REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no. JR2792/12

In the matter between:

SOLIDARITY obo S W PARKINSON **Applicant**

and

DAMELIN (PTY) LTD **First Respondent**

COMMISSIONER SIBONGISENI SITHOLE **Second Respondent**

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION **Third Respondent**

Heard: **11 July 2014**

Delivered: **2 December 2014**

Summary: **This is an Application to review and set aside an Award by the Second Respondent who found that the dismissal of S.W. Parkinson (hereinafter referred to as the "Applicant") was fair. Court found that the First Respondent did not adhere to its own Disciplinary Code and that the findings of the Second Respondent were not, in the circumstances, reasonable. The Award was also defective on a**

process related basis. Award of the Second Respondent reviewed and set aside and replaced with an Order to reinstate Applicant but not to date of dismissal to take account of systemic delays.

JUDGMENT

BLEAZARD, AJ

[1] This is an Application in terms of which the Applicant seeks to review and set aside the Award of the Second Respondent sitting under the auspices of the Third Respondent. The Award was issued under case number GAJB16309-12 and dated 11 October 2012. (Whilst the "Applicant" in this matter is "Solidarity on behalf of S.W. Parkinson" the reference to "the Applicant" hereinafter is a reference to S.W. Parkinson.)

[2] The Applicant was employed by the First Respondent as the General Manager at its Boksburg campus, and was dismissed on 15 May 2012. It is to be noted that the Boksburg campus was in close proximity to a new campus in Benoni, an adjoining town on the East Rand.

[3] There are essentially two grounds upon which an Award of the Commissioner at the CCMA can be set aside. The one is the so called reasonableness test as set out in the well-known *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*[1] case and the other the process related test as enunciated by Van Niekerk J in the matter of *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[2] .

[4] In this matter the Second Respondent came to the following conclusion in her Award:

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[1] **(2007) 28** *ILJ* **2405 (CC)**
[2] [2009] 11 BLLR 1128 (LC)

‘28 It is trite law that a disciplinary code is a guideline and each case has to be determined based on its own merits. The Applicant was a GM which is a senior position. It is trite law that higher standard of competence and performance are expected of senior employees than ordinary workers – *C van Aarde v Sanlam (1194) 3 LCD 375 (IC)*.

29 At all material times the Applicant was made aware by his line manager that his campus was not meeting the required standards. He was further offered marketing assistance and Rithesh was seconded to the campus to salvage the situation. The Applicant’s assertion that the letter dated 25 January 2012 was not a formal written warning cannot stand and would be setting too high a standard for determining what constitutes a warning. The letter warned the Applicant and the mere fact that it was not written final written warning in a warning template did not negate it as a formal warning. This was not the first warning issued to the Applicant in that in Nov 2011 the Applicant’s leave was cancelled and he was formally given notice that the employer intends [sic] dismiss him. Documentary evidence shows that numerous corresponds [sic] was sent by the line manager to the Applicant regarding the serious consequences for non-performance. I thus find that progressive disciplinary measures were complied with.

30 Evidence led suggested the Applicant took reasonable steps to improve his performance but the sales were below the previous year’s actual sales. There is no evidence to show that further disciplinary measures would have changed the situation. I therefore find that the dismissal was an appropriate sanction.

31 I find on a balance of probabilities that the dismissal of the Applicant was procedurally and substantively fair’.

[5] The first issue to determine is whether the Second Respondent’s findings in connection with the nature and extent of the warning can be sustained. The First Respondent’s Disciplinary Procedure and Code was submitted in evidence and it is necessary to refer to aspects of that Disciplinary Procedure and Code:

'1. Purpose

1.1 The purpose of this policy is:

(a) To provide the guidelines to be followed where conduct or performance of an employee is unsatisfactory;

(b) To ensure that EDUCOR gives fair and just treatment to employees who appear to have transgressed company rules, policies or its disciplinary code;

(c) To create certainty and consistency in the application of discipline.

2. Disciplinary Principles

2.1 The Company shall:

2.1.1 maintain fair, just and consistent discipline;

2.1.2 ensure that all employees are made aware of the standards of acceptable behaviour expected of them;

2.2 The Company's employees are expected to:

2.2.1 comply with the disciplinary code and procedures of the Company;

Forms of Discipline

3.1 There is a distinction between disciplinary action and counseling. In general, counselling is appropriate where employees are not performing to standard, or is unaware of a rule regulating conduct and/or where the breach of the rules is relatively minor and can be condoned. Disciplinary action will be appropriate where a breach of the rules cannot be condoned, or where counselling has failed to achieve the desired effect.

4. The Application of Discipline

4.1 It is the responsibility of EDUCOR management to decide when it is necessary to apply this procedure, and what form of disciplinary action is appropriate.

4.2 Before deciding what form of disciplinary action is appropriate, management must meet the employee concerned in order to explain the nature of the rule she/he is alleged to have breached, and give the employee an opportunity to explain her or his conduct. Such a meeting does not constitute a formal hearing'.

'4.3.3 Final Written Warning

A final written warning may be given when an employee has received a written warning(s) for the same or similar breach of rules, or when a first offence is of such a serious nature that it warrants a final written warning.

Record of this disciplinary action should be kept on an employee's personal file.

If an employee disputes her final written warning given without there having been a disciplinary hearing, s/he may request a formal hearing to review such warning within 7 days of receiving such warning.

The employee's manager must inform the employee that a failure to heed a final written warning may result in dismissal'.

[6] The Disciplinary Code then goes on to give the recommended penalties to be imposed for various offences. Under the heading *"*Failure to meet sales target*"* the "corrective action*"* which is contemplated for a first offence is *"counselling"*, a second offence is a "written warning*"*, a third offence is a "final written warning" and a fourth offence could result in "dismissal". See page 60 of the bundle of

documents submitted at the arbitration proceedings before the Second Respondent.

[7] In terms of the Applicant's contract of employment the following is stated:

> '15. Disciplinary Code and Grievance Policy
>
> *a.* The Employee is subject to the Employer's Disciplinary Code, Codes of Conduct and Code of Ethics. Copies of these documents are available from the HR Department.
>
> *b.* The Employee undertakes to familiarize himself with the content of the relevant codes.
>
> *c.* Should it be necessary to discipline the Employee in respect of misconduct, discipline will be applied according to the Employer's relevant codes'.

[8] In the First Respondent's Heads of Argument the following was, *inter alia* stated:

> '3.7 It is further submitted as trite law that a company policy on the application of a system of warnings designed to address poor work performance, is in the main, a guideline which does not require slavish adherence. This, it is submitted, fits snuggly into the requirements of our law as provided for by Schedule 8: Code of Good Practice in the Labour Relations Act which simply requires the application of progressive discipline but makes no mention of whether the discipline (warnings) are required to be in writing or the number that should be issued in giving effect to the progressiveness of the discipline. It is therefore the principle that is laid down and not the manner in which it is to be executed'.

[9] At paragraph 5.20 of the First Respondent's Heads of Argument the following was stated:

> '5.20 It is furthermore submitted that the Arbitrator's application of the law as it pertains to progressive discipline and the manner in which the Applicant was warned cannot be faulted. Accordingly, it

is submitted that the First Respondent's code is merely a guide and as such there was no duty on the First Respondent to slavishly adhere to same'.

[10] When the matter came before me I asked the representative of the First Respondent, Advocate Nel, what the nature of the complaint was that the First Respondent had against the Applicant. He confirmed that the issue was one of misconduct and not of "poor performance".

[11] Of critical importance to this matter is the letter received by the Applicant from the First Respondent dated 25 January 2012 and it is necessary to set out such letter in its entirety:

'Employee: Steven.Parkinson

Employed As: General Manager

Campus: Boksburg

25th January 2012

Dear Steven

As you are well aware, our business is dependent on sales, as a primary driver for all our expenses. We have a serious challenge to improve all aspects of the business for 2012 and your sales budgets have been set accordingly.

Your campus performance as of 25th January 2012 compared year on year is as follows:

(117 First Year Students 2012, 168 First Year Students 2011)

Your official target for 2012 (by end February 2012) is as follows:

(420 First Year Students and 138 Student Rollovers)

This situation is not acceptable and the level of poor performance will not be tolerated.

You are hereby officially informed that if your campus is not at least a few percent ahead of sales as compared to last year (irrespective of the national sales target), formal disciplinary steps will be taken which will result in your dismissal.

Should you wish to discuss this any further, kindly contact me.

Kind Regards

_____

(Signed: Nolan Charles

Group Chief Commercial Officer – pp David?)

ACKNOWLEDGEMENT:

I hereby acknowledge receipt hereof by affixing my signature hereto.

(Signed) 01/02/2012

Employee Date'

It is interesting to note that, whilst the target set in terms of this letter was 420 First Year Students for 2012 as opposed to 168 First Year Students in 2011 - a massive increase - and while it is that level of poor performance to which the letter refers, the letter also indicates that disciplinary action will be taken against him if his campus is *"not at least a few percent ahead of sales as compared to last year"*. The letter is, in itself, therefore ambiguous. It is also interesting to note that Nolan Charles who was the author of the letter, the person to whom the Applicant reported, and was the most appropriate person to address the issues raised was not called as a witness in the proceedings before the Second Respondent.

[12] My view is that the issue of the Applicant's failure to reach the sales target (or a few percent above the previous year's sales) constitutes an issue which should have been subject to poor performance in accordance with the First

Respondent's own policies. However, it is not necessary for the purpose of this Judgment to decide this issue.

[13] It is common cause that this matter was to be dealt with on the basis of misconduct.

[14] As referred to above the Disciplinary Code of the First Respondent requires employees such as the Applicant to "comply with the Disciplinary Code and Procedure of the Company" (see paragraph 5 above).

[15] The First Respondent indicates that it is not required to "slavishly" follow its disciplinary procedures, and that disciplinary process for senior employees can be less rigorous than that for more junior employees.

[16] Whilst the Disciplinary Code and Procedure formed part of the Applicant's employment contract and whilst employees are required to be acquainted with and to follow the Disciplinary Code and Procedure, the First Respondent believes it can be *laissez faire* in respect of its adherence to and compliance with such disciplinary code.

[17] Even if the First Respondent could show that clause 15 of the Applicant's contract of employment did not constitute a contractual term, I am of the view that the norm to be adopted is that both the First Respondent and its employees should adhere to the Disciplinary Code and Procedure. In the event that the First Respondent determines that there are circumstances which arise which require a process that deviates from such Disciplinary Code and Procedure it must have compelling and good reasons to do so. At the very least it should advise the employee that whilst the Disciplinary Code makes provision for certain steps and procedures the First Respondent believes that there are compelling circumstances and reasons why, in the particular instance, the First Respondent does not intend to follow the Disciplinary Code and Procedure and allow the employee an opportunity to comment and advance reasons why he does not believe that there should be a deviance from such Disciplinary Code and

Procedure. Thereafter, if the First Respondent is satisfied that the need to deviate from the Disciplinary Code and Procedure outweighs the compliance therewith, it would then be entitled to proceed on the basis which it had proposed. This, of course, is subject to the Commissioner at the CCMA or the Judge at the Labour Court finding that the reasons advanced by the employer from deviating from the Disciplinary Code and Procedure were justified and reasonable.

[18] In this case there is no question that the First Respondent did not follow its Disciplinary Code and Procedure. First of all, the First Respondent sought to rely on the letter of 25 January 2012 as a *"*final written warning*"*. In terms of clause 4.3.3 of the Disciplinary Code (paragraph 5 above) the employee had the right to contest a written warning within "7 days of receiving such warning".

[19] It is to be noted that there is nothing on the letter of 25 January 2012 that says that it is a "final written warning*"*. Indeed, it refers to the fact that "formal disciplinary steps will be taken which will result in your dismissal*"*. The use of the word "will" is, in any event, misplaced.

[20] It must also be borne in mind that the sanction for the misconduct of which the Applicant was accused had 3 steps before a dismissal could be contemplated (see paragraph 6 above).

[21] Mr Nel who appeared on behalf of the First Respondent at the hearing before me was at pains to refer to judgments where the need to follow disciplinary processes to the letter in respect of senior employees was less rigorous than in respect of other employees. I do not understand that to mean that you can simply bypass a Disciplinary Code and Procedure that you yourself have drafted when it suits you. This makes nonsense of a Disciplinary Code and Procedure which employees are required to follow and gives *carte blanche* to the employer to act at its will.

[22] In the circumstances, I am unable to agree with the Second Respondent that the Applicant was warned in accordance with the First Respondent's Disciplinary Code and Procedure and that "progressive disciplinary measures were complied with". My view that this is not a finding to which a reasonable Commissioner in the position of the Second Respondent could have come.

[23] I have alluded to the fact that there are two grounds upon which an Award can be set aside. Whilst I am satisfied that on the first ground as set out above there is sufficient grounds to warrant the setting aside of the Award of the Second Respondent, I also believe that there has been a failure by the Second Respondent to deal with the matter as envisaged by Judge Van Niekerk in the *Southern Sun's* case referred to above. In this regard, it is clear from a reading of the transcript of proceedings before her that the manner in which the evidence was led by the representative of the First Respondent at the hearing before the Second Respondent was to lead his witnesses. Despite the fact that the representative of the Applicant objected on occasion to the fact that he was leading the witnesses, the Second Respondent allowed this process to continue throughout. Accordingly, it is difficult to assess what reliance can be placed on the evidence that was presented by the First Respondent.

[24] It then remains to determine what relief ought to be given to the Applicant in the light of what I have stated above.

[25] My view is that little purpose would be served by remitting this matter back to the Third Respondent for consideration by another Commissioner. I am also alive to the fact that the Award in this matter was handed down on 15 October 2012 and that the proceedings were instituted by the Applicant on 28 November 2012. It is now towards the end of 2014 and the question arises as to whether the reinstatement of the Applicant ought to be to the date of his dismissal. I am aware that there are changes that are contemplated by virtue of the amendments to the Labour Relations Act to facilitate the more timeous consideration of

matters such as this. I have taken this into account as well as the systemic delays in the processing of matters such as this.

[26] In the circumstances, I make the following Order:

26.1. The Award of the Second Respondent under case number GAJB16309-12 is reviewed and set aside;

26.2. The Applicant is reinstated in the employ of the First Respondent with effect from 1 January 2014;

26.3. The First Respondent is to pay the costs of this application.

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Bleazard, AJ

Acting Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: N. Greef, an Official of Solidarity Trade Union

For the First Respondent: Advocate Nel

Instructed by: Garlicke & Bousfield Inc.