IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

Case no: C504/06

In the matter between:

NATIONAL UNION OF MINEWORKERS	**1ST APPLICANT**
JOHN SETLHODI	**2ND APPLICANT**
MICHAEL MGANU	**3RD APPLICANT**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**1ST RESPONDENT**
COMMISSIONER SHIRAZ M OSMAN NO	**2ND RESPONDENT**
SUPERSTONE MINING (PTY) LTD	**3RD RESPONDENT**

JUDGEMENT

CHEADLE AJ

Introduction

[1] This is an application to review an arbitration award issued by the arbitrator (the second respondent) to the effect that the dismissal of the individual applicants was substantively fair but procedurally unfair attracting a compensation award of two months salary.

[2] The individual applicants were dismissed for sleeping on duty. The applicants denied that they were sleeping and said that they were in the kitchen making tea. On the probabilities, the arbitrator found against them. In so far as the procedural unfairness was concerned, the arbitrator found that the chairperson of the disciplinary enquiry created a perception of bias

by the way she addressed the individual applicants and their representative.

[3] The grounds of review are that the second respondent committed the following gross irregularities-

3.1 the exclusion of the third applicant from attending a substantial portion of the arbitration hearing;

3.2 the unjustifiability of the finding that the employees were not making tea but were sleeping;

3.3 the failure to apply the disciplinary code which permitted a sanction other than dismissal for serious offences;

3.4 the failure to take into account inconsistency in the application of the code to other employees who slept at work;

3.5 the failure to find that the dismissal of a first offender by a biased chairperson was unfair;

3.6 the award of an unreasonably low amount of compensation without any rational basis for the procedural irregularity;

3.7 not affording the applicants an opportunity to make final arguments.

[4] There were two bundles indexed and paginated. The first contained the pleadings. The second contained the transcript and the documents submitted by the parties. The first bundle is cited as P (for pleadings) with the page number following. If the page is delineated or paragraphed, the line or paragraph is then denoted. The second is cited as R (for the Record) with the page number and any delineation or paragraphing numbered thereafter. Accordingly, the provision of the disciplinary code that records its corrective nature is cited as R.585.4.3.

Background

[5] The individual applicants claimed that they were making tea when Mr Barry Hohne, the mine manager, came upon them in the kitchen.

[6] Mr Hohne testified that he arrived at the paste plant at about 6.45am and found the control room empty and when he saw the individual applicants asleep in the kitchen through a window, he entered the kitchen and confronted them with the fact that they were sleeping and not in uniform. Mr Hohne's testimony was confirmed by a Mr Dale Hohne, the final recovery manager. Another witness testified that she arrived at the plant at 7am and was told by Mr Barry Hohne that he had found the individual applicants asleep. She confirmed that the second applicant was not in uniform. The arbitrator accepted the evidence of these witnesses as both credible and probable – P13.18.

Grounds of review

First ground of review

[7] The third applicant was asked by the arbitrator to leave the arbitration proceedings while the first applicant was giving evidence – R233-235. This the Applicants contend constitutes a reviewable irregularity. The arbitrator is given the power to conduct the arbitration in a manner that he considers to be appropriate to determine the dispute fairly and quickly – section 138(1) of the LRA.

[8] He exercised that power by deciding that the third applicant should not be present while the second applicant was giving testimony in respect of events to which he was party. The exclusion of an applicant when the respondent witnesses are giving evidence would be another matter because a fair trial would require an applicant the opportunity to instruct a representative in their questioning of the witnesses. That does not apply in respect of co-applicants who are part of the same factual matrix.

[9] It is disingenuous to state as the second applicant does in his supplementary affidavit that the third applicant did not give evidence 'as he was not aware of what had been testified to in his absence' – P22. He may not have been aware of the second applicant's testimony but he was aware of what took place because he was there. The only implication that

one can draw from his failure to give evidence is his fear that he would contradict the evidence of the second applicant.

[10] Although it may have been better to allow the third applicant to be present and to record that fact and weigh his evidence accordingly, his exclusion during the second applicant's testimony is not so material as to vitiate the proceedings.

Second ground of review

[11] The second ground of review is that the arbitrator was not justified in coming to the conclusion that the individual applicants were sleeping. The weakness of this attack is evident from the manner in which it is pleaded – 'sleeping workers cannot boil water for the purpose of making tea' – P22.43. That assumes of course that the employee's testimony is accepted. The arbitrator carefully records the evidence of both the employer and the employee witnesses of what transpired in the kitchen at 6.45am and finds that on the probabilities that the employer's version should be preferred. Although there is a general attack on 'contradictory evidence of the employer witnesses' no specific instances are cited.

[12] It is also claimed that it is 'inherently improbable' that the employees were sleeping because there was gravel on the driveway, the employees heard the vehicle approaching, they were making tea and holding a conversation. Apart from the first fact, the other allegations constitute the Applicants' version of what happened. In so far as the first fact is concerned, the failure to hear a vehicle approaching on gravel is consistent with their being asleep.

[13] In any event, this particular ground was not pursued with any vigour by Mr Cloete who represented the Applicants.

Third ground of review

[14] This ground of review concerned the application of the disciplinary code. The argument was that despite the fact that the code regarded sleeping on duty as a dismissable offence (R595), the code provided that was corrective in nature (R585.4.3) and that even 'if an offence is sufficiently

serious to warrant dismissal, the employer is nevertheless not prevented from merely issuing a warning' (R587.7.3).

[15] The Applicant's attack the arbitrator's failure to apply those provisions of the disciplinary code and the provisions of the Code of Good Practice: Dismissal – Schedule 8 of the LRA - particularly since the individual applicants were first offenders.

[16] This attack fails to take account though of the evidence of Mr Owen, the 3rd Respondent's HR Officer. He stated that the paste plant is made up of very technical machinery; that a shut down of the plant placed other businesses in jeopardy; that the tanks if breached could result in thousands of tons of sludge being leaked. Although perfunctorily contested, there was no serious challenge to the fact that the paste plant processes were potentially dangerous and required continuous monitoring. Moreover, Mr Owen testified that the third respondent's contract with De Beers required it to adhere strictly to its disciplinary code. If the code was not adhered to, De Beers would be entitled to cancel its contract with the third respondent. None of this evidence was seriously contested by the Applicants.

[17] The disciplinary code gives the employer the discretion not to dismiss in certain circumstances. The arbitrator held that in the circumstances of this case that the employer's exercise of its discretion to dismiss was appropriate given the danger involved – see P1637.

Fourth ground of review

[18] This ground of review is based on the testimony of the second applicant to the effect that there was a historical inconsistancy in treatment – in the past a worker was not dismissed for sleeping on duty. Mr Gasan Williams, the employee in question, testified that he was not 'feeling too well' and had told his assistant that he was going to take a nap – R384; that he took his nap during his lunch break; set an alarm to wake up – R 396. The arbitrator finds that these circumstances distinguished Mr Williams' case

and accordingly that there was no inconsisitancy in treatment. There is nothing irregular in that finding given the evidence that was led.

[19] Moreover, the 3rd Respondent had changed its policy in respect of sleeping on duty as a consequence of the leniency accorded to Mr Williams and that change was brought to the attention of the two individual applicants. There is no substance to this ground of review.

Fifth ground of review

[20] This ground of review is that the dismissal of a first offender by a biased chairperson of a disciplinary hearing is substantively unfair. This attack fails to recognise that a CCMA hearing is not reviewing the employer's decision but constitutes a fresh hearing into the substantive fairness of the dismissal. Accordingly, the substantive fairness of the dismissal is determined by arbitration. That has to be determined on the reasons advanced by the employer for the employee's dismissal.

[21] In this matter whatever the bias of the chairperson may have been, the fairness of the employer's decision to dismiss is not premised on the chairperson's views or conduct. It is an assessment of fact and an evaluation of whether dismissal is an appropriate sanction in the circumstances – an assessment and evaluation that is made in the final analysis by the arbitrator. There is accordingly no basis for this ground of review.

Sixth ground of review

[22] The attack here is that having found that the chairperson conducted the disciplinary enquiry in a manner that was capable of being perceived as biased, the arbitrator awarded minimal compensation.

[23] There are two issues at stake here – the failure to take account of the seriousness of the chairperson's conduct and the failure to give reasons for why the compensation for procedural unfairness should be minimal. Both constitute reviewable irregularities.

[24] It is worth recording the two egregious remarks made by the chairperson of the disciplinary enquiries into the individual applicants:

24.1 She threatened the third applicant in the course of the proceedings that he would regret his lies – 'jy gaan spyt wees oor die leuene' - R573;

24.2 She referred to the employee representative in the proceedings as 'Jy is die mannetjie wat wil leer vir n prokureur' – R620.

[25] Both remarks were utterly unnecessary given the context in which they were uttered and gave rise to a perception of bias, if not a demonstration of bias itself. That raises the question of whether it is a requirement of procedural fairness that the person conducting a disciplinary enquiry must be impartial. A disciplinary enquiry is not an administrative or court proceeding and should not be evaluated according to the standards associated with those kinds of proceedings. I endorse the reasoning in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] 9 BALR 833 (LC) in this regard.

[26] The appropriate standard for evaluating procedural fairness starts with item 4 of the Code of Good Practice: Dismissal, which gives content to the requirements of procedural fairness guaranteed by the constitutional right to fair labour practices and its embodiment in section 185 read with section 188(1) (b) of the LRA. All that item requires is an enquiry, proper notice of the allegations, reasonable time to prepare a response; an opportunity to respond to the allegations; the right to assistance of a trade union representative or a fellow employee. It does not require a formal hearing with all the trappings of a court case. Although it is good management policy to appoint an impartial person to conduct the enquiry there is no requirement in the Code that an employer has to do so. Grogan in *Workplace Law,* Juta 9ed argues that a presiding officer of a disciplinary enquiry should be impartial. He says that the rule against bias emanates from administrative law and that 'similar considerations apply in employment law'. All his authority is drawn from administrative law or decisions in respect of the 1956 LRA. Those decisions are no longer

authority in respect of what is required in respect of the 1995 LRA. The Code of Good Practice selectively codified the earlier jurisprudence to suit the new policies underlying the new LRA. Very different considerations are at play.

[27] Those considerations include employee dignity, labour peace, effective dispute resolution, good management practice and transactional costs. Dignity is a constitutional value that animates all constitutional rights and the constitutional right to fair labour practices in particular. That is one of the reasons why the Code requires that the employee is given a reasonable opportunity to respond to allegations that may lead to dismissal. Labour peace is a fundamental object of the LRA – as the Explanatory Memorandum accompanying the 1995 Labour Relations Bill recognises 'unless a credible and legitimate alternative process is provided for determining unfair dismissal disputes, workers will restort to industrial action in response to dismissal'. The notification of the allegations, the opportunity to be heard and be assisted, and the provisions of reasons render decisions in this potentially volatile area transparent and more rational.

[28] Effective dispute resolution promotes the resolution of disputes at the most immediate level. A hearing before dismissal allows the employee to evaluate the strength of the case against her and the prospects of a referral of a dispute over the dismissal to the CCMA. This does not mean that employees do not refer disputes over perfectly fair dismissals simply that without a hearing an employee is more likely than not to refer a dispute into the statutory dispute resolution machinery. Good management practice calls for rational decisions on the dismissal of employees. Not hearing the employee's response to allegations made by other employees even more senior employees may lead to an irrational decision in a particular case and will lead to systemic irrational decision making. One of the central concerns motivating the system of dispute resolution in respect of dismissals was the issue of costs. The explanatory memorandum identified the system under the 1956 LRA as 'one of the most lengthy and expensive in the world'. The 1995 LRA introduced a different system – it

opted for a brief pre-dismissal procedure with the right to challenge the fairness of a decision to dismiss in a fresh and full hearing before an independent arbitrator. There is no need for a full and independent hearing (unless of course it is contractually imposed) before dismissal under the Code – to require it would mean a duplication of proceedings, the very thing the LRA sought to prevent.

[29] These are the considerations that should inform any jurisprudential development of the fairness requirements contained in the Code. Accordingly, it is not bias per se that would render a dismissal procedurally unfair. It has long been recognised that the decision to dismiss is a management decision and that in any disciplinary enquiry it is invariably a person delegated or appointed by the employer that conducts the disciplinary proceedings. Disciplinary proceedings are proceedings 'with an institutional bias' - *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 *ILJ* 573 (LAC). Although the judgement is one that precedes the 1995 LRA, it identifies the nature of disciplinary proceedings in the workplace. That nature has not changed as a result of the new legislation – the proceedings and the decision remain a management run proceedings and a management decision.

[30] The fact that a chairperson of a disciplinary enquiry is drawn from management or reflects the prevailing view of the employer in respect of its code or sanctions should not affect the procedural fairness of the enquiry. But the unwarranted statement during the proceedings that an employee is lying and the humiliation of an employee's representative is the kind of conduct that undermines the policies advanced by the procedural requirements of fairness. It is critical for industrial peace that disciplinary hearings are considered by fellow workers to be legitimate. It is critical that the hearings are conducted in such a manner that the employees and their union are able to assess the fairness of the decision to dismiss. It is not surprising that the Applicants' considered that the ostensible bias poisoned the chairperson's reasoning and conclusion. It is also necessary that employees and their representatives are treated with respect. Although the normal rules of impartiality in civil and administrative

proceedings do not necessarily apply in disciplinary proceedings unless supported by the policies outlined above, the probability of actual bias strikes at each of the policies underlying the requirement of procedural fairness in disciplinary hearings.

[31] I am of the view that the arbitrator failed to recognise that the chairperson in making the unnecessary remarks not only insulted the third applicant and his representative, undermined the legitimacy of pre-dismissal hearings, and may have prompted an unnecessary referral of a dispute to the CCMA in respect of both individual applicants. Although not directly the subject of the abusive statements, the second Applicant was indirectly affected. Without an explanation as to why he regarded the conduct is minimal, I must conclude that he did not properly apply his mind to the order of compensation.

[32] Although a court should not easily substitute its own decision for that of the arbitrator, this is a case in which all the necessary facts are before me and there is no good reason to refer the matter back for a decision on an appropriate award of compensation for procedural unfairness.

[33] I consider the chairperson's interventions as a serious and accordingly consider that an appropriate order of compensation for procedural unfairness to be the equivalent of 4 months salary.

[34] Given that both parties are partly successful, it is appropriate that each party should pay their own costs.

[35] Accordingly, I make the following order:

35.1 The arbitration award is set aside in respect of the orders 2, 3, and 4 in respect of the amount of compensation;

35.2 Orders 2, 3,and 4 are substituted with the following:

35.2.1 The respondent is ordered to pay the individual applicants the equivalent of 4 months salary as compensation;

35.2.2 The compensation is calculated at 4 x R5400 for Mr Setlhodi and 4 x R1500 for Mr Mganu;

35.2.3 The amounts of R 21 600 (twenty one thousand and six hundred) and R 6 000 (six thousand) respectively are to be paid to the individual applicants by cheque.

35.3 Each party to pay their own costs.

CHEADLE AJ

Date of Hearing : 3/02/2010

Date of Judgment : 25/03/2010

Appearances

For the Applicant : N. Cloete

Instructed by : Neville Cloete Attorneys

For the Respondent : Grant Marinus

Instructed by : Werksman Inc