IN THE LABOUR COURT OF SOUTHN AFRICA

HELD AT JOHANNESBURG

In the matter between: **Case no JR 832/07**

SOUTH AFRICAN POST OFFICE LIMITED **APPLICANT**

And

G S JANSEN

VAN VUUREN N.O **1ST RESPONDENT**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **2ND RESPONDENT**

PIETER STEPHANUS BURGER **3RD RESPONDENT**

JUDGEMENT

Molahlehi J

Introduction

[1] This is an application in terms of which the applicant seeks an order to review and correct or set aside an

award issued under case number GAPT 2030-6, dated 31 January 2007.

[2] The award was received by the applicant on the 6th February 2007 and the review papers were filed on the 12 April 2007. It is in this regard that the applicant has also filed an application for condonation for the late filing of its review application.

[3] Whilst the explanation proffered by the applicant is not satisfactory the period of delay which is 22 (twenty two) days is not excessive. I have for this reason decided to grant condonation for the late referral of the applicant's review application.

Background facts

[4] At the time the unfair labour practice dispute arose the third respondent, Mr Burger (the employee) was employed as a senior systems programmer by the applicant and was responsible for the installation and maintenance of server level computers.

[5] On the 1st December 2005, the applicants experienced an electricity outage in the server room. The applicant contended that the employee was the only person last seen in the server room prior to the outage. It was because of this that the employee was called upon to provide an explanation as to what happened. The employee was suspended on the 8 December 2006, as he was found by the applicant to have provided an unsatisfactory explanation for the outage. The employee was suspended because it was suspected that he had

made unauthorised changes in the production environment.

[6] The employee was charged with the following:

> "Gross negligence and dishonest working or making changes in Production environment on 1 December 2005 between 11:15 and 12:15 without proper authorisation. This action resulted in a loss of about twenty one transactions. In spite of having several meetings with management trying to find a cause of the outage you fail to come forward with the explanation".

[7] Following the disciplinary enquiry the employee was issued with a final written warning which provided as follows:

> "Transgression of the company's disciplinary code: Negligence- Working or making changes in the production environment on the 1st December 2005 between 11:15 and 12:15 am without proper authorisation".

[8] The applicant conceded that it failed to properly adhere to its own disciplinary code and procedures but contended that the employee_was the only person in the server room at the time and that therefore the only inference it could draw was that he had caused the outage.

Grounds of review

[9] The applicant contended that the first respondent, the Commissioner, committed misconduct in relation to his duties and exceeded his powers by granting compensation to the applicant for the unfair labour practice dispute.

[10] The applicant further contended that the Commissioner committed a gross irregularity in issuing his ruling and comparing the facts of this matter with those involving sexual harassment.

[11] The applicant also attacked the award because the Commissioner relied on the case of **Intertech Systems (PTY) LTD v/s Sowter (1997) 18 ILJ 689 (LAC) where it was held**:

> "It is clear to me that not every compensation has to be derived from an actuarially calculable loss. In the present case Sowter must be compensated for the egregious invasion of employment security and her dignity which the company perpetrated. That calculation cannot be mechanical".

[12] The applicant further contended that the Commissioner erred in his finding that the suspension and the warning issued against the employee resulted in the invasion of the employee's security and undermined his dignity.

[13] The applicant also attacked the decision of the Commissioner for granting the employee compensation in the amount of R126827.28 on the basis that the employee at no stage suffered any financial loss as he was paid during his suspension. The further submission made by the applicant was that the written warning which was given to the employee had elapsed at the time of the arbitration hearing.

[14] The Commissioner was also criticised for awarding the compensation without quantifying the damages that the employee suffered as result of the suspension.

[15] The final criticism against the Commissioner is failure to take into consideration the time of the year as well as the fact that the employee was suspended on the 6th December 2006 and his enquiry took place on the 16th December 2007, a period that is not unduly long.

[16] The employee did not deny that he was in the server room on the day in question. He testified that he was on that day installing rails on which the servers were to be mounted in the cabinets in the server room. He further testified that this was part of his job and his presence in the server room on the day in question was authorised. Whilst busy in the server room the manager of operations department Mr Paul Bosman and Network Technicians Mr Badenhorst entered the server room and informed the employee that there had been a loss of a banking transaction. The applicant assisted them to investigate the cause to no avail. The cabinet on which the employee worked and the network switches in that cabinet were checked by both Mr Bosman and Mr Badenhorst who could not find anything wrong.

[17] Apparently whilst busy investigating the cause of the loss of the banking transaction Ms Mosupe also entered the server room and enquired from the employee what he

could have done that may have caused the transaction loss. In addition to the applicant informing her that he had not done anything wrong, both Messrs Bosman and Badenhorst also informed her that they could not find anything wrong.

[18] The Commissioner found that the applicant did not know what caused the outage on the 1st of December 2005, and that the employee was suspected of being the cause simply because of his presence in the server room. He further found in this regard that the applicant had placed the burden on the employee to prove that he was not responsible for the outage.

[19] The Commissioner also found that the applicant expected the employee to plead to a charge which neither the chairperson of the disciplinary enquiry nor the applicant could tell him what he was alleged to have done. In these regard the Commissioner found that the acceptance by the chairperson of the plea of guilt by the employee in the circumstances of the case was patently unfair. He found the charge to have been extremely vague and did not disclose any misconduct. In these regard the Commissioner also found that negligence per se cannot constitute misconduct and the applicant should have formulated the charge by indicating the act of the employee which constituted negligence or an omission.

[20] As concerning the plea of guilty by the employee at the disciplinary hearing the Commissioner found that the record of the disciplinary enquiry did not reflect an unequivocal admission of guilt by the employee and therefore the “possibility of negligence” by the employee did not constitute an admission of guilt.

[21] In relation to the issue of unauthorised presence of the employee in the server room the Commissioner found that it was common cause that the employee was

authorised to work in the server room.

[22] The commissioner rejected the applicant's contention that the employee had caused the transaction losses. He also rejected the video footage as being inconclusive in that it did not show the applicant doing anything he was accused of.

[23] It was on the basis of the above detailed analysis of the evidence and the facts that the Commissioner came to the conclusion that the warning issued to the employee constituted an unfair labour practice.

[24] In my view the Commissioner had fully appreciated the task that was before him and applied his mind to the dispute he was required to consider and resolve. The conclusion that the commissioner arrived at is fully and well supported by not only the thinking he embarked on but also by the evidence and the circumstances of the case. His decision in this regard, in my view, meet the threshold of reasonableness as set out in **Sidumo & Others v Rustenburg Platinum Mine LTD (2007) 28 ILJ 2405 and Fidelity Cash Management Services v CCMA (2008) 3 BLLR 197 (LAC).**

[25] Turning to the issue of suspension the Commissioner found that the suspension constituted a separate unfair labour practice in that it was unwarranted and inherently unfair from both a procedural and substantive point of view. The commissioner found that the employee was left in the dark as to the nature of the offence and was not offered an opportunity to say why he should not be suspended or to state his case.

[26] In arriving at the decision that the suspension was unfair the commissioner reasoned that the suspension usually prejudices an alleged offender, psychologically and in terms of future job prospects. In support of his view the Commissioner correctly relied on the decision in **Muller and Other v Chairman of the Ministers' Council House of Representative an Others (1991) 12 ILJ**

761 at 775 to 776 where the court held:

> *"The implications of being barred from going to work and pursuing one's chosen calling, and of being seen by the community round one to be so barred, are not so immediately realized by the outside observer and appear, with respect, perhaps to have been underestimated in the Swart and Jacobs cases. There are indeed substantial social and personal implications inherent in that aspect of suspension. These considerations weigh as heavily in South Africa as they do in other countries.*

[27] The commissioner was also influenced by the comment made by **Prof Halton Cheadle in his article; Regulated Flexibility Revisiting the LRA and the Blea (2006) 27 ILJ 663 at 683 to 684 where the learned author says:**

> *"It is suspension pending disciplinary action that requires considered review. There are two abuses: arbitrary decisions and the inordinate periods of suspension. Suspension is the*

employment equivalent of arrest. The only rationale for suspension is the reasonable apprehension that the employees will interfere with investigation or repeat the misconduct. It follows that it is only in exceptional circumstances that an employee should be suspended pending a disciplinary enquiry. The employee suffers palpable prejudice to reputation, advancement and fulfilment. These limited reasons for suspension and this prejudice make a compelling case for regulation"

[28] Having found that the warning issued against the employee and his suspension constituted an unfair labour practice the Commissioner ordered the applicant to compensated the employee in the amount of R126 827.28 (one hundred and twenty seven rand and twenty eight cents) which is an equivalent of six month salary.

Evaluation

[30] Section 194 (4) of the Labour Relations Act provides:

> "The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all circumstances but not more than the required of 12 months remuneration"

[31] *In* ***Solidarity obo Kers v Mudau No & Others (2007) 28 ILJ 1146 (LC), Mokgoatlheng*** **AJ** in dealing with unfair labour practice concerning demotion held that the employer had committed an unfair labour practice and the employee was entitled to compensation for the period that he would have been appointed into the position in question.

[32] The same approach was adopted by Ravelas J in **MEC for Tourism, Environmental & Economic Affair, Free State v Nondumo & Others (2005) 10 BLLR 974 (LC) at para 977 G,** where the court held that in a matter where it was conceded that the suspension was both procedurally and substantively unfair that the first respondent would be entitled to 12 months remuneration.

[33] In MEC for Transport the employer had conceded that the employee was not paid for the 9 (nine) months period of suspension. This meant that the employee had suffered in terms of the actual monetary loss, of 9 (nine) months salary loss. After reviewing the arbitration award where the Commissioner had awarded 18 (eighteen) months compensation for outstanding salary and 12 (twelve)

months' compensation in terms of s 194 (4) of the LRA, the court substituted the award and ordered compensation in an amount equal to 12(twelve) months remuneration. The court also awarded compensation for 9 (nine) months remuneration being for the non payment during the suspension.

[34] The Labour Appeal Court in **Ferodo (Pty) Ltd v De Ruiter (1993) 14 ILJ 974 (LAC),** in dealing with the issue of compensation in an unfair labour practice under the 1956 Labour Relations Act, formulated following guidelines which are in my view apposite even under the current labour regime:

(a) [T]here must be evidence of actual financial loss suffered by the person claiming compensation;

(b) There must be proof that the loss was caused by the unfair labour practice;

(c) The loss must be foreseeable, ie not too remote or speculative;

(d) The award must endeavour to place the applicant in monetary terms in that position which he would have been had the unfair labour practice not been committed;

(e) In making the award the court must be guided by what is reasonable and fair in the circumstances;

(f) There is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment.

[35] The decision of the Labour Appeal Court in **Johnson & Johnson v Cwiu (1998) 12 BLLR 1209 (LAC)** is also instructive on the approach to adopted when dealing with the issue of compensation although the decision dealt with section 194 prior to the 2002 amendments of the LRA. The Court held that even if it is accepted that compensation means a sum of money for the loss suffered by an employee, the loss suffered is not necessarily the actual loss suffered as a result of the procedural unfairness. Compensation in terms of Johnson & Johnson included payment in solace for the loss of a right.

[36] I align myself with the Commissioner's view in **Fourie v Capitec Bank (2005) 1 BALR 29 (CCMA)**, where it was held that:

> "The determination of appropriate relief, therefore calls for the balancing of the various interests that might be affected by the remedy. The balancing must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right, secondly to deter future violations, third to make on order that can be complied with, and fourth of fairness to all who might be effected by the relied invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the

appropriate relief, “we must carefully analyse the nature of [the] constitutional infringement and strike effectively of the source”.

[37] In the present case, in awarding the compensation as he did the commissioner ought to have weighed the unfair labour practice by the applicant against the loss that the employee suffered as a result, including the extent to which the employee’s right to a fair labour practice was infringed. This entails looking also at the length of period of the suspension and the procedure that led to the issuance of the written warning against the employee.

[38] In my view the commissioner failed to apply his mind to what was just and equitable compensation for the employee in the circumstance of this case. Whilst, the commissioner correctly found the suspension and the warning to have been unfair, he failed to take into account when considering compensation that, the period thereby was not long and the suspension was with pay. The employee suffered no actual financial loss as a result of the suspension. The commissioner also ought to have taken into account the fact that at the time of the arbitration the warning issued against the employee had expired.

[39] There is however a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there are no valid reasons to do so. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. It is therefore necessary, that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee. In other words unless circumstances dictates otherwise, the employer should

offer an employee an opportunity to be heard before placing him or her on suspension.

[40] Turning to the facts of this case I am of the view that a fair compensation for the unfair labour practice committed by the applicant which resulted in an injustice to the employee would have been an equivalent of one month salary.

[41] In the premises, the following order is made:

1. The award of the first respondent dated 31 January 2007 is reviewed and corrected as follows:

   "The respondent should compensate the applicant in the amount of R21 137.88 being an equivalent of one month salary."

2. There is no order as to costs.

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Molahlehi J

Date of Hearing: 06 DECEMBER 2007

Date of Judgment: 22 MARCH 2008

APPEARANCES

For the Applicant:

Instructed by: NKAISENG CHENIA BABA PIENAAR & SWART

For the Respondent:

Instructed by: DEON BRUYN ATTORNEYS