Not reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 947 / 2008

In the matter between:

ANNA M RHEEDER	**Applicant**
and	
D MIRKIN & CO T/A	
A&D DISTRIBUTORS	**First respondent**
Adv C DE KOCK N.O.	**Second respondent**
CCMA	**Third respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is an application for review in terms of s 145 of the Labour Relations Act.[1] The arbitrator (the second respondent) of the CCMA (the third respondent) found that the dismissal of the applicant was substantively unfair. Nevertheless, he deemed it "equitable and fair to both parties" not to award any relief to the applicant, "given the circumstances surrounding the employment relationship".

[1] Act 66 of 1995 (the LRA).

[2] The applicant seeks to review the award only insofar as no award of compensation was made.

BACKGROUND FACTS

[3] The applicant (Rheeder) was employed as a bookkeeper by the first respondent ("the company") since January 1995. In January 2008 she increased her own salary without consulting the company's directors, but it appears from the evidence led at arbitration that this was in accordance with an existing practice.

[4] In November 2007, due to her unhappiness about alleged non-payment of a bonus, victimisation and alleged unfair labour practices, Rheeder engaged the services of a labour consultant in Worcester, one Eloise Peacock.

[5] Rheeder paid Peacock a fee and provided her with documents relating to her grievances. *Inter alia,* and at Peacock's request, Rheeder sent her a letter or memorandum comprising some 18 pages setting out in detail the background to her grievances, her employment history with the company, and – in a two page annexure headed "characters of the play" – her perceptions of the *dramatis personae* at the helm of the company. It is this document, and especially the latter annexure, that loomed large in the mind of the arbitrator when he declined to award Rheeder any compensation in his eventual unfair dismissal award.

[6] Rheeder set out her view of the *dramatis personae* in emotional, uncouth and irrational terms. For example, she described the "owner"[2] of the company, Mr Avi Milstein, as "arrogant", loving the sound of his own voice, and: "If he has had enough of you and what you say he will look around as if to see some imaginary escape hatch, then he will cut you off in mid sentence or whatever and start shouting fuck off – get the fuck out of my shop. Then duck and run." Mrs Toni Millstein was described as a "kugel, verbal diarrhea (*sic*) diva". Their daughter, Ronit, "daddy's darling" and a "bitch" who "manipulates him and bosses him around."

[2] It appears that he was, in fact, the managing director of the private company.

[7] Rheeder was unhappy with Peacock's lack of diligence and terminated her services. She asked Peacock to return her documentation. Although there is some dispute on the papers as to exactly what transpired, Avi Milstein testified at arbitration that Peacock delivered the documentation to the company's post box. Although Rheeder testified that that the envelope was clearly marked for her attention, Milstein opened it and read the document containing the unflattering descriptions of him and his family members.

[8] In March 2008, Milstein confronted Rheeder with the documents. He also confronted her with having increased her salary without his consent. On 13 March 2008 Rheeder received a notice to attend a disciplinary hearing on 7 April 2008 on a charge of "fraud" and she was suspended pending the hearing. To her surprise, the disciplinary hearing was to be chaired by Eloise Peacock – the very person whom she had consulted a few months earlier and to who the letter was addressed containing the details of her relationship with the company and her views of its directors.

[9] On 7 April 2008 Rheeder received a "notice of dismissal" signed by Peacock and Milstein. It read, *inter alia*:

> "This letter serves to confirm that your services with the company has been terminated. The above sanction is the outcome of a disciplinary hearing held on the premises of A&D Distributors on 7 April 2008 at 09h15.
>
> You have the right to appeal this finding within three working days of the above date. An appeal form can be obtained from the company on request."

[10] Rheeder appealed on the same day. However, the company did not entertain the appeal and confirmed the dismissal on 15 April 2008. Rheeder referred an unfair dismissal dispute to the CCMA.

THE AWARD

[11] With regard to the substantive fairness of the dismissal, the arbitrator took into account prior practice and found that Rheeder had no dishonest intention in failing to ask Milstein's authorisation before awarding herself a

10% salary increase in February 2008. He found the dismissal to have been substantively unfair.

[12] With regard to alleged procedural unfairness, the arbitrator said: "The applicant ... participated in the disciplinary proceedings and although I am not entirely satisfied with the conduct of Mrs Peacock deciding to chair the disciplinary hearing, I do not believe that it is sufficient to lead to a finding that the dismissal was procedurally unfair."

[13] The "crux of the matter", the arbitrator found, lay with the relief to be awarded. He had regard to the letter that Rheeder had addressed to Peacock and stated that "...the remarks made by the applicant were slanderous and of extremely bad taste". He also found that Rheeder had, during cross-examination, "...admitted that the trust relationship between her and her employer 'incinerated', was gone, finished and did not exist when Mr Milstein got hold of the letter in question."

[14] Given these factors, the arbitrator concluded that "the applicant played a huge role in the complete breakdown of the trust relationship and it will certainly not be fair, under these circumstances, to award to the applicant any relief."[3]

GROUNDS OF REVIEW

[15] The applicant submits that the arbitrator committed a gross irregularity, failed to apply his mind to relevant considerations and hence came to a decision that no reasonable arbitrator could reach.[4]

Relevance of the letter to Peacock

[16] As set out above, the decision of the arbitrator not to award any compensation, despite his finding of substantive fairness, was largely influenced by the sentiments Rheeder expressed in her letter to Peacock.

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[3] It is common cause that the applicant sought compensation, and not reinstatement, from the CCMA.

[4] In accordance with the test set out in *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[17] Mr *Le Roux*, who appeared for the applicant in these proceedings, submitted that the arbitrator did not apply his mind to the question of the intention of the letter in question. I agree.

[18] Rheeder sent the document to Peacock, at the latter's request, in order to instruct her with regard to her employment related grievances with the company. Had Peacock been a practising attorney, the communication may well have been governed by attorney-client privilege. But she is not, and I need not decide that point. Suffice to say that the communication was clearly intended for Peacock's eyes only. Rheeder did not intend to publish her remarks to the world at large, and she could certainly not have foreseen that her employer would make use of the services of the very same consultant that Rheeder had instructed, much less that the document would find its way from Peacock to Milstein.

The contributors to the breakdown in the relationship

[19] The arbitrator appears to have considered two factors when deciding that "the applicant played a huge role in the breakdown of the trust relationship": Firstly, the contents of the letter addressed to Peacock; and secondly, that Rheeder "had no intentions to return to her workplace".

[20] I have already dealt with the relevance of the letter. With regard to the second factor, it does not appear from the award that the arbitrator had any regard to the reasons why Rheeder did not want to return to the company, or what the company's contribution to the breakdown – if any – was.

[21] Rheeder had, as set out above, voiced a number of grievances she had with the company. That was the very reason why she had retained the services of Peacock, who ended up chairing her disciplinary hearing. At the arbitration, the arbitrator – perhaps understandably – made it clear that he did not wish to hear any evidence about those grievances. That was not the reason for her dismissal. But then the arbitrator did take into account the breakdown in the relationship when deciding whether to grant

any relief, without having any regard to the underlying causes (other than the letter to Peacock).

[22] In attributing the breakdown solely to the applicant, without having had the benefit of any evidence setting out the reasons for her mistrust in the employer, the arbitrator failed to apply his mind to relevant considerations. His process of reasoning was such that it led to a conclusion a reasonable arbitrator could not have reached.

Procedural fairness

[23] The applicant also raised procedural unfairness as a ground of review, specifically relating to the appointment of Peacock as chairperson.

[24] It is indeed astounding that a so-called labour consultant should, within a month of two of having advised an employee, agree to act as a chairperson in a disciplinary hearing involving the very same employee and the same employer. Any practising lawyer would have recognised the conflict of interest immediately and would not have accepted the instruction.

[25] Nevertheless, Rheeder did not ask Peacock to recuse herself at the outset of the disciplinary hearing. She only raised an allegation of bias after all the evidence had been led and before Peacock gave her decision. I share the arbitrator's misgivings about Peacock's role, but I do not find his conclusion on procedural fairness so unreasonable that no reasonable arbitrator could have come to the same conclusion.

REMIT OR SUBSTITUTE?

[26] I have come to the conclusion that, given his finding on substantive unfairness and the evidence before him, the arbitrator's decision not to award any relief was unreasonable.

[27] The applicant submitted that I have all the evidence before that served before the arbitrator and that I am in as good a position as he was to make a decision on the appropriate award. I agree that it would serve no

purpose to remit the matter to hear evidence afresh for another arbitrator to decide on the appropriate relief.

What relief?

[28] The applicant does not wish to be reinstated. She seeks compensation in terms of s 193(1)(c) read with s 194(1) of the LRA.

[29] In *Boxer Superstores (Pty) Ltd v Zuma & others*[5] Davis JA summarised the factors to be taken into account when deciding on the appropriate relief:

> "What [the arbitrator] should have done was to have said in effect: I have examined the evidence. It appears to me that, given the grave nature of the charges levelled against [the employee], that is of dishonesty, it is clear that the relationship between the two parties is at the level where they can no longer work together. Reinstatement would therefore be inappropriate, re-employment would be inappropriate because of the conclusions reached by the [employer] as set out in my award. Accordingly in terms of the powers that I have under s 193(2), I make a small award of compensation."

[30] And in *Maepe v CCMA* [6] Zondo JP pointed out that, in that case, the employee ought to have been awarded compensation for a substantively unfair dismissal, even though he had given dishonest evidence at arbitration and reinstatement would therefore be inappropriate.

[31] In *Maepe*'s case, he was awarded the maximum compensation of 12 months' remuneration, even though he had lied under oath in his arbitration. Without any disrespect to the Labour Appeal Court, I do not consider that to be an appropriate award in a case where the trust relationship between the parities has manifestly broken down and where the employee has played a significant role in that breakdown.

[32] I am more inclined to follow the cue of the LAC in *Zuma*'s case and to make "a small award of compensation". Even though there is no evidence or even a remaining allegation of dishonesty on the part of Rheeder, I have to take into account the part that she played in the breakdown of the relationship, even though she is not solely to blame. I base this not on the letter that she had sent to her labour consultant in confidence, but on the

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[5] (2008) 29 *ILJ* 2685 (LAC) 2684 E-F para [11]
[6] (2008) 29 *ILJ* 2189 (LAC) 2203 G-I para [26]

common cause evidence that there was a mutual breakdown in the relationship. Her attorney, Mr *Le Roux*, also agreed that the maximum award envisaged by the Act would not be appropriate.

[33] I have also had regard to the judgment of the Labour Appeal Court in *Dr DC Kemp t/a Centralmed v MB Rawlins.*[7] In that case, Zondo JP[8] stated that the ultimate question that the Labour Court or an arbitrator has to answer in order to determine whether compensation should be granted or refused is the following: "Which one of the two options would better meet the requirements of fairness having regard to all teh circumstances of the case?" And Waglay JA[9] added:

> "If the arbitrator or the Labour Court decides to award or order payment of compensation as provided in s 193(1)(c) then it must turn to s 194(1) to determine the amount of compensation. Although s 194(1) sets out the parameters for the amount of compensation the arbitrator or the Labour Court may order, teh arbitrator or the Labour Court has a discretion to decide on the appropriate amount. The parameters do not hinder the choice: it merely sets the outer limits beyond which the arbitrator may not go. Within the limits, however, the arbitrator or the Labour Court may make any decision which it considers to be the correct one."

[34] In that case, recently confirmed on appeal to the SCA[10], the court decided that no compensation should have been awarded in circumstances where the employee was offered reinstatement.

[35] Taking the relevant case law and the facts of the dismissal and its surrounding circumstances into account, I consider compensation equivalent to four months' remuneration to be fair. The parties were *ad idem* that, at the time of her dismissal, the applicant earned R 12 665, 00 per month.

[36] The applicant has incurred legal costs in pursuing this review application. She is an individual who is not assisted by a trade union. I can see no reason in law or fairness why costs should not follow the result.

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[7] Unreported, case no JA 11/06, 26 March 2009.
[8] (as he then was) at para [22]
[9] (now Wagley DJP) at para [54]
[10] *Rawlins v Kemp* (438/09) [2010] ZASCA 102 (7 September 2010)

CONCLUSION

[37] The arbitration award of 3 November 2008 under case number WE 5755-08 is reviewed and set aside only insofar as it directs that the applicant is not entitled to any relief.

[38] The award is substituted with the following award:

38.1 The dismissal of the applicant was substantively unfair.

38.2 The first respondent, D Mirkin & Co Ltd t/a A & D Distributors, is ordered to pay the applicant compensation in the amount of R50 660, 00, being the equivalent of four months' remuneration.

[39] The first respondent is ordered to pay the amount referred to in paragraph [36.2] into the trust account of the applicant's attorneys within seven days of this order.

[40] The first respondent is ordered to pay the applicant's costs.

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ANTON STEENKAMP

Judge of the Labour Court

Cape Town

Date of hearing:	25 November 2010
Date of judgment:	3 December 2010
For the applicants:	Dawie le Roux
	Murray Fourie & Le Roux Inc, Worcester
For the respondent:	Brandon Schiff
	Bagraims attorneys, Cape Town