IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO. D460/08

In the matter between:

SHAUN SAMSON	Applicant
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
ALMEIRO DEYZEL	Second respondent
TOYOTA SA MOTORS (PTY) LTD	Third Respondent

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award made by the second respondent, to whom I shall refer as "the commissioner". The award was made after an arbitration conducted by the commissioner under the auspices of the first respondent, the CCMA, at which the applicant challenged the fairness of his dismissal by the third respondent, ("the company").

[2] The applicant was dismissed for distributing pornography on the company's intranet. At the disciplinary enquiry convened on 5 November

2007 to consider the charges against him, the applicant pleaded guilty, expressed remorse for his conduct, and apologised to the co-employee to whom his email (with the pornographic material attached to it) was inadvertently sent. At the conclusion of the enquiry, the chairperson, Mr Hawley, imposed a sanction of a final written warning, valid for three years. On 14 November 2007, Mr. Gazendam, the company's executive vice president for corporate affairs, addressed a letter to applicant, which read as follows:

> "*In reviewing the merits of this matter and in considering the Chairpersons duty to apply the disciplinary code and standards set by the Company,: I accordingly set aside the original sanction of Final Written Warning and impose a sanction of dismissal.*
> *You have the right to appeal against my penalty of dismissal. Should you wish to appeal, you must notify the company Human resources Department on the appropriate form within 48 hours, giving just cause on reasons of the appeal.*
> *You are also advised that you may refer the matter to the CCMA within 30 days of your dismissal*."

In response to this letter, the applicant lodged an appeal. An appeal hearing was duly convened, at which the applicant *inter alia* raised the defence of "double jeopardy". The penalty of dismissal upheld. The applicant referred a dispute to the CCMA, where after a failed conciliation, the matter was referred to arbitration.

[3] At the commencement of the arbitration hearing, the commissioner dealt first with an application by the company to be represented by a legal practitioner. The applicant opposed the application. After hearing the parties' respective submissions, the commissioner granted the company the right to be represented by its attorney.

[4] The company called two witnesses. The applicant called the chair of the disciplinary enquiry, a Mr. Hawley, and testified gave evidence himself.

[5] In his award, the commissioner recorded the issue for decision as the fairness of the applicant's dismissal, and in particular:

- Whether it was fair to overturn the decision of the chairperson of the disciplinary enquiry
- Whether the company followed a fair procedure in deciding to dismiss the applicant
- Whether the sanction of dismissal was fair
- Whether the company applied discipline consistently.

In his analysis of the evidence and argument, the commissioner first considered a number of judgments on whether an employer may fairly overrule a sanction imposed by a chairperson of a disciplinary enquiry if the sanction was inconsistent with sanctions imposed in the past for similar misconduct. The commissioner quoted at some length from the judgment of this court in *Greater Letaba Local Municipality v Mankage NO & others* [2008] 3 BLLR 229 (LC)), without, it seems, applying any principle that might be derived from that judgment. The commissioner went on to find that the company's disciplinary code prescribed dismissal as the sanction for distributing pornography, and that it had in the past imposed the sanction of dismissal for that offence. The commissioner found further that the cases relied on to sustain any allegation of inconsistency by the company in the application of discipline could be distinguished, on the basis that they concerned the storing and not distribution of pornography. The distribution of pornography was a serious offence that in general warranted the sanction of dismissal. On the issue of overturning the sanction of a final written warning, the commissioner

found that this was recognised and permitted by practice, and finally, the commissioner found that that the applicant's dismissal was procedurally fair. For these reasons, the commissioner concluded that the applicant was not entitled to any relief. The commissioner's reasoning in respect of each of his conclusions is considered below, in the context of an evaluation of the applicant's grounds for review.

[6] In these proceedings, the applicant attacked the arbitration award on a number of grounds. These include the ruling made by the commissioner on legal representation, the commissioner's acceptance of evidence regarding the company's practice of reviewing the decision of the chair of a disciplinary enquiry when there was no provision for it in the disciplinary code, the commissioner's findings in regard to the consistency of sanction, the commissioner's finding that the failure by the company to afford the applicant a further hearing when the sanction was reviewed did not amount to procedural fairness.

[7] The grounds for review, as articulated both in the founding affidavit and the heads of argument filed on the applicant's behalf, are expressed in the pre-*Sidumo* language of rational justifiability. No reference is made to the proper test for review, i. e. whether the decision made by the commissioner represents a decision to which no reasonable decision maker could come. One might have thought that by now, more than two years after the *Sidumo* judgment was reported, legal representatives in this court would invoke the correct test when drafting papers and formulating their submissions. Indeed, there is a good argument to be made that this application should be dismissed on this ground alone. That notwithstanding, I intend to evaluate the stated grounds for review and the submissions made by the applicant's counsel, Mr Pillay, in the light of the *Sidumo* test. It follows that the commissioner's award stands to be

reviewed and set aside if and only if it fails to meet the threshold established by that judgment.

[8] I deal first with the commissioner's ruling on legal representation. The applicant avers that the commissioner permitted the company legal representation contrary to the provisions of s 140 (1) of the LRA. Section 140 (1) was repealed in 2002. I fail to appreciate on what basis the applicant now claims that a breach of that subsection might form the basis of a reviewable irregularity. The applicable provision is Rule 25 of the Rules for the Conduct of Proceedings before the CCMA. In terms of that Rule, the commissioner was required *inter alia* to take into account the nature of the questions of law raised by the dispute, the complexity of the dispute and the comparative ability of the parties or their representatives to deal with the dispute. It is clear from the record that the commissioner weighed up the relevant factors, and in particular the disadvantage to which the applicant may be put by allowing the company legal representation. The commissioner further considered the nature of the proceedings (which he indicated would assume an inquisitorial form) and the clarity that a legal trained person might bring to what promised to be a debate on a number of legal technical issues. Further, the applicant's attitude was that he had conducted research and prepared himself to argue the legal points that would arise in the course of the proceedings. When the commissioner ruled against the applicant, the applicant did not seek the right to secure legal representation for himself - he appeared to be content to continue with the proceedings. In these circumstances, I fail to appreciate on what basis it can be said that the commissioners ruling on legal representation was a decision to which no reasonable decision-maker could come. The commissioner was required to exercise discretion as to whether the company should be afforded the right to legal representation, and to exercise that discretion judicially. There is nothing in the record to suggest that the commissioner either conducted himself in

a manner so as give rise to a reviewable irregularity, or that the outcome (as represented by his ruling) fell outside of the band of reasonableness established by *Sidumo*. None of the factors that he took into account was irrelevant, and his assessment of them given the nature of the claim before him cannot be called into question. There is thus no basis for this court to interfere with the commissioner's ruling that the company be permitted legal representation.

[9] I turn now to the issue of consistency. At the arbitration hearing, the applicant submitted that other employees, found guilty of a similar charge, had not been dismissed, and that some lesser penalty had been imposed. Killian's evidence was that the company's code prescribed dismissal as a penalty for distributing pornographic material, and that the company had in the past dismissed employees found to have committed that misconduct. The commissioner dealt with the consistency point by distinguishing the cases relied on by the applicant to establish inconsistent conduct by the company. Killian's unchallenged evidence was that in two of the five cases raised by the applicant, no record existed of any disciplinary action on charges of distributing pornography, and that three of the cases, the employees concerned were disciplined for failing to delete pornographic material received via email and stored in their inboxes, and not for distributing pornography. Other cases referred to by the applicant in which employees were given a final warning for conduct that was alleged to be similar were distinguished by Killian on the basis that they concerned the distribution of an email that was gender insensitive, but which did not amount to pornography. None of this evidence was challenged by the applicant.

[10] In his findings, the commissioner held: "*In my view the previous cases that the applicant relied on was indeed distinguishable as the respondent contended. Storing pornography on computer is simply not the same as*

distributing it" (at para 44 of the award). The parity principle, which has been held to underlie the requirement that employers treat like cases alike, inherently contemplates that different cases should be treated differently. Where there is a valid basis to distinguish one case from another in circumstances where employees have been involved in the same misconduct, there is a valid ground to distinguish one case from another. (See *Cape Town City Council V Masitho & others* (2000) 21 *ILJ* 1957 (LAC)). If the employees concerned have been involved in different conduct, it follows that the parity rule does not apply. The commissioner's decision on the issue of inconsistency therefore cannot be faulted.

[11] The next ground for review is the decision by Gazendam to change the sanction imposed on the applicant from a final written warning to dismissal. The applicant's submissions in this regard have both a substantive and procedural component to them. First, the applicant submits that the commissioner committed an irregularity in that he accreted evidence of the existence of a practice in terms of which decisions made by chairpersons of disciplinary enquiries would be reviewed. Secondly, it is submitted that the commissioner's conclusion does not accord with the principles of natural justice, in particular, the *audi alteram partem* rule, in that the applicant was not given an opportunity to present evidence or mitigating circumstances when the sanction of a final written warning substitute with dismissal. I deal with each of these submissions in turn. Killian's evidence was that the company's policies and procedures provided that a disciplinary decision can be reviewed by eth head of corporate affairs He stated this in respondent to a question from the commissioner as to whether the company's policy anywhere stated that the senior executive vice president can overturn a wrong decision made by a chairperson of a disciplinary enquiry. Killian stated further that while he did not have a copy of the procedure with him, it had been a practice for many years; that unions used the procedure,

employees used it and that he did not think the matter was in dispute. In his cross-examination by the applicant, Killian conceded that he did not know whether the provision was contained in the HR policy, but he stated that the rule was so well known within human resources, and that he had been aware of it since he joined the company. The commissioner found that it was practice for the executive vice-president: corporate affairs to review the disciplinary decisions of chairpersons of disciplinary enquiries and that it was not prohibited by the respondent's disciplinary procedure. Given the evidence before him, and in particular the applicant's failure to dispute Killian's evidence in this regard (the debate in the arbitration proceedings was more narrowly based on whether this practice was actually written into the company's policies), the commissioner's conclusion that the evidence established the existence of a practice to the effect claimed by the company cannot be impugned.

[12] In so far as the procedural fairness of the applicant's dismissal is concerned, it is not the applicant's case, either in its founding papers or in the heads of argument, that the commissioner committed a material error of law in coming to the conclusion he did. At the hearing of this application, Mr Pillay urged me to find that the commissioner had committed gross misconduct on this basis. Assuming for present purposes that in the absence of any averment to this effect in the founding papers this court is nonetheless entitled to entertain a submission to this effect, and looking for the moment at the commissioner's conduct rather than the result of the arbitration proceedings, I fail to appreciate how it could be said that the commissioner could be said to have committed gross misconduct in the form of committing an error of law. First, it is trite that not every wrong conclusion of law leads to a conclusion that there has not been a fair trail - the mistake of law must be material (see Stocks Civil Engineering (Pty) Ltd v Rip NO & another (2002) 23 ILJ 358 (LAC)). Secondly, the law as it presently stands is that an employer is entitled,

when it is fair to do so (subject to the qualification that it is only in exceptional circumstances that it will be fair) to revisit a penalty already imposed and substitute it with a more severe sanction. Further, it does not axiomatically follow that a failure to afford a hearing before a decision is taken is unfair - a failure to afford a hearing may in some circumstances at least be remedied by a hearing given after the event. Authority for the latter proposition is to be found in *Semenya & others v CCMA & others* (2006) 27 *ILJ* 1627 (LAC), where the Labour Appeal Court said:

> "*Although generally speaking such an opportunity [the opportunity to be heard] should be given before the decision can be taken, there are circumstances where an opportunity to be heard that is given after the decision has been taken is acceptable*."

In so far as the former proposition is concerned, in *MEC for Finance, Kwa Zulu Natal & another v Dorkin NO & another* [2008] 6 BLLR 540 (LAC), the LAC considered a case in which a presiding officer imposed a decision to issue a final written warning to an employee found guilty of financial impropriety. The employer sought to review the decision in the Labour Court. In the course of his judgment, Zondo JP recalled the principle established by the LAC in *BMW (South Africa) (Pty) Ltd v Van der Walt* (2000) 21 *ILJ* 113 (LAC) to the effect that an employee may be subjected to further disciplinary action even though a sanction in respect of the same offence has already been imposed provided that it is fair, in all the circumstances, to do so. In *Bamford v Metrorail Services (Durban) & others* (2003) 24 *ILJ* 2269 (LAC), the LAC conformed that the test was one of fairness, where both the interests of the employee and the employer must be brought into account. The court rejected an argument to the effect that further disciplinary action was permissible only in exceptional circumstances. In the *Dorkin* case, the court held while the test was ultimately one of fairness, it would probably be unfair to subject

an employee to further disciplinary action except in exceptional circumstances (at para 14). Given the seriousness of the charges and the loss sustained by the employer in that case, the matter was one in which it could be said that exceptional circumstances justified the employer's seeking to have the sanction of dismissal with immediate effect imposed. The LAC went on effectively to set aside the warning and impose the penalty of dismissal.

[13] In the present circumstances, the commissioner lengthy quote form the *Greater Letaba Local Municipality* case was misplaced - that case deals with the consistency requirement, in other words, the requirement, as expressed in the Code of Good Practice: Dismissal, that an employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the same misconduct. The commissioner had found that there was no inconsistency, because the applicant was found guilty of distributing as opposed to storing pornography. There was therefore no need for him to consider the debate raised in the *Greater Letaba* judgment i.e. whether a "conservative" or "liberal "approach ought to be adopted to cases of alleged inconsistency, or, as he might have done, to consider whether that judgment misconceives the principles established by the LAC in *Cape Town City Council v Masitho & others SACCAWU & others v Irvin & Johnson Ltd* (1999) 20 I*LJ* 2302 (LAC) and (2000) 21 *ILJ* 1957 (LAC). The issues of inconsistency and "upgrading" the disciplinary penalty were separate issues, and the commissioner's initial conceptual approach might be said to conflate the two. But this is no more than mild criticism from the comfort of the proverbial armchair - the commissioner's approach does not disclose any mistake of law, at least not one that can remotely be described as material.

[14] On the point of procedural fairness, the commissioner observed, there was no evidence that Gazendam did not have regard to the applicant's submissions to Hawley. Further, it is clear from the record that the evidence before the commissioner (given by the applicant himself) was that Gazendam afforded him a right of appeal, and that he exercised that right, claiming "double jeopardy". A Mr Badenhorst, who heard the appeal, upheld Gazendam's decision. It is evident from the record that the applicant was present at the hearing before Badenhorst, that he was represented and that he participated in the proceedings. The minute of the hearing reflects that Badenhorst considered a wide range of grounds for appeal submitted by the applicant, and that the main issue pursued by the applicant was that of double jeopardy. Badenhorst concluded that a decision to review a penalty imposed by the chairperson should happen only in exceptional circumstances, but that the circumstances of the present case warranted a review, and that the decision to dismiss the applicant should be upheld. It is not disputed in these proceedings that the applicant's misconduct was serious, or that the company's disciplinary code prescribed dismissal as the appropriate penalty for employees found guilty of distributing pornography. In these circumstances, I fail to appreciate how it can be said that the commissioner, in concluding that the company's failure to afford the applicant a hearing before Gazendam when he considered the appropriateness of the penalty imposed by Hawley did not render the applicant's dismissal procedurally unfair can be said to constitute a gross irregularity, or that it is a decision to which no reasonable decision-maker could come.

[15] For the above reasons, in my view, the commissioner did not commit any gross misconduct in his conduct of the arbitration proceedings, nor does the result of those proceedings (as represented by his award) represent a decision to which no reasonable decision-maker could not come. This

application therefore stands to be dismissed. There is no reason why costs should not follow the result.

I accordingly make the following order:

The application is dismissed, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application: 26 May 2009
Date of judgment: 29 May 2009

Appearances:
For the applicant: Adv Pillay instructed by Murugasens.
For the respondent: Adv M Posemann, instructed by Shepstone and Wylie.