

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO C31/2009

In the matter between:

SHELCO SHELVING (PTY) LTD

Applicant

and

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL
(WESTERN CAPE)**

First Respondent

COMMISSIONER HILARY MOFSOWITZ N.O.

Second Respondent

NUMSA on behalf of SIBONGILE WISEMAN DODA

Third Respondent

JUDGMENT

TIP AJ:

1. On 10 April 2008 there was an incident at the applicant's workplace which gave rise to a charge of fighting against Mr Wiseman Doda, the third respondent ("Doda"). He was found guilty and dismissed, the chairman having rejected a contention of inconsistent treatment which had been raised on Doda's behalf. That outcome was reversed in the arbitration award made by the second respondent, who upheld the plea of inconsistency. The applicant ("Shelco") now seeks to have that award set aside.

2. The issue of inconsistency rests on a comparison of the Doda incident with, firstly, an earlier one heard on 13 December 2007 involving an employee named Jackson Miller ("Miller") and a subsequent one disposed of on 9 May 2008 concerning two employees called D Manzana and P Arendse ("Manzana"). Before I turn to a comparative evaluation of these various incidents, it will be helpful for me to briefly set out the applicable legal framework.

3. Consistency in the meting out of disciplinary consequences forms an important part of dealing with workplace transgressions. At its core is the requirement that the treatment of employees should be fair. Plainly, inconsistent outcomes in relation to evidently comparable factual circumstances will lead to the serious erosion of respect for the applicable disciplinary regime. At the same time, it must be borne in mind that the objective of consistency is but one of several factors and that it is primarily essential that fairness should be seen to result in any particular case on the basis of the facts in that case. In short, consistency is not a rigid rule but a guiding concept calculated to ensure that discipline is not capricious or uneven. The manner in which an employer applies it must be in keeping with existing standards and expectations. See, variously: *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 545; *SACCAWU and others v Irvin & Johnson Ltd* [1999] 8 BLLR 741 (LAC) at paras [29] and [30]; *Cape Town City Council v Masitho and others* (2000) 21 ILJ 1957 (LAC) at 1961B-C. Where these considerations must be applied to a situation where outcomes in different events fall to be examined for consistency, it may be useful to compare different facets of them. Ultimately, though, a value judgment must be exercised and not a 'checklist' or 'scorecard' approach.

4. What, then, are the pertinent features of the three cases here at issue? On the basis of the records of the respective disciplinary enquiries, which were before the arbitrator, they may be summarised as follows:

- 4.1. In *Miller* a disagreement arose in the workplace over a bottle of milk. Miller had asked the complainant (who was then in charge of a crate of milk bottles) for some milk and the response was that he should get milk from the paintshop. The complainant then found that there was one bottle short. He approached Miller and asked if he had taken a bottle. Miller felt that he was being accused of taking it and an argument broke out. He then slapped the complainant once.
- 4.2. Directly afterwards, Miller apologised for what he had done. Two days later he attempted to apologise once more but the complainant would not accept the apology. The complainant said that his ear still hurt, although he hadn't gone to a doctor. Miller was charged and pleaded guilty to assault at the disciplinary hearing. Having regard to his evident remorse, the presence of an element of provocation, and his personal circumstances, the sanction of a final written warning valid for 12 months was imposed.
- 4.3. The *Manzana* case involved two employees who were charged with fighting. They pleaded not guilty and a plea bargaining process was entered into, the upshot of which was that the union apparently facilitated an agreement between the two, who stated that they were good friends, that they had reaffirmed their friendship after the incident, that they were not prepared to testify against each other, and that the employer was requested to withdraw the charges.
- 4.4. The employer refused to accede to the last request, pointing to the seriousness of the transgression. In the result, an agreement was concluded which involved a formal recognition by the two employees of the fact that fighting was a very serious offence and the imposition of the sanction of three days suspension without pay. Part of this agreement was that the two employees would carry their own medical expenses. This is significant, since the incident involved injuries, so much so that one of the two employees required eight stitches.

- 4.5. In the instant case, that of *Doda*, the circumstances were basically that Doda was in charge of the loading of orders on to a truck. Different orders needed to be kept separate, which was done by putting strips between them. These had been placed horizontally and Mr Kamfer, a general labourer, then started changing them to be vertical. While he was doing this, Doda came up behind him and hit him very hard at the back of his neck and asked what he was doing. Kamfer reacted by pushing Doda back and asking what was going on. Doda then struck him twice with an open hand, once on his chest and once in the face. Kamfer started crying and went to report. He had marks on his face where he had been struck.
- 4.6. Doda's version was that after Kamfer had pushed him back he, Doda, did not strike Kamfer but pushed him back with his hands. He also stated that he hadn't initially hit Kamfer on the neck but had grabbed him from behind and choked him. A difficulty in this version was noted, in that there were definite marks on Kamfer's face. After the incident, Doda's representative went to Kamfer and tried to persuade him to withdraw the charge of assault. Kamfer didn't agree and expressed the view that Doda should get a stiff warning. There was no suggestion that Doda had himself approached Kamfer in order to apologise. Underlining that in the record is the fact that at the beginning of the disciplinary hearing, Doda stated that he had no knowledge of any incident of fighting.
- 4.7. The *Miller* case was raised and the disciplinary chairman concluded that it did not fit the facts before him. He alluded to the fact that Miller had shown remorse, had pleaded guilty and that provocation was present. He also took into account of a number of decided cases dealing with inconsistency issues. In the result, he applied the company's code regarding fighting or assaults in the workplace and held that Doda was to be dismissed. I may add that the chairman was an independent external appointee, namely Mr Giliomee. He had been brought in (appropriately so) because Mr

Petersen, the applicant's Labour Relations Manager, had been involved in the incident in that Kamfer had reported it to him.

5. At the arbitration the above records were traversed in evidence, in considerable detail. Had there been nothing more before the arbitrator it would have been difficult to support her conclusions. Indeed, it is my view that the reasoning of Mr Giliomee was sound in relation to the evidence and submissions tendered at the disciplinary hearing. He gave evidence at the arbitration and dealt with his reasoning. It was *inter alia* pointed out by him that a notice which the applicant issued to all its employees to the effect that it would adopt a 'zero tolerance' approach to offences such as assaults did not state that any employee found guilty of such an offence *would* be dismissed. Rather, the notice states that these are offences "that can warrant dismissal".
6. However, significant additional evidence was presented at the arbitration. At one stage Mr Petersen, who represented the applicant (and also gave evidence as a witness), complained that Doda was giving evidence that had not been raised at the internal inquiry. Not much more was done about this aspect of the matter. In any event, by far the most significant such evidence came not from Doda but from Kamfer.
7. That evidence included the following:
 - 7.1. On the same day, at a later stage, Doda had apologised to him, saying in effect that he hadn't known what he was doing. Kamfer had accepted this apology and the two had shaken hands.
 - 7.2. Subsequently, at a funeral, after Doda had been dismissed, he had again apologised for what he'd done. They'd had a drink together and Kamfer stated that there were no issues between them. If Doda were to return to work, he would have no problems working with him again.

- 7.3. Immediately before the incident, Doda had more than once queried the manner in which Kamfer was setting up the separator strips between different orders being loaded on to the truck. Kamfer confirmed that Doda had been concerned that if this was being done incorrectly, orders could become mixed up or fall off the truck.
- 7.4. In the course of this, Doda had said to him a few times: "What are you doing, what are you doing?"
- 7.5. Evidently because Kamfer did not react to his satisfaction, Doda then slapped the back of his neck.
- 7.6. Kamfer's response to this was to push Doda back. The latter lost his balance as a result of this. He then became very angry and slapped Kamfer hard in his face. Kamfer accepted that Doda was provoked when he pushed him back.
- 7.7. Kamfer described the slap in his face as "a real slap" and it is clear from his evidence that it was this slap that led to him reporting the incident to Petersen. When asked whether he wanted to put in a case against Doda, Kamfer said to Petersen: "Yes because Mr Doda did slap me in my face."
8. As I have indicated, this evidence was not tested against what had been said in the course of the disciplinary hearing. It must therefore be taken into account at face value. The result is that material parallels with the *Miller* case are substantially strengthened, particularly when compared to the record of the internal enquiry. In the first place it is so that Doda expressed remorse and that he and Kamfer have reconciled any remaining differences between them. In the second place it is so that the incident was preceded by work-related verbal interaction, with an apparent failure by Kamfer to meet Doda's queries leading to the initial slap, as distinct from an utterly baseless attack from out of the blue. In the third place it is so that the real core of the complaint, being the hard

slap in the face, was seen even by the complainant as flowing from a provocative push by himself.

9. Certain comparable portions of the evidence of Doda also need to be identified. He confirmed that he had apologised to Kamfer on the same day and that the two of them were again on good terms. He explained that he had become angry when Kamfer continued working in a particular way despite the fact that he had spoken to him about how that work was to be done. He became cross because the company would hold him, Doda, responsible if anything went wrong, since he was the supervisor in charge. Doda also gave an account of his personal circumstances. Just at the time of this incident, he had lost his mother and his father had lost both legs. There is a large family and a far greater burden of support then fell on him. He concluded his evidence with the statement that he considered that he had been unfairly dismissed, having regard to the fact that Jackson Miller was still working at the company.
10. Once these further considerations are factored into the conspectus of this matter, the differential between this case and that of *Miller* becomes well-nigh impossible to sustain. That was the conclusion of the arbitrator and I see no sufficient ground in the record before me to hold that such conclusion should be set aside on review as being unreasonable and unjustifiable. It follows that the application must fail.
11. The award does however contain a lacuna. The arbitrator correctly found that Doda was guilty of assaulting a fellow employee, but held that dismissal was in all the circumstances unfair. That concerned the issue of the sanction and not the finding of guilt. The arbitrator went on to order reinstatement and three months remuneration. What she did not do was to make an order in respect of the sanction. Neither of the parties addressed this aspect of the matter and I do not propose to deal with it as part of my order. It may nonetheless not be inappropriate for me to observe that the greatest part of the debate as to inconsistency revolved around the *Miller* case and the extent to which it was or was not

comparable to the case before me. Given that, it is my *prima facie* view that Doda should receive the same sanction, namely a final written warning valid for 12 months calculated as from the date of his reinstatement.

12. Formally, the application for review was lodged late and condonation thereof was sought. It was initially opposed but that was no longer the position as at the date of the hearing of this application. I am satisfied that condonation should be granted.
13. In relation to costs, it seems to me that this is not a case where the ordinary rule that costs should follow the result ought to be applied. As set out above, this is a somewhat unusual matter in the sense that I essentially concur with the outcome of the disciplinary hearing, but depart from it in consequence of the further evidence led at the arbitration. Considerations of fairness persuade me that there should hence be no order as to costs.
14. I make the following order:
 - 1 The late institution of this application is condoned.
 - 2 The application is dismissed.
 - 3 There is no order as to costs.

K S TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:	27 JANUARY 2010
DATE OF JUDGMENT:	12 MARCH 2010
FOR APPLICANT:	ADV J VAN NIEKERK Instructed by SMIT KRUGER INC
FOR THIRD RESPONDENT:	ADV C BESTER Instructed by H MATUKANE ATTORNEYS