



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

(Not reportable)
Case no: JR 243/14

In the matter between:

ROSE PHIRI

Applicant

and

**NATIONAL BARGAINING COUNCIL FOR THE
CATERING, RESTAURANTS & ALLIED TRADES**

First Respondent

GQWETSHA N.O.

Second Respondent

**YUM RESTUARANTS INTERNATIONAL (PTY) LTD
t/a KFC**

Third Respondent

Heard: 5 July 2016

Delivered: 30 May 2017

JUDGMENT

MYHILL AJ

Introduction

[1] This is an application *inter alia* to review and set aside the arbitration award issued by the second respondent, dated 13 January 2015, under case number DSP20/03/13. The application is brought in terms of section 145 of the Labour Relations Act¹ on the basis that – despite the second respondent finding that the dismissal of the applicant was substantively unfair and ordering the third respondent to reinstate the applicant to the date of her dismissal – he ordered that this be without back pay. The applicant seeks the reinstatement to be coupled with 12 months' back pay.

[2] The application is opposed by the third respondent.

Background

[3] The applicant was employed by the third respondent during 1995 as a Restaurant General Manager and after a disciplinary hearing was found guilty of:

“Non-compliance with policies and procedures: The above arises in that you failed to log a call with the company to fix the credit card machine that was faulty and failed to inform your AC [Area Coach] about the problem in your store.”

[4] As a result, she was dismissed and referred an unfair dismissal dispute to the first respondent which appointed the second respondent to arbitrate the dispute. The second respondent decided that the dismissal was substantively unfair and ordered the third respondent to reinstate the applicant to the date of her dismissal without back pay and ordered the applicant to report for duty at the third respondent on or before 21 January 2014.

Grounds of Review

[5] Mr Shongwe, on behalf of the applicant, submitted that the Award is being

¹ 66 of 1995, as amended. (the Act)

reviewed because the second respondent found that a previous final written warning issued against the applicant was unfair as it was for an offence that occurred whilst the applicant was off duty and before the final written warning was issued the applicant was not given a chance to defend herself.

- [6] The second respondent then ruled that having scrapped the final written warning, what was left was a new breach which did not deserve dismissal as a sanction but, rather, a final written warning which was valid for 6 months.
- [7] This was the basis for the third respondent finding that the dismissal was substantively unfair. He disagreed with the applicant that she should be reinstated with retrospective effect to the date of her dismissal because she would benefit financially from her wrong doing which he believed was against the interests of justice and fairness. He found that reinstating the applicant without back pay of her salary was fair and appropriate under the circumstances.
- [8] Mr Shongwe submitted that as the first final written warning was invalid the applicant should never have been dismissed. The second respondent found that the applicant, according to the third respondent's disciplinary code of conduct, should have been given a final written warning rather than dismissal. Her dismissal, however, had caused her to suffer financially because she was unemployed for 12 months before being reinstated. The second respondent thus erred by saying that the effect of reinstatement with retrospective effect will be that she will benefit financially from her wrong doing. His Award should thus be corrected by ordering that she be reinstated with retrospective effect to the date of her dismissal which means she would be entitled to back pay from the date of her dismissal to the date of her reinstatement (21 January 2014).
- [9] Mr Noorbaai, on behalf of the third respondent, submitted that the applicant has been back at work since 21 January 2014 and the decision not to award her back pay was a rational one. He had a discretion in this regard in terms of section 193(1)(c) of the Act which had been properly exercised. He had clearly

explained in his Award why it would not be in the interests of justice to award back pay to an individual in the applicant's position. He had found her guilty, however, the sanction of dismissal was too harsh and he found further that the employer had acted inconsistently in dismissing her. His conclusion was thus rationally connected to his reasons taking into account the material before him. The applicant had failed to prove that it was a decision that no other reasonable decision-maker could come to.

- [10] Mr Noorbaai referred me to the case of *Kemp t/a Centralmed v Rawlins*² as authority for his submission that it was correct that the applicant was not awarded back pay. He submitted that the requirements of justice and fairness were met in the exercise of the second respondent's discretion not to award back pay. He argued that a reasonable arbitrator would have come to the same conclusion. The applicant was found guilty of misconduct and had a valid final written warning so this justifies her not being awarded back pay. Awarding her back pay would financially prejudice the employer. It was necessary to discipline the applicant and proper procedures were followed.
- [11] When I asked Mr Noorbaai to comment on the seeming contradiction by the second respondent in his order in paragraph 110 of his Award, he submitted that paragraph 108 clarifies 110. In paragraph 108 the second respondent made it clear that the effect of retrospective reinstatement would be that the applicant would benefit financially from her wrong doing. His intention thus was not to reinstate her to the date of her dismissal with back pay.
- [12] In reply, Mr Shongwe submitted that the applicant was erroneously dismissed which resulted in her being unemployed for 12 months, so she should have been awarded back pay retrospectively to the date of her dismissal. The order of the second respondent was contradictory. There was no benefit derived by the applicant from her wrong doing.

² [2009] ZALAC 8; [2009] 11 BLLR 1027 (LAC); (2009) 30 ILJ 2677 (LAC). (*Kemp*)

Evaluation

- [13] Mr Noorbaai is incorrect when he submits that the second respondent exercised his discretion in terms of section 193(1)(c) of the Act.³ That section deals with the remedy of compensation. The second respondent did not order that compensation be paid to the applicant but ordered that she be reinstated to the date of her dismissal without back pay (p.42 of Bundle). The *Kemp* case he referred me to deals with compensation as a remedy for unfair dismissal so it is largely inapplicable to the facts of the present matter except for the discussion by Zondo JP of the concept of “judicial discretion” at p.2689 of the judgment.
- [14] Section 193(1)(a) states that the Court or the arbitrator may—
 “order the employer to reinstate the employee from any date not earlier than the date of dismissal.”
- [15] That means that the Court or the arbitrator has been given a discretion as to the degree of retrospectivity of the reinstatement.⁴ This discretion must, however, be exercised judicially.
- [16] In paragraph 110 of his Award the second respondent ordered the Respondent to reinstate the Applicant “to the date of her dismissal without back pay of the salary.”
- [17] Read on its own that is a contradictory statement because reinstating an employee to the date of her dismissal sounds like retrospective reinstatement. The part -” without back pay” is inconsistent with the first part. However, in paragraph 108 of the Award the second respondent disagreed with the

³ Section 193(1)(c) provides:

- “(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
 (c) order the employer to pay compensation to the employee.”

⁴ *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* 2009 (3) SA 493 (SCA); (2009) 30 ILJ 829 (SCA) at para 32.

submission of the applicant that she should be reinstated retrospectively with a written warning on the basis that the applicant would benefit financially from her wrong doing which he believed to be against the interests of justice and fairness. I thus accept that the intention of the second respondent was not to reinstate the applicant to the date of her dismissal.

[18] In paragraph 97 of his Award, however, he found that the final written warning that the third respondent relied on in dismissing the applicant was issued without the applicant being given an opportunity to state a case in response to the allegation and it was for misconduct when she was off duty. In paragraph 99 of his Award he found that this final written warning was not properly issued. He stated further that the offence that led to her dismissal was a level 3 transgression and that the respondent's disciplinary code of conduct provides for a final written warning for such offences. He thus found that the applicant should have been issued with a final written warning. In addition to finding that the dismissal was also too harsh he found that the respondent acted inconsistently in applying discipline because other members of management had not reported the malfunctioning of the Nomad system (paragraph 102 of the Award).

[19] The second respondent did not explain in his Award how the applicant would benefit from her wrongdoing if she was reinstated with retrospective effect. The respondent's disciplinary code prescribed a final written warning for the offence for which she was dismissed. It was on the basis of her already having a final written warning for a similar offence that she was dismissed. The second respondent found that the first final written warning was improperly issued and that she should have been issued with a final written warning for the offence for which she was dismissed.

[20] I agree with Mr Shongwe that the applicant would not have been dismissed if she did not have that first final written warning on her record. Owing to that error on the part of the management of the respondent, the applicant lost her job and remained unemployed for almost 12 months before she was reinstated by the

second respondent and ordered to report for work on 21 January 2014.

[21] The order to reinstate the applicant without back pay thus makes no rational sense.

[22] I agree with the applicant that the decision made by the second respondent not to reinstate the applicant with full retrospective effect (i.e. with back pay from the date of her dismissal to 21 January 2014) is one that no reasonable decision-maker could make having considered the facts of the case.

[23] I agree that the second respondent committed misconduct in terms of section 145(2)(a)(i)⁵ in not reinstating the applicant with retrospective effect to the date of her dismissal.⁶

[24] As the third respondent opposed this application I see no reason for the costs not following the result.

Order

[25] In the premises I make the following order:

1. The second respondent's decision not to make the operation of his Award, dated 13 January 2014, of reinstatement retrospective to the date of dismissal is reviewed and set aside;
2. Paragraph 110 of the second respondent's arbitration Award is amended to read as follows:

⁵ This section provides:

- "(2) A defect referred to in subsection (1), means—
- (a) that the commissioner—
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator."

⁶ See test for review in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 110.

“I order the Respondent, Yum Restaurants International (Pty) Ltd t/a KFC, to reinstate Ms Rose Phiri with full retrospective effect to the date of her dismissal with back pay from the date of her dismissal to 20 January 2014.”

3. The back pay must be paid to the applicant on or before 31 May 2017.
4. The third respondent is to pay the costs of this application.

E. Myhill

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Shongwe

Instructed by:

For the Respondent: Mr Noorbaai

Instructed by:

LABOUR COURT