

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**HELD AT DURBAN**

**OF INTEREST**

**CASE NO: D765/05**

In the matter between

**NAMPAK PRODUCTS LIMITED**

Applicant

and

**COMMISSIONER PATRICK STILWELL**

1<sup>st</sup> Respondent

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

2<sup>nd</sup> Respondent

**C MARION**

3<sup>rd</sup> Respondent

**SOUTH AFRICAN TYPOGRAPHICAL UNION**

4<sup>th</sup> Respondent

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**JUDGMENT**

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**PILLAY D, J**

[1] It is not always manifest from arbitration awards precisely what factors commissioners take into account when they decide cases.

Hence it is important for a party who seeks to review an award to stipulate quite clearly what the grounds of review are and where the commissioner failed in his duty to give a rational and justifiable decision and one free of any irregularity.

[2] When the commissioner is not informed precisely of what the criticisms against his award are, then he cannot respond and the Court is left in the dark as to whether the criticisms are valid. This

observation is particularly true when commissioners are criticised for not applying their minds to some or other material before them.

[3] In this case, the applicant employer pleaded that the commissioner  
5 failed to show due deference to the employer's decision to dismiss the employee and took into account mitigating factors, some of which were not well-founded.

[4] Since the pleadings and the heads of argument were filed, the legal  
10 position has changed. The pleadings were drawn on the strength of the Supreme Court of Appeal's decision in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* [2000] 11 BLLR 1021 (SCA). Since that decision, the Constitutional Court, under unreported case No CCT85/06, has reversed the decision of  
15 the Supreme Court of Appeal. Of significance in this case is the Constitutional Court's decision that the test for fairness is not deference to an employer's decision.

[5] The Constitutional Court's decision has weakened the employer's  
20 grounds of review in this case to such an extent that Mr I Pillay, who appeared for the employer, argued from the Bar a new complaint against the award. He submitted that the award is reviewable because the commissioner failed to take into account the purpose of the rule that prohibited pornography. The purpose was to limit the  
25 risk to the employer's computer technology system and to protect its

reputation, he submitted.

[6] This is a material allegation, and to require this Court to hold that the commissioner did not apply his mind to it, places on the employer an obligation to plead that proposition so that the commissioner can accept or refute it.

[7] In the absence of any allegation in the pleadings to that effect, the applicant must be barred from raising it in these proceedings from the Bar.

[8] In any event, assuming that the commissioner did not take the employer's policy into account, the Court is in a position to consider the policy to determine whether the penalty imposed is appropriate for the offence for which he was charged. The penalty imposed by the commissioner was to deprive the employee of about five months' remuneration.

[9] The employer was in a position to impose such a penalty at the time of the disciplinary inquiry as the employee tendered to work for a period of time without pay. Such a penalty could only be imposed with the consent of the employee. As that offer included a tender of the employee's services, it would also have been as, if not more, onerous to the employee than the award of the commissioner.

[10] As Mr *Bingham* for the third respondent employee pointed out, the chairperson of the disciplinary inquiry, as representative of the employer, was also in a quandary as to whether he should, on the one hand, strictly maintain the policy and the standards in the workplace or, on the other hand, take into account mitigating factors. Misconduct arising from the distribution of pornography raises for any adjudicator difficult questions of morality, dignity, ethics, privacy, reputation and risk.

10 [11] The Court is of the view that the appropriate penalty is one that deprived the employee of some amount of his remuneration. As this is a review and not an appeal, the amount determined by the commissioner is reasonable and represents a fair balance of the respective interests of the parties.

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[12] In all the circumstances, the nature of the offence is not one that goes to the root of the relationship of trust between the parties, it is a relationship that can be resurrected, and with the high cost that the employee has had to bear, not only in terms of sacrificing his remuneration, but incurring the costs of litigation and the stress of it, he will no doubt be slow to transgress in a similar way again.

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[13] The application for review is dismissed with costs.

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[Signed] PILLAY D, J

JUDGE OF THE LABOUR COURT

5 DATE OF JUDGMENT: 17 OCTOBER 2007

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APPEARANCES

10 ON BEHALF OF THE APPLICANT: MR I PILLAY

ON BEHALF OF THE 3<sup>RD</sup> RESPONDENT: MR BINGHAM

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