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Ram Hand-to-Hand Couriers v National Bargaining Council for the Road Freight Industry(2009)ZALC 67.

AC Basson J

The Applicant applied for an order reviewing and setting aside the commissioner's award in terms of which the Commissioner found that the employee was guilty of insubordination in that he failed to carry out reasonable instructions. The Commissioner, however set aside the penalty of dismissal and substituted it with a penalty of a final written warning valid for 12 months. The reinstatement order was further limited to three months.

The facts

The employee commenced employment with the Applicant in 1995 and was dismissed on the 23 May 2006 for "*gross*" insubordination. The Commissioner at arbitration found the Respondent guilty of insubordination (as opposed to "*gross*" insubordination) in that he failed to carry out a reasonable instruction. The Applicant does not challenge this finding.

It appears that the crux of the Applicant's argument in support of its application to review is the notion that the Commissioner exceeded his powers, alternatively committed a gross irregularity when, notwithstanding finding the employee guilty of insubordination, proceeded to substitute the sanction of dismissal with a sanction of a final written warning valid for 12 months and reinstatement with limited "*back pay*".

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Review test

The review test of reasonableness is now firmly established in our law. See in this regard: **Sidumo & Others v Rustenburg Platinum Mines Ltd & Others (2007) 2405 (CC)**. In the majority judgment delivered by **Navsa AJ**, the following principles were, *inter alia*, highlighted:

- Firstly, in arriving at a decision as to the fairness of the dismissal, a Commissioner is *not* obliged to defer to the decision of the employer.
- Secondly, in determining the fairness or otherwise of a dismissal, the Commissioner will take into account the totality of the circumstances.
- Thirdly, the review test is namely whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach. See also **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)**.

The court held that the mere fact that the Commissioner overturned the decision to dismiss after having found the Respondent guilty of insubordination is not *per se* irregular and therefore reviewable. There is also nothing before this Court to suggest that the Commissioner committed some irregularity in terms of the factors taken into account in coming to the conclusion that dismissal was not an appropriate sanction. It is clear from the **Sidumo-** decision that a Commissioner is entitled, despite a finding of guilt to determine whether or not dismissal was an appropriate sanction in the circumstances.

The court held that it cannot therefore find that the Commissioner committed a reviewable irregularity in substituting the sanction.

In light of his **length of service** and the fact that for more than a year the employee and his supervisor had been able to work together, the Commissioner came to the conclusion that dismissal (which is the ultimate penalty) was not the appropriate sanction.

It further appears from the award that the Commissioner was of the view that the dispute has been **blown out of all reasonable proportion** by the manager and that the dispute was a storm in “*a teacup*” that “*was blown into a full-scale war situation*”.



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The fact that the employee was found guilty of “insubordination” as opposed to “gross insubordination” in the circumstances also appears to have played a roll in the mind of the Commissioner in coming to a conclusion that dismissal was a too severe sanction.

The Commissioner in coming to a conclusion to substitute the dismissal sanction also took note of the principles laid down in terms of **Schedule 8 3.(4) of the Code of Good Practice of the Labour Relations Act, Act 66 of 1995** which requires that it is not appropriate to dismiss an employee for a first offence. In the present matter it appears that it was common cause that the Respondent had a clean record.

It was further argued on behalf of the Applicant that the Commissioner failed, or alternatively neglected to exercise the necessary caution in his determination whether the workplace sanction imposed by the Applicant was fair. This notion that the employer’s sanction should be approached with caution by Commissioners was a finding of the Supreme Court of Appeal in the **Sidumo**-matter which was overturned by the Constitutional Court:

“[75] It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing ‘discretions’. Employer and commissioner each play a different part.”

The court held that there is therefore no merit in the argument that the Commissioner was obliged to exercise any caution and/or deference in determining whether the workplace sanction imposed by the Applicant was fair or not.

It was further submitted that the Commissioner committed misconduct in relation to the duties of a commissioner in that he did not take into consideration the weight of evidence submitted in favour of the Applicant. There is no indication that the Commissioner did not consider the evidence.



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The court held that in the present matter there is also no evidence before this Court to show that **progressive discipline** would not change employee's attitude and efficiency. See also in this regard *Sidumo* where the Court also took into account that there was no indication that progressive discipline would not assist Sidumo in changing his attitude and efficiency.

The court was satisfied that the Commissioner took into account the totality of the circumstances and that the conclusion reached was not one that a reasonable decision maker could not reach in the circumstances.

In the event the review application was dismissed with costs.

