the business. This was a serious misconduct and goes to the heart of the trust relationship. By engaging in this behaviour, the applicant severed the trust relationship between the parties. This breach of the trust relationship on its own was sufficient to apply the sanction of dismissal.
11. The commissioner found that there was sufficient evidence to indicate incompatibility between the applicant and the management of the first respondent. There was also sufficient evidence that the applicant was guilty of serious misconduct in that he deliberately slowed work down.
12. The commissioner said that the next issue was whether the first respondent warned and counselled the applicant about his behaviour.

The evidence is that the directors had discussions with both the applicant and Barberini about the problems. The applicant

stated that he complained to the directors. Sibiya stated that he had a round table meeting with the two employees to attempt to resolve the dispute. This was an attempt to resolve the dispute but it was done in an informal manner long before the dispute arose. If anything this indicated that the first respondent was aware of the strained relationship but took a wait and see approach. The commissioner said that there was no evidence before him that the first respondent formally warned the applicant. Furthermore there was no evidence before him that the first respondent held a counselling session with the applicant about his behaviour. The informal discussions with the directors did not constitute formal counselling sessions. The directors were not called to

testify as to what transpired at during these discussions. The counselling session scheduled at Fluxman's attorney was merely a ventilation of the issues. A counselling session entails assessing the underlying emotional issues and attempting to resolve the issue as well as affording the applicant sufficient time to adjust his behaviour. The evidence showed that this was not done. Although the alternatives were proposed, these were initially rejected and the correspondence shows that these were reconsidered but the first respondent failed to respond thereto. The sequence of events indicates that shortly thereafter the applicant was charged and issued a notice to attend a disciplinary hearing. It is apparent that the first respondent did not exhaust the counselling procedure.

13. The commissioner said that the evidence indicated that the first respondent followed a fair procedure to the hearing. The only concern raised by the applicant was that his representative did not ask enough questions in cross-examination. This may constitute negligence on behalf of the representative but does not render the procedure followed by the first respondent defective.
14. The commissioner said that the applicant had requested reinstatement. It was evident from the behaviour of the parties

during arbitration that the working relationship is non-existent. Furthermore he accepted the evidence before him that the trust relationship had irretrievably broken down. In light of this set of circumstances the only available remedy was that of compensation. Considering the nature and manner in which the dismissal occurred as the first respondent failed to warn and counsel the applicant compensation would be awarded in terms of section 194 of the Act. The commissioner said that the evidence was that the applicant was out of work for a month and a half. He awarded him compensation of a month and half. The commissioner said that no evidence was led as to the applicant's last remuneration and as such he was at a loss to calculate such. He said that if the parties furnished him with proof of the applicant's remuneration at the date of dismissal a variation order may be made quantifying the amount of one month and two weeks salary. The commissioner upheld the dismissal and awarded him one month and two weeks compensation.

The grounds of review

15. The applicant's grounds of review are as follows:

15.1 The conclusion reached by the commissioner is not justifiable in relation to the reasons given therefore. The commissioner failed to appreciate the weight of the evidence, and in so doing, arrived at a factually incorrect finding that his dismissal sought to be upheld.

15.2 The award is vague and confusing in that it is not clear what is to be understood by the words: "the dismissal is upheld". The deduction that his dispute is to be upheld is apparent in that he was awarded one and a half month's compensation. His dispute ought to be upheld based on the evidence presented during the arbitration hearing.

15.3 The commissioner furthermore misdirected himself in finding that there was evidence to the effect that the trust relationship between himself and the first respondent had irretrievably broken down. The commissioner's entitlement, and in fact his obligation to order his reinstatement by the third respondent is borne out by the latter's contemplation during the course of the arbitration hearing.

15.4 The commissioner upheld his dismissal but nonetheless awarded him compensation of one month and two weeks. The only plausible explanation for this apparent contradictory award is that the commissioner correctly found that it was permissible for the first respondent to dismiss him on the grounds of incompatibility and so awarded him compensation.

15.5 The commissioner made no finding about the second charge of misconduct namely gross insubordination. There was insufficient evidence to support a guilty finding in that regard. However the commissioner found that there was sufficient evidence that he had deliberately slowed worked down. He presumed that it was on that basis that the commissioner upheld his dismissal. In support of his finding, the commissioner accepted Barberini's evidence that tonnage had dropped. This conclusion is apparently based on his reasoning that other staff members were aware of the breakdown of communication between him and Barberini and that this awareness directly impacted on the production of work. The commissioner held further that a parts list which was locked away, indicates that information concerning the output and remaining deliverables were not known and the inference that may be drawn is that it impacted on production. This inference was not supported by the evidence.

15.6 The commissioner then concluded that the inference may be drawn that as a result of the tense working relationship he slowed work down and this is indicative of disrespect for Barberini and the first respondent. These findings totally ignore the evidence of Magwete led on behalf of the first respondent that the applicant allegedly instructed him to under perform in his work. At no stage did the first respondent seek to rely on the poor relationship between himself and Barberini as causing the slowing down of work. It was always the first respondent's contention in this regard that he had instructed an employee, Magwete to under perform.

15.7 The commissioner has misconstrued the evidence and reached certain findings that are incompatible with the evidence led during the arbitration hearing. The evidence of Magwete is in any event unreliable and untrustworthy as shown during the arbitration hearing.

Analysis of the facts and arguments raised

16. The Constitutional Court in the matter of Z Sidumo and another vs Rustenburg Platinum Mines Ltd and others CCT 85/06 has given clear guidelines to commissioner about how unfair dismissals should be dealt with. So for example it has said at paragraphs 72, 78 and 79 that in deciding how commissioners should approach the task of determining the fairness of a dismissal it is important to bear in mind that security of employment is a core value of the Constitution which had been given effect to by the Act. This is a protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterises employment in modern developing economies. In approaching the dismissal

dispute impartially a commissioner will take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed 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, 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. The commissioner must 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 decision of the employer. What is required is that he or she must consider all relevant circumstances.

17. The following was said at paragraph 110 in Sidumo about the test to be used in reviews:

"To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an

administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.

18. Before considering the principles referred to in the Sidumo matter there is the issue of the record of the arbitration proceedings. It is trite that there is a duty on the applicant to provide this court with a record of the arbitration proceedings. It is also trite that where the applicant fails to provide this court with a transcript after the cassettes were made available him the review application stands to be dismissed on that basis alone.
19. This court has cautioned in several judgments that it is not the duty of this Court to alert an applicant that the record is deficient. The applicant was represented by an attorney at the arbitration proceedings and by an attorney in this application. The first respondent in its written heads filed on 17 May 2007 pointed out that there is a missing cassette and furthermore that the evidence of Sibiya seems absent from the transcription of the mechanically recorded proceedings. It pointed out that the testimony of Sibiya was important in several respects and that the material facts in Sibiya's evidence relevant to the review were not common cause. The applicant did nothing about this.

20. The applicant has not dealt at all with the evidence given by Sibiya either in his founding papers, supplementary affidavit or in its written heads of argument. He simply ignored the evidence of Sibiya and had hoped that it would disappear. He should have approached the commissioner for the missing cassette or attempted to reconstruct the record. He has failed to do so.
21. What makes matter worse for the applicant is that he has failed to record what evidence was led at the arbitration proceedings in his founding affidavit, supplementary affidavit and replying affidavit. No factual basis was given about why he alleges that the commissioner has committed a reviewable irregularity.
22. The question that arises is whether I should dismiss the application on the basis that the applicant has failed to provide this court with a full transcript of the record. I have decided against doing so since it appears that the commissioner's award is reviewable on the face of it.
23. The applicant contends that the award is subject to review in that the conclusions reached by the commissioner in upholding the dismissal is not justifiable in relation to the reasons given therefore. The commissioner failed to appreciate the weight of evidence and in so doing, arrived at a factually incorrect finding that his dismissal sought to be upheld. This court cannot even attempt to consider this ground of review when the full record of the arbitration proceedings was not placed before it. The applicant has not even placed "the weight of evidence" before me.
24. The applicant had contended that the commissioner misdirected herself in finding that there was no evidence to the effect that the trust relationship between the applicant and the first respondent had irretrievably broken down. He said that the commissioner's entitlement, and in fact her obligation to order his reinstatement by the third respondent is borne out by the commissioner's contemplation thereof during the course of the arbitration hearing. Once again this ground is based on what evidence was led before the commissioner. As pointed out above this court has not been provided with a full transcript of the record of proceedings and cannot apply its mind properly to this ground of review.
25. It was further contended that the award was vague and confusing, in that it is not clear about what is to be understood by the words: "the dismissal is upheld". There is some substance on this ground of review. It appears from the commissioner's award that the commissioner had found that the applicant and Barberini were incompatible. This had been so for a number of years and is a fact known to the first respondent. The first respondent had adopted a wait and see approach. Both the applicant and Barberini had brought it to the attention of the first respondent. A meeting was held to deal with this. Nothing happened. It was only after the first respondent had received a letter from Barberini that the first respondent jolted into action. It appears from the evidence led that all three charges really flow from the bad

relationship between the applicant and Barberini. The commissioner appears to have awarded the applicant compensation as a result of the first respondent's failure to have "warned and counsel the applicant". This is rather confusing.

26. The commissioner had found that the applicant's challenge to the procedural fairness was premised on one basis namely that his representative did not ask enough questions in cross examination. He correctly found that the dismissal was not procedurally fair. The commissioner than was required to deal with the issue about whether the applicant's dismissal was for a fair reason. If it were for a fair reason, the applicant would not have been entitled to any compensation at all. If the commissioner found that the applicant had committed the misconduct that he was accused of, the commissioner would than had to consider whether the dismissal was fair. To put it differently what sanction would be fair in the circumstances.
27. It appears from the award that as far as incompatibility is concerned the commissioner found that there were no warning and counselling. The commissioner has stated that both the applicant and Barberini were counselled by the first respondent. He said that warning and counselling is required. Their relationship had deteriorated over a number of years. Their relationship broke down during 2002 and 2003. Both complained to management about their concerns. This was noticed by the rest of the employees and this impacted on the production of the work. The commissioner found that there was no evidence before him that the first respondent held counselling session with the applicant about his behaviour. The informal discussions with the directors did not constitute formal counselling sessions nor were the directors called to testify about what transpired during those discussions. He said that a counselling session entailed the underlying emotional issues and attempting to resolve the issue as well as affording the applicant sufficient time to adjust his behaviour. He found that this was not done and said that although the alternatives were proposed these were initially rejected and the correspondence shows that these were reconsidered. However, the first respondent failed to respond thereto. The commissioner clearly found that the first respondent did not exhaust the counselling procedure in respect of incompatibility and had acted hastily when the disciplinary action was taken against the applicant. The commissioner should than not have made any finding in this regard due to this defect.
28. The commissioner then dealt with the second charge. The second charge is gross insubordination in that the applicant had over a period of time, and particularly over the preceding four to six weeks, have acted in a grossly insubordinate manner towards Barberini by, inter alia, making childlike sounds when answering him, and in addition thereto, refusing to obey lawful and reasonable instructions furnished to him by Barberini in numerous areas of performance of the carrying out of his duties. The applicant had been found guilty of insolence by the chairperson of the disciplinary hearing. This is a factor that the commissioner appears to have failed to have considered in his award. The commissioner said that it was common cause that the parts list was locked away. This indicated that the

information concerning the output and remaining deliverables were not known and the inference that may be drawn is that it impacted on production. The applicant conceded that he was asked for the amount of work that had been completed and he refused to do this. The inference that may be drawn is that the applicant refused to follow a reasonable and lawful instructions. It is unclear from the award whether the applicant was found guilty of gross insubordination or failing to follow a reasonable instruction or insolence.

29. The third charge is that the applicant had deliberately incited co-workers to slow down the production. The commissioner has dealt with this charge in the following manner. He said that the applicant's evidence that he was not given sufficient staff to do his job there is little evidence to corroborate this version and as such was rejected. He also stated that there was very little work to do and as such he spread the work out. The inference that may be drawn is that as a result of the tense working relationship the applicant slowed work down and this indicative of disrespectful for Barberini and the first respondent. It was in this way that the applicant's behaviour had a direct impact on the first respondent's business. This is also a serious misconduct in that it flies in the face of the employment relationship. One aspect of the employment relationship is that the employee should act in the best interest of the employer in furthering the employer's business. The applicant's

actions of slowing down work cannot be regarded as falling within the best interests of the business. This was a serious misconduct and goes to the heart of the trust relationship. By engaging in this behaviour the applicant severed the trust relationship between the parties. This breach of the trust relationship on its own is sufficient to apply the sanction of dismissal. The particular given in relation to this charge is that the applicant had deliberately incited co-workers to slow down the production. The commissioner has not dealt with this at all in his award. The commissioner finding of guilt is based on something that the applicant was not charged with.

30. The commissioner was required after finding the applicant guilty of misconduct to consider whether dismissal would be a fair sanction in the circumstances. It is clear from the commissioner's award that the commissioner has only taken into account the reason the first respondent imposed the sanction and failed to take into account the basis of the applicant's challenge to the dismissal. He should have taken other factors into account which for example is the harm caused by the applicant's

conduct, whether additional training and instructions may result in the applicant not repeating the misconduct, the effect of dismissal

on the applicant and his long service record. It is clear from the award that the commissioner did not consider any mitigating

factors into account. He did not take into account the length of service of the applicant, the tense relationship between the applicant and Barberini which on the commissioner's own finding caused work to slow down. The first respondent was aware of the strained relationship and adopted a wait and see approach. Action was only taken after Barberini had approached attorneys. There was an overlap between the charges and were linked to the stormy relationship between the parties.

31. The commissioner was required to decide whether what the first respondent did was fair. In arriving at his decision he is not required to defer to the decision of the first respondent. What he is required to do was to consider all the relevant circumstances. It is clear from his award that the commissioner did not do so.

32. In deciding the review application the question that I need to ask is whether the decision reached by the commissioner is one that a reasonable decision maker could not have reached. After a careful consideration of the evidence led and the commissioner's

reasons given for the award I do not believe that the decision reached by the commissioner is one that a reasonable decision maker

could have reached.

33. The award stands to be reviewed. This brings me to the question about whether I should refer the matter to the bargaining council for a rehearing or whether I should deal with matter myself. I do not believe that I have all the facts at my disposal. I have already indicated that the applicant has failed to provide this court with a full transcript of the arbitration proceedings. I am therefore not in a position to consider the matter on my own.

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

35. In the circumstances I make the following order:

35.1 The arbitration award made by the commissioner on 13 March 2006 under case number MEGA1834 is reviewed and set aside and is referred to the bargaining council for a de novo hearing before another commissioner other than the second respondent.

35.2 There is no order as to costs.

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT

: HP WEST INSTRUCTED BY LOCKETTS ATTORNEYS

FOR FIRST RESPONDENT : C ASCAR INSTRUCTED BY FLUXMANS INC

DATE OF

JUDGMENT

: 16 NOVEMBER 2007

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