IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 993/14

In the matter between:

UTI PHARMA **Applicant**

and

GIWUSA obo LUVATSHA & 9 OTHERS **First Respondent**

PHALA, MOTLATSI, *N.O*. **Second Respondent**

NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY **Third Respondent**

Heard: **10 May 2017**

Delivered: **16 October 2017**

JUDGMENT

WHITCHER, J:

Introduction:

[1] The applicant seeks an order reviewing and setting aside the arbitration award issued on 4 April 2014 by second respondent under case number GPCHEM 525-11/12, and substituting the award with an order to the effect

that the dismissal of the first respondents was substantively fair; alternatively, remitting the matter to the third respondent for a hearing *de novo* and determination by a different commissioner (with costs).

The evidence at the arbitration:

[2] On Monday, 23 April 2012 at about 7.45am a senior supervisor, Jeff Nkonyane, noticed that the first respondents had not reported for work. He testified that he had to call in temps because the workplace could not function with 10 employees absent.

[3] Later that morning, he ascertained that two of the first respondents, Nokuthula Dlamini and Lindiwe Luvatsha, had called and told their supervisors that they were at the Commission for Conciliation Mediation and Arbitration (CCMA) for a conciliation hearing and will return to work after the hearing. Dlamini had called at about 9am and Luvatsha had called the previous evening. The first respondents reported for work at 12 noon.

[4] The conciliation hearing concerned final written warnings the first respondents had received a few weeks back.

[5] The first respondents were charged in the following terms:

> *On 23 April 2012 you failed to communicate your intended absence to your supervisor at least 2 hours after the commencement of your shift. Furthermore you did not get permission from your supervisor about your absence. Furthermore because of your unauthorised absence the company was inconvenienced and had to get temps to assist in doing your job and that cost the company as this was unplanned.*

[6] The charge made reference to Rule 2 of the Disciplinary Code which stipulates that employees must inform the company of their absence and the nature and duration thereof within two hours of the commencement of their shift.

[7] Madukane, a supervisor, testified that there were two sets of rules applicable to absence from work.

[8] Rule 2 provided for unforeseen and unplanned absences, where the employee would need to contact his or her line manager within two hours of the commencement of his or her shift.

[9] However, there existed another rule, which, although unwritten, was known by the first respondents. This rule applied to foreseen absences and an employee needed to obtain permission from his or her supervisor and complete a leave form prior to the event.

[10] He pointed out that the first respondents had completed leave forms before they attended the arbitration of the matter of 23 April 2012.

[11] Nkonyane gave similar evidence but when asked whether the first respondents had complied with the rules, he said yes, but only Dlamini and Luvatsha.

[12] The applicant submitted that the first respondents had known well in advance that on 23 April they would be absent from work for a substantial period of time and would have appreciated the effect of this on the functioning of the company. It is common cause that the company was forced to employ temps at short notice and at a huge expense.

[13] The Commissioner agreed with the first respondents' submissions that their dismissals were substantively unfair because, when one considers the contents of the charge, they were only charged with contravening Rule 2 and they did comply with the rule. In this regard, Dlamini and Luvatsha had notified the company of the first respondents' absence in the two hour period.

[14] The Commissioner also accepted their claim that Rule 2 was the only rule they were aware of.

[15] It was also the first respondents' case that they completed leave forms to attend the arbitration because the forms were brought to them by their supervisors.

The review:

[16] In my view, the Commissioner took a very technical approach to the charge and failed to appreciate that the allegations in the charge, read fully and sensibly, raised the following case for the first respondents to meet: not simply whether they had called their supervisor within the two hour period but also whether their failure to warn the applicant in advance about their intended absence constituted misconduct, particularly given the fact that 10 employees would be absent.

[17] It does not matter whether such a rule existed in writing or not. Given that a collective absence was planned, common sense and fairness would have dictated that the first respondents provide the applicant with a fair warning about their intended absence. They could have, but chose not to. As a result, the applicant had to employ temps in their place.

[18] In all these circumstances, the actions of the first respondents constituted misconduct. This case is not about their right to attend the conciliation. It is about the fact that the particular circumstances of this case placed a duty on the first respondents to warn your employer about a planned collective absence.

[19] The Commissioner failed to appreciate this and chose to take a rather technical approach to the matter, which served to avoid the real issue before him.

[20] It is significant that, even on the Commissioner's technical approach, eight of the first respondent's did not technically comply with the written rule. They did not call their supervisors within the two hour period.

[21] The next issue is whether the dismissal of the first respondents was fair.

[22] The applicant submitted that the first respondents were on final written warnings at the time of the offence. It however failed to establish with reference to the record of evidence that the warnings were for a similar offence. The warnings thus have no bearing on whether the dismissal was fair.

[23] In my view, considering the first respondents did attempt to comply with a written rule, it is arguable that they should have received a severe sanction short of dismissal.

[24] This brings the court to the issue of relief. I note that two years had already passed by the time arbitration was held and there is no evidence on record of the parties having addressed the Commissioner on the appropriate relief in the event that the dismissals are found to be unfair.

[25] In light of the above, it would be appropriate for the matter to be remitted to the first respondent for a commissioner to determine whether the first respondents should be reinstated or awarded compensation.

Order:

[26] In the circumstances, the following order is made:

1. The arbitration award issued by Arbitrator Motlatsi Phala on 31 March 2014 under case number GPCHEM 525-11/12 issued under the auspices of the National Bargaining Council for Chemical Industry is reviewed and set aside and is substituted with an award that:

    i. "The employees were guilty of the misconduct in issue, but their dismissal was substantively unfair."

2. The third respondent is directed to appoint an arbitrator to determine the appropriate relief to be granted taking into consideration section 193 of the Labour Relations Act 66 of 1995.

3. There is no order as to costs.

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B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	A J Nel,
Instructed by:	Lee and McAdam Attorneys.
For the First Respondents:	Mr M. Bayi of Bayi Attorneys