IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR622/03

In the matter between

NELSON MAWELELE Applicant

And

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION 1st Respondent

W FERREIRA N.O. 2nd Respondent

APRON SERVICES (PTY) LTD 3rd Respondent

JUDGMENT

REVELAS, J:

[1] This is an application for the review and setting aside of an award made by the second respondent ("the arbitrator"), who found that the dismissal of the applicant was fair. The arbitrator made his award after conducting an arbitration hearing under the auspices of the first respondent, ("the CCMA").

The applicant, a shift control officer was dismissed by the third respondent, having been found guilty of four charges. They are:

1. Leaving the workplace early without permission.
2. Failing to work according to standard.
3. Leaving a subordinate with responsibilities he was not able to carry out and before the end of the shift.

4. Bringing the company's name into disrepute.

[2] These four charges were brought against the applicant after he had left the workplace to go elsewhere and asked a person by the name of Mr Khoza to take care of his duties. In his absence several things went wrong.

[3] The third respondent provides certain passenger service for the South African Airways. As a result of the applicant's absence certain passenger buses did not get to their designated airplanes and passengers had to walk some distance to the terminal building, which was, as argued, a safety risk. Disgruntled passengers articulated their dissatisfaction and the airline in question indicated to the third respondent that it would rather seek the services of a different service provider if the third respondent was to continue providing service of this quality.

[4] The arbitrator found that the four charges on their own did not constitute dismissable offences, but that their cumulative effect had the result that the third respondent was entitled to dismiss the applicant. It is common cause that all four charges arose out of the same incident. The arbitrator further found that the dismissal was procedurally fair and this latter finding was not attacked on review. The main ground of review was, that the record was insufficient and thus the matter had to be remitted back to the CCMA.

[5] The record is far from satisfactory but neither party persuaded me that the record was so deficient that one could not make certain findings about the rationality of the award, that is the connection between the conclusion and the facts placed before the arbitrator. That ground was in any event not pursued very seriously although it was apparently not abandoned.

[6] Secondly, the rationality of the award was attacked. In this regard the arbitrator's "splitting" of the charges to the detriment of the applicant, he was criticised. At this juncture I may just say that this was not argued before the arbitrator. The argument arises for the first time on review. The arbitrator was also criticised for his failure to apply his mind to the facts before him.

[7] It was submitted that the finding, that the previous instance when the applicant delegated his responsibilities to a subordinate and left the workplace before the end of the shift, was an isolated incident. The applicant contended that he delegated his responsibilities to Mr Khoza specifically and on several occasions. He also denied that he knew anything about the standard ground rules to be followed at the workplace. The applicant argued that his presence would have made no difference, due to the fact that the breakdown of the bus was the main problem on the night in question.

[8] The arbitrator was also criticised for the finding that Mr Hlongwane's evidence, pertaining to Mr Khoza's lack of authority to instruct bus drivers to work overtime, should have been preferred to the evidence of the applicant, that he did have the authority.

[9] In my view, the transgression committed by the applicant was rather serious and the third respondent may possibly have faced a loss of business as a result of the incident in question. The applicant also had no right to delegate his duties to Mr Khoza and should not have done so on several occasions. However he was charged on the basis of one incident. The charges all flow from one incident.

[10] What the arbitrator had overlooked was whether this was indeed a dismissable offence. The applicant had worked some seven years for the third respondent and apparently had certain other warnings. This issued was not clarified to me. Before me, he had a clean record. I had made specific enquiries in court from the parties in this regard. The offence is one which should be corrected with progressive discipline.

It seems that the applicant does not deem it necessary to obey instructions. It is not for him to leave early and leave others to do his work but he did deserve a warning, before being summarily dismissed.

[11] There was also evidence that as a result of poor weather conditions two incoming flights were delayed. The applicant had no knowledge that these flights would be delayed.

Furthermore, due to a breakdown in a number of buses there were insufficient buses to transport the passengers on these two flights at the arrival hall. As a result of this delay the applicant was charged with the four separate offences, which in my view, should have been one. I gained the impression that the applicant was punished for the consequences of his offence, rather than the offence itself.

[12] The third respondent's counsel admitted that the fourth charge, namely that of bringing the company's name into disrepute, was a consequence of the first charge and those two charges, at best, could lead me to opine that that was a splitting of charges. However, he argued that the second and third charges were different in that delegating authority was a separate offence. Insofar as the third charge is concerned I am not quite certain that the failure to work according to standard, (the second charge), is the same as the first charge, (leaving the workplace early without permission). It seems to be the same as the third charge, (leaving a subordinate with responsibilities he was unable to perform). The fact that the applicant delegated his work to someone else should not constitute a separate offence. He did so as part of an in perpetrating the dereliction of his duties or leaving the workplace without permission, which is the offence in question. If he did not delegate his duties that afternoon, his offence might have been regarded as even more serious. The four separate charges are indicative of a shotgun approach.
Furthermore his offence is one where an employer should observe progressive discipline. The arbitrator also held that on their own the four separate charges, (including the charge of leaving the workplace) are not dismissable offences. There is only one offence. Therefore, in the absence of a clear warning relating to a similar offence, dismissal was not appropriate.

[13] The offence or charge is serious, but I gained the impression that other matters also went wrong on this particular day which the arbitrator did not take into account. The sanction imposed was a rather harsh penalty on the applicant in the circumstances. This is a case where it should have been made clear, in no uncertain terms, to Mr Mawelele that should he ever leave the workplace again he would lose his job. There are no doubt many people waiting at the third respondent’s gates who are looking for jobs and who are prepared to work their full hours and not leave early. It is not for Mr Mawelele to leave the

workplace early. Yet, he was entitled to a warning. The fact that so much went wrong on this day, should not detract therefrom.

[14] I am also cautious that I should not interfere with the sanction of the employer. If the employer feels that an employee should be dismissed, courts and arbitrators must be cautious not to interfere unnecessarily with that sanction because they do not work at this particular workplace and they do not know what the constraints are.

[15] Yet I also have to look at what is fair and, in my experience, I believe it was unfair not to have given the applicant a final written warning.

[16] In the circumstances I make the following finding:

1. The award of the second respondent is hereby set aside and substituted with the following:

"The applicant is to receive a final written warning to the effect that should he commit a similar transgression in the next two years he may be dismissed immediately".

2. There is no order as to costs.

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REVELAS J

For the Applicant: Mr R Daniels
Instructed by Cheadle Thompson and Haysom Attorneys

For the Respondent: Adv. Le Grange

Date of Hearing: 15 October 2004

JUDGMENT

Date of Judgment: 18 October 2004