IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no. J3313/99

ORANGE TOYOTA (KIMBERLY) Applicant

AND

MR JOHN TREVA VAN DER WALT Respondent

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JUDGEMENT

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MOLAHLEHI AJ

INTRODUCTION

This an application in which the Applicant Orange Toyota (Kimberly) sought to review and set

aside an award of the second Respondent Motor Industry Bargaining Council (Athe Bargaining

Council@). In the award Advocate Van Zyl seating as an arbitrator, concluded that the dismissal

of Mr Van Der Walt, the first respondent, was unfair and ordered re-employment. He imposed

a final warning which is valid for a period not exciding six months from the day of the re-

employment.

APPLICATION FOR CONDONATION

The Labour Appeal Court in the case of Queestown Fuel Distributors CCV Luschagne No & others (2000) / BLLR 45 (LAC) set aside the decision of the court quo which refused to grant condonation for a late filling of a review application. The court a quo had refused to grant condonation on the basis that it had no power to do so in the absence of an express provision in section 145 of the Labour Relations Act No 66 of 1995 as amended (the Act). The Labour Appeal Court held that the time limit of six weeks provided for under section 145 of the Act which is plainly modelled on section 33 of the Arbitration 42 of 1996 was peremptory and

not mandatory. (CHECK SECTION 38 OF ARBITRATION ACT).

In this regard conradie JA stated: (at 53 - H) AIt follows, however from what I have said above that condonation in the case of disputes over individual dismissal will not be readily granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.@
The reason for the late application according to the applicant was occasioned by the departure of Mr Neck Barnaschone, one of the senior partners of the attorneys of record who used to be responsible for dealing with labour. He was also responsible for dealing with this matter before his relocation to Cape Town. The delay occurred as he was winding up his practice in preparation to leave. He took instructions from the applicant regarding this matter but had to pass the file to someone else in the process of his arrangement of relocating to Cape Town. In essence this is the reason for the two weeks delay in filing the review application.

I am satisfied that a case for granting condonation for the late filing of the review application has been made out. Taking into account the circumstances of this case two weeks is not unreasonably too long and I belief the excuse to be compelling and the reason for attacking the defect I cogent. The condonation for late filling of the review application was accordingly granted.

The facts
The facts are simple and common course. The first respondent was employed by the applicant as a Service Advisor at its Kimberly branch. During March 1999 the respondent was advised to attend a course in Bloemfontein. He was advised that the participants of the course would have to pay for their lunch meal. He raised this issue with Mr Viljoen who authorised that an amount of R150,00 be issued to both the respondent and Mr Van Herden another employee who attended the course with him.

At the end of the course on the 10 March 1999 both first respondent and Mr Van Herden stoped at as three places where they had drinks and food. Their first stop was at the Waterfront in Bloemfontein where they had some drinks and thereafter they proceeded to Sportmans Bar where they again consumed more drinks. Their last stop was at Olien Hotel at Delseville where they again took some more drinks and had something to eat. At this stage the respondent realised that he no longer had money and decided to create fictitious cash slips in order to justify the expenditure in the amount of R150,00.

The following day the applicant confronted the first respondent and inquired from him as to whether they had ACalamari@ and ADon Pedros@. The respondent denied this and indicated that they only had

ASteak and Chips@.

Grounds for review
The grounds for review are based on the allegation that, the arbitrator failed to apply his mind to the issue at hand and if did he would he would not have made the award he did, namely re- employment of the respondent. It was submitted in this regard that by ordering re-employment he had failed to take into account clearly established principle that dishonesty undermines the trust upon which an employment relationship is built and that under the circumstances summery dismissal was justified.

The facts being common course, the arbitrator had two issues to consider being:
A(1) was sanksie van ontslag te hard en
(2) Was daar konsekwente optrede deur die werkgewer A

It is not necessary in this review to deal with the second issue referred to above as nothing turns on it. I confine myself to the arbitrator=s finding that the applicant did not take into account mitigating factors when it imposed the sanction - resulting in the dismissal being too harsh. In this regard the arbitrator ruled as follows:
A Quote last paragraph on page page 68 second paragraph up to the end

The arbitrator arrived at the above conclusion on the basis that the applicant did not take into account mitigating factors in favour of the respondent. (Check repetition).

He also found that the applicant applied the policy against theft rigidly without regard to the surrounding circumstances. The arbitrator took into account the following mitigating circumstances in ordering the re-employment of the respondent:
Qute last paragraph on 67 ending on page 68

Deal with the issue of applying the same atandards tot arbitration arwqards issued by bargaining council

One of the basic standard in the employment relationship recognised by our law is that an employee has a duty to act in good faith and honestly to his or her employer. (See Standard Bank of South Africa Ltd v CCMA &

others [1998] 6 BLLR 622 (LC)). In the absence of special circumstances a breach of this duty is generally visited with the ultimate sanction of dismissal. The severity of the punishment is generally determined by the presence or absence of mitigating factors. In Toyota South Africa (PTY) LTD v Radebe & others (2000) BLLR 243 (LAC) Nicholson AJ said at paragraph 44:
AIt is not an invariable rule that offences involving dishonesty necessarily incur the supreme penalty of dismissal. The facts of every case must be assessed and mitigating features taken into account.@

In dealing with the issue of whether or not an arbitrator should interfere with a decision of an employer in dismissal for misconduct cases the court in County Fair Foods (Pty) Ltd v CCMA & others [1999] 11 BLLR 1117 (LAC) held that:
AIt remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited, interference therewith is only justified in the case of unreasonableness and unfairness.@

As stated above the arbitrator interfered with the sanction imposed by the employer on the basis that the applicant applied the policy regarding theft rigidly and failed to take into account mitigating factors when it arrived at the decision to dismiss the respondent. It is apparent to me that the arbitrator applied his mind before interfering with the decision of the employer. This, I belief is a justifiable ground upon which the arbitrator was entitled to interfere with the decision of the employer.

Having regard to the material placed before the arbitrator, I am not shocked or alarmed by his decision. In my view, the arbitrator in arriving at his decision as he did took into account factors relating to the fairness of the dismissal imposed by the employer.

In the premises the application to review the award handed down by the arbitrator in this matter is dismissed with costs. However paragraph 3 of the award is replaced with the following:
AThe first respondent is to receive a final written warning valid for six months from the date of his return to work, which will concern any breach of his employer=s workplace concerning any form of dishonest misconduct.@

I am of the view that it cannot be said that the senior commissioner exceeded his powers in coming to the conclusion that it was appropriate to impose suspension without pay and to do so in terms which sought to give effect to this.

Molahlehi AJ

Date of Hearing

Date of Judgement

For the applicant Advocate JP Daffue instructed by G Chemary and H Cilliers

For the respondent Mr Attorney Thompson