

-----LABOUR NEWS-----

25 September 2009

Compiled by: Adv J Delpont
Delpont Labour Consultants



Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation Mediation and Arbitration(2009) ZALC 68

Van Niekerk J

Introduction

The applicant applied in terms of **section 145** of the LRA, to review and set aside an arbitration award issued by the CCMA commissioner. The application was opposed.

The fourth, fifth and further respondents (there being 19 in total), the employees, were all employed at the Johannesburg International Airport Holiday Inn. Eleven of them were attached to the hotel's food and beverage department, and the remaining four held clerical positions. After having experienced problems with costs of sales in the department and further to having exhausted all conventional means at resolving the issue, the hotel installed video cameras at the hotel in the guest bar, the kitchen, the service bar and the storeroom. The footage was monitored for approximately six weeks. Subsequently 36 employees were charged with the unauthorised consumption of company beverages and some with an additional charge of consuming alcohol on duty. Thirty-two individual disciplinary enquiries were convened, after three employees resigned and another absconded in reaction to the charges. Of these 32 employees, two were found not guilty, one (Kele) given a final warning, and the remaining 29 dismissed. The dismissals were effected on different dates.

Of the 29 employees who were dismissed, 19 of them (the individual respondents in these proceedings) challenged the fairness of their dismissal before the CCMA in arbitration proceedings presided over by the commissioner. At the arbitration, it was common cause that all of the employees were guilty as charged, save for Madimlane and Tema (who contested their guilt), and that but for the company allegedly having acted **inconsistently** in not dismissing *inter alia* One Peter, Nyembe and Kele, the sanction of dismissal was fair and appropriate. A number of challenges to the procedural fairness of the employees' dismissal were also raised.

-----LABOUR NEWS-----

The arbitration award

At the conclusion of the arbitration proceedings, the commissioner handed down an award in which he found that the dismissal of the employees was procedurally fair, but substantively unfair. The sole basis on which he made the finding of substantive unfairness was that of inconsistent conduct by the company in the application of discipline. In his summary of the law on inconsistency, the commissioner recorded that the law was controversial, but that he would “attempt to reconcile different decisions in order to come with a sober approach that is applicable in to the facts in casu.” After referring to the Labour Appeal Court’s decision in **SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd (1999) 20 ILJ 2302 (LAC)**, the commissioner recorded that “some doubt” about the correctness of the approach adopted in that matter had been expressed by the Labour Appeal Court in **Cape Town City Council v Mashito & others (2000) 21 ILJ 1957 (LAC)**. After applying what he considered to be the law to the facts before him, the commissioner found that the employees had established inconsistency in both a **historical** and a **contemporaneous** sense.

Turning next to the question of sanction, the commissioner found that the hotel had failed to apply the sanction of dismissal consistently in that it had failed previously to dismiss Peter, Nyembe and Kele for similar misconduct and that on this basis, and only on this basis, the employees’ dismissal was substantively unfair. The commissioner awarded each of the employees’ compensation equivalent to 11 months’ remuneration, denying them the reinstatement that they sought because of them having given ‘*dishonest evidence*’ and having ‘*showed no remorse*’.

Grounds for review:

In these proceedings, the applicant attacks the commissioner’s finding that the employees’ dismissal was substantively unfair. The essential grounds of review are that the commissioner committed a gross irregularity (and / or acted unreasonably) in failing to apply his mind to a host of materially relevant considerations that arise from the evidence, and that he made material errors of law.

Relevant legal principles

The legal principles applicable to consistency in the exercise of discipline are set out in **Item 7 (b) (iii) of the Code of Good Practice**: Dismissal establishes as a guideline for testing the fairness of a dismissal for misconduct whether ‘*the rule or standard has been consistently applied by the employer*’. This is often referred to as the ‘**parity principle**’, a basic tenet of fairness that requires like cases to be treated alike.

The courts have distinguished two forms of inconsistency – **historical** and **contemporaneous** inconsistency.



-----LABOUR NEWS-----

- The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees **in the past**;
- the latter requires that the penalty be applied consistently as **between two or more employees** who commit the same misconduct.

A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a **subjective element** - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as comparator (see, for example, **Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC) at paras 37-38**).

The **objective element** of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See **Shoprite Checkers (Pty) Ltd v CCMA & others [2001] 7 BLLR 840 (LC)**) Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of *inter alia* differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.

Further, the Labour Appeal Court has held that employees **cannot profit** from an employer's manifestly wrong decision in the name of inconsistency. In **SACCAWU & others v Irvin & Johnson Ltd [1999] 8 BLLR 741 (LAC)**, **Conradie JA** held:

"Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case."

In **Cape Town City Council v Masitho & others (2000) 21 ILJ 1957 (LAC)**, **Nugent JA** held as follows with reference to **Irvin & Johnson**:

"While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency..., in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future"

This passage (which was relied upon by the commissioner in his award as having cast doubt on the correctness of **Irvin & Johnson**), deals with what an employer must do to protect itself in the future against a claim of historical inconsistency arising from a wrong decision in the past. It is evident from the above principles that there is no confusion in the jurisprudence as it relates to the consistency requirement, nor is there any conflict between decisions of the Labour Appeal Court.



-----LABOUR NEWS-----

The test to be applied by a reviewing court in applications for review was laid down in **Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC)**, where **Navsa AJ** held that the threshold test for the reasonableness of an award or ruling as this: **“Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”**

The court held that in summary, **section 145** requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner’s decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.

With this background, the court considered the challenge to the commissioner’s award.

The court held that in respect of the instances of inconsistency the commissioner had to decide over, the commissioner failed to apply his mind to the evidence, which led to the wrong conclusions.

The court held that the commissioner’s finding that the chairperson of the disciplinary hearing was ‘not honest’ gives rise to the inescapable inference that the commissioner hopelessly failed to apply his mind to the evidence before him. Indeed, the only inference to be drawn from the award is that the finding of dishonesty was contrived with a view to overcoming the decision of the LAC in **Irvin & Johnson** to the effect that, in the absence of *mala fides* or dishonesty by their employer, employees should not be allowed to profit from a wrong decision.

This in itself, according to the court, was an act of gross misconduct, warranting the review and setting aside of the entire award. For these reasons, all of which establish gross misconduct on the part of the commissioner, the commissioner’s award was reviewed and set aside.

