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Boss Logistics v Phopi and Others [2010] ZALC 5

JUDGMENT

Applicant has brought an application for the review of an arbitration award. In order for the applicant to succeed, this Court must be satisfied that the arbitration award made was one which no reasonable Commissioner would have made on the evidence which was presented at the hearing (see *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] ZACC 22)

Facts:

The first respondent had been employed by TNT WORLDWIDE EXPRESS ('TNT'), a company which operated as air freight couriers, as a Major Accounts Manager for a period of approximately 3 years. During 2008 he actively sought employment with the applicant.

Eventually, the first respondent was granted an interview. The first respondent provided a detailed CV setting out his qualifications and experience. According to the CV, the

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position which he held at TNT entailed that he was responsible for, inter alia, the compilation of sales plans detailing targeted corporate clients, making presentations of the product range to clients and performing a needs analysis, monitoring of recommended plans, sourcing and securing new business, production of weekly reports and the drafting of financial business plans with management.

The first respondent was subsequently employed by the applicant. In terms of his employment contract, he would be on probation for a period of 6 months.

At the interview the third respondent led the applicant to believe that he was an expert sales person and required no training in sales, although he required knowledge of the applicant's product which he was to sell. On the strength of his apparent experience, the applicant offered the first respondent a position as Customer Relationship Manager. At the time when the first respondent was offered the aforesaid position, the applicant approached the matter on the basis that the first respondent required no training in sales.

Not long after first respondent's appointment it became apparent to management that he was not able to perform the functions he was appointed for. He was suspended pending the conducting of an investigation into allegations of misconduct and was



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subsequently given notice of disciplinary proceedings. He faced 3 charges which read as follows:

‘1. Gross Misconduct in that you misrepresented your experience & qualifications within the logistics industry at the job interview/s resulting in a breach of the trust relationship.

2. Gross Misconduct in that you failed and/or refused to disclose to the management prior to employment that you had to undergo a medical examination and you went to hospital.

3. Poor Work Performance in that you are unable to attain the standards of performance required of the position for which you have been employed given your misrepresentation of experience within the logistics industry.’

At the hearing first respondent pleaded not guilty to all of the charges, but the chairperson found him guilty on charges 1 and 3 though he was acquitted in respect of charge 2. The chairperson recommended dismissal as sanction, after the first respondent had agreed that the employment relationship had broken down.

Unfair dismissal dispute

First respondent thereafter preferred an unfair dismissal dispute to the CCMA on the grounds that his dismissal was procedurally and substantively unfair. He alleged:



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- that the chairperson of the disciplinary enquiry had been **biased** because he had been apprised of the first respondent's alleged lack of performance and the applicant's desire to terminate his services by the e-mail referred to earlier.
- First respondent further averred that he had at no stage presented himself as someone who was an expert sales person who did not **require training** as such and denied that he had been appointed to a senior, or management position. First respondent, in addition, maintained that he had effectively only had two weeks within which to prove himself at work by the time he was dismissed, that the applicant knew full well that he required knowledge of, and training in, its product and that it was unreasonable to expect of him to acquire such knowledge within such a short period of time.
- First respondent further alleged that if he performed poorly, the applicant ought to have afforded him **counselling and training** to equip him for the sales portfolio, but that the applicant had instead denied him the opportunity to demonstrate that he was capable of performing well in the position.

Bias

The Commissioner, in her award, made the following finding in relation to the alleged bias of the chairperson:



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'What this e-mail indicates is that the respondent was telling Bailey on how this dispute is to be resolved and indeed the outcome reflects that. One can therefore deduce from these events that the chairperson's decision was influenced by the respondent long before the disciplinary hearing was held on 06 June 2008. The chairperson of the disciplinary hearing was therefore bias, making the disciplinary hearing to be procedurally unfair.'

The court held that whilst it is certainly desirable that the chairperson of a disciplinary enquiry not have any knowledge whatsoever of the alleged transgressions prior to commencement of an enquiry, this is an ideal which often cannot be practically achieved. In the instant case, the e-mail which was sent to the chairperson certainly served to outline the applicant's complaints about the first respondent's performance and the fact that the applicant would seek his dismissal. This is the type of information which would ordinarily appear in any charge sheet. There is however, no indication that management attempted to influence the chairperson to determine the matter in the applicant's favour or that the chairperson conducted himself in a manner where he was inclined to afford an unfair advantage to the applicant. Indications are that the chairperson exercised his mind independently. Indeed, he acquitted the first respondent on one of the charges.



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Before a finding of bias on the part of the chairperson can be sustained, there has to be evidence that bias existed. At the very least, the first respondent would have to allege facts from which it could be inferred that bias indeed existed. A bald allegation or suspicious conjecture is insufficient to sustain such a serious allegation. There is no evidence on record to show that the disciplinary enquiry was a sham. In these circumstances, it appeared to the court that no reasonable Commissioner, exercising his/her mind adequately in evaluating the evidence, would come to a conclusion that the first respondent's disciplinary enquiry was conducted in an unfair manner, because the chairperson was biased.

Poor work performance

In regard to the first respondent's alleged poor work performance, the Commissioner found that the first respondent was effectively given two weeks, or 10 working days, to prove that he could perform to the required standard and that this was an unreasonably short period of time for any employee to prove him/herself. She also found that if the applicant was of the view that the first respondent was not meeting the required standard, processes had to be put into place to assist him and that this had not been done. Consequently, the Commissioner found that the first respondent's dismissal was substantively unfair.



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The court held that the period of time which is required in order to evaluate an employee's performance would clearly depend on the circumstances of each case. There is no hard and fast rule in this regard. In some instances, the employee's incapacity might only become evident after the lapse of a considerable period of time, whilst in other instances it might be evident within a few days. The standard of performance would, generally speaking, be dependent upon the nature of the job and the complexity thereof, the volume or ambit of the work that had to be mastered, the nature and complexity of the employer's operations, the qualifications and experience of the employee, the level of stress which is inherent in the position, the extent to which the employee is required to exercise his/her own initiative and the extent of the training or induction that may be required.

The list is not exhaustive. In the final analysis, the employer is pre-eminently the person who has to decide in each case what period of time is reasonably required to evaluate the employee's performance. In the courts view, in the absence of clear indications that the employer acted in bad faith, or that the employer acted in a manner which was otherwise unfair to the employee, the Court or a Commissioner ought not to second-guess the employer in this respect.

In the instant case, the first respondent's performance clearly failed to impress the employer. Objectively speaking, the first respondent had failed to provide any



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meaningful leads to management despite his impressive CV and his professed sales expertise. The evidence of the applicant as to the manner in which the first respondent presented himself at the job interview was clear and unequivocal. First respondent led them to believe that he was in a management position, that he was thoroughly familiar with logistics, albeit in aviation, that he was an expert in sales and that the only knowledge he lacked, was knowledge of the applicant's particular product.

It is clearly for these reasons that applicant appointed him to a management position. However, despite the allegations in his CV that he had been responsible for 'putting together a sales plan detailing targeted corporate clients ...', the compilation of a recommended plan and 'compiling potential client business background' , he failed to present any meaningful leads to the applicant as and when required to do so.

Counselling, guidance, instruction and assistance

Given that the first respondent did not appear to be competent to perform the job he was hired to do, the next issue for determination is whether or not the applicant ought to have counselled, guided, instructed and assisted him in an attempt to bring his performance to the required standard.

If an applicant for a position misrepresents his experience and/or qualifications and is appointed to a position on the basis of such a misrepresentation, there was, in the



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courts view, no duty on the employer to provide such an employee with counselling, training or assistance. An employee who misrepresents his/her qualifications or experience is dishonest and is not entitled to be appointed to a position in the first place. An employment relationship is based on mutual trust and deceit is incompatible with, as well as destructive of, trust. Moreover, if an employer would, in such circumstances, be required to provide counselling, assistance and/or training to the deceitful employee, it would mean that the employee would in fact be rewarded for his/her dishonesty or deceit while the employer would be penalised.

Moreover, the measure of instruction, counselling and guidance which an employer has to provide in order to enable an employee to meet the required standard of performance, is dependent on the level of seniority of the employee as well as the latter's qualifications and experience. The ordinary requirements that an employer must instruct, guide and counsel an employee whose performance is poor, may not apply to a manager or senior employee whose knowledge and experience qualify him to judge whether he is meeting the required standards set by the employer (see *Somyo v Ross Poultry Breeders (Pty) Ltd* [1997] 7 BLLR 862 (LAC) and *New Forest Farming C C v Cachalia & Others* (2003) 24 ILJ 1995 (LC))



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The primary issues for determination in this regard are therefore whether or not the first respondent was employed in a management or senior position and whether or not he ought to have been able to determine for himself whether his performance was up to the mark. The court held that from the evidence it was clear that the employee was indeed appointed in a senior position.

Given the aforesaid facts and circumstances which appear from the record of the proceedings, it appeared to court that no reasonable Commissioner would have come to the conclusion that the first respondent's dismissal was substantively unfair.

On an overall conspectus of the evidence which was before the Commissioner at the CCMA, no reasonable Commissioner could, in the court's view, have concluded that the first respondent's dismissal had been procedurally or substantively unfair. It is accordingly clear that the Commissioner's Award falls to be reviewed and set aside.

