Kunene / Hotshot Freight CC t/a D&H Deliveries

National Bargaining Council for the Road Freight & Logistics Industry

Award date: 29/05/2017 *Case No*: RFBC44803

Before: W Stephens, Commissioner

Referral in terms of section 191(5)(a)(i) of the LRA

Dismissal – Substantive fairness – Misconduct – Intimidation – Employee threatening female manager with violence – Dismissal appropriate.

Editor's Summary

The applicant was dismissed for threatening and intimidating a woman manager. He accepted that threats of violence in the workplace are unacceptable, but claimed that dismissal was too harsh a sanction as the respondent could have given him a chance to show that he would reform.

The Commissioner accepted that the applicant had breached a workplace rule of which he was aware. The only issue was whether dismissal was an appropriate sanction. In deciding that issue, the interests of both employer and employee must be considered. Threatening a female colleague cannot be condoned under any circumstances, especially in a society in which gender violence is rife. The only mitigating factor the applicant had provided was that he was sorry. However, the respondent's disciplinary code provided for dismissal at first instance for intimidation and threats of violence. The dismissal was, accordingly, substantively fair.

The application was dismissed.

Award

Details of hearing

The arbitration took place at the offices of the National Bargaining Council for the Road Freight & Logistics Industry ("NBCRFLI") – Newcastle – on 19 May 2017. The applicant represented himself and the respondent was represented by Mr S Jainarain of CEO (SA) a duly registered Employer's Organisation.

Issue to be decided

The applicant did not dispute that he broke a valid rule in the workplace, however submitted that he felt that his dismissal was too harsh. He did not dispute the procedural aspects of his dismissal. I was, therefore, simply to determine whether the sanction of dismissal was the correct one.

Preliminary issues

The respondent tendered a bundle of documents consisting of 17 pages. The applicant did not dispute the contents of the bundle and I accept the documents to be what they purported to be.

Background to the issue

The applicant commenced his employment with the respondent on 1 May 2015 and was dismissed on 24 January 2017 at the conclusion of a disciplinary enquiry – he was found guilty of misconduct.

At the time of his dismissal, he was employed as a Warehouse Assistant and earned approximately R4 300 per month.

Survey of evidence

The respondent

The respondent submitted that the applicant threatened and intimidated a female Manager whilst on duty. In addition to this, the applicant knows where the employee lives and the Manager felt that she was not safe at work or at home. The disciplinary code confirms that the offence is dismissible and progressive discipline would not be justified in this matter due to the nature of the misconduct.

The first witness Elsa Bothma, testified that she is employed as the Branch Manager – and as a woman, "anything can happen". When the applicant told her that he was going to get her, he was aggressive and angry and she felt extremely scared of him – he also knows her home address. Because of this, she stated that the employment relationship has completely broken down. She further testified that there is no relationship between the two of them and that she simply can no longer work with him. In addition, prior to the disciplinary enquiry, the applicant did not take instructions from her and ignored her.

She stated that page 15 of the bundle of documents confirms that threatening behaviour is a dismissible offence in terms of the Disciplinary Code.

On cross-examination, Bothma confirmed that subsequent to the incident, the applicant "did nothing wrong to her" and that he did apologise to her.

The applicant

Mr Kunene testified that he felt that his dismissal was too harsh, as the company did not give him a second chance to show that what he did would not happen again. He further testified that he was not aware that threatening behaviour was a dismissible offence.

On cross-examination, the applicant confirmed that it is wrong to threaten anybody. He stated that the words he said were meant to mean, "what goes around comes around" – he did not mean to fight with Bothma and that Bothma accepted his apology. It was put to him that as a result of his actions, the employment relationship had reached a point where it had irretrievably broken down. He had no comment. He conceded that threats of violence or violence in workplace are unacceptable.

Closing arguments

Both parties gave brief summaries of their respective versions.

Analysis of argument and evidence

The applicant has alleged that an unfair dismissal took place. Section 192 of the Labour Relations Act 66 of 1995 ("the Act/LRA") places the onus on the employer to show the dismissal was fair, both *substantively* and *procedurally*.

Substantive fairness

Insofar as *substantive fairness* is concerned, the Code of Good Practice: Dismissal sets out guidelines for employers to follow in dismissing an employee for misconduct. Specifically, item 7 of Schedule 8 requires one to show:

> "Any person who is determining whether a dismissal for misconduct is unfair should consider
>
> (a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
>
> (b) if a rule or standard was contravened, whether or not –
>
> (i) The rule was a valid or reasonable rule or standard;
>
> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
>
> (iii) the rule or standard has been consistently applied by the employer; and
>
> (iv) dismissal was an appropriate sanction for the contravention of the rule or standard."

(a) Did the employee contravene a rule in the workplace?

The applicant conceded that he broke the following rule in the workplace:

> Gross Insolence and or threatening behaviour in that on 9 December 2016 you approached manager Elsa and demanded taxi fare from her in a rude and aggressive manner. You furthermore threatened her by stating "I will get you!"

I, therefore, accept that the applicant contravened a rule in the workplace.

(b) If a rule or standard was contravened –

(i) If the rule was a valid or reasonable one?

I accept that the rule of no threat of violence will be tolerated at the workplace, is a valid and reasonable one.

(ii) Was the employee aware of, or could reasonably be expected to have been aware, of the rule or standard;

This was not in dispute.

(iii) Has the rule or standard been consistently applied by the employer?

This too was not placed in dispute.

(iv) Is dismissal an appropriate sanction?

A reading of item 3 of the Code of Good Practice – Dismissal – seems to suggest that "serious" misconduct will be conduct, which is of such gravity that it makes a continued employment relationship intolerable.

In *County Fair Foods* (*Pty*) *Ltd v CCMA and others* (1999 (8) LAC 1.11.46) [reported at [1999] 11 BLLR 1117 (LAC) – Ed], Ngcobo AJP said that a Commissioner should not simply substitute his/her value judgment for that of the employer and should not interfere with the sanction unless warranted. This principle was confirmed in the Constitutional Court decision of *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] 28 ILJ 2405 (CC) [also reported at [2007] 12 BLLR 1097 (CC) – Ed] (5 October 2007) where the court stated:

> "In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list. To sum up, in terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

The above requires an Arbitrator to give consideration to the position and interests of both the employer and employee in order to make a balanced and equitable assessment. An arbitrator is to assess the fairness of the dismissal objectively by taking the "totality of circumstances" into account. Facts and circumstances that may be relevant to the question whether dismissal was an appropriate sanction include:

- the importance of the rule that has been breached;
- the reason why the employer imposed the sanction of dismissal;
- the basis of the employee's challenge to the appropriateness of the sanction;
- the harm caused by the employee's conduct;
- the effect of dismissal on the employee;
- whether additional training and instruction may result in the employee not repeating the misconduct;
- whether progressive discipline was applied and if not, whether progressive discipline may be effective;
- the employee's disciplinary record and length of service;
- the presence or absence of dishonesty in the employee's conduct;
- whether the employee admitted the misconduct or disputed it and; if the employee disputed it, whether the employee behaved dishonestly or inappropriately in doing so.

In relation to the actual charge, Professor Grogan in his book, *Workplace Law*, (8ed) (174) cites a Labour Appeal Court case of *Adcock Ingram Critical Care v CCMA and others* (2001) 22 ILJ 1799 (LAC) [also reported at [2001] 9 BLLR

979 (LAC) – Ed]. In that case, a shop steward was dismissed for uttering a threat during negotiations with management. The shop steward uttered the words: "You can take this as a threat – there will be more blood on your hands." Management walked out but returned to the meeting after being persuaded to do so. The meeting continued in an orderly manner. At the disciplinary hearing, the shop steward claimed that he merely intended to convey the message that workers might be injured if an outstanding dispute was not resolved. The CCMA Commissioner found that the words did not constitute intimidation. So, did the Labour Court. The Labour Appeal Court ("LAC"), however, thought otherwise. The LAC considered as important the "plain meaning" of the words. The LAC also considered as important the *circumstances* in which the words were uttered. It also mentioned the importance of *mutual respect* between employee and employer notwithstanding the tension existing at the time the words were used. In this case too, the plain meaning of the words, "I will get you" shows that they were meant to intimidate Bothma. I further take note that Bothma is the single female manager employed by the respondent.

This act of threatening behaviour toward a female employee simply cannot be condoned in any form whatsoever. The comment uttered by the applicant was made at a time where gender-based violence in South Africa is once again in the spotlight. An article authored by Susan Goldstein, an Honorary Senior Lecturer at the School of Public Health – University of the Witwatersrand – published in the Mail and Guardian suggests that in South Africa, one in four women in the general population has experienced physical violence at some point in their life. In addition, Social Development Minister Bathabile Dlamini recently stated at the funeral of Karaba Mokoena, that "if nothing is done about female abuse there will be more cases like that of Karabo Mokoena." She further stated that "there's genocide against women in this country."

The only mitigating factor the applicant has submitted in this matter was that he was sorry for uttering the words. On the other hand, the applicant has committed gross misconduct of a serious nature. Threats of violence in the workplace are generally regarded as gross misconduct and accepted as good grounds for dismissal. Assault consists in unlawfully and intentionally: (a) applying force, directly or indirectly, to the person of another; or (b) threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends and has the power to carry out the threat. Quite clearly, Bothma felt extremely intimidated and threatened and testified that the applicant knew where she lived – she believed that her life was in danger. She further submitted that for him to return to work would be inconceivable, as she still fears for her life.

I accept that the sanction prescribed by a disciplinary code for a specific disciplinary offence is generally regarded as the primary determinant of the appropriateness of the sanction. (See Grogan *Dismissals, Discrimination and Unfair Labour Practices* Juta (2ed) 282). The respondent submitted that the offence warrants dismissal as a sanction in terms of the Company's Disciplinary Code and that the offence does not warrant the principle of corrective and progressive discipline. I accept this. Taking the above into consideration, I accept Dismissal to be a fair and just sanction for the nature of the offence committed. I, therefore, believe the dismissal of the applicant to be substantively fair.

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Procedural fairness

This was not in dispute.

Award

The application is dismissed.

The following cases were referred to in the above award:

Adcock Ingram Critical Care v CCMA and others
[2001] 9 BLLR 979 ((2001) 22 ILJ 1799) (LAC) 1298
County Fair Foods (Pty) Ltd v CCMA and others
[1999] 11 BLLR 1117 (LAC) 1298
Sidumo and another v Rustenburg Platinum Mines Ltd and others
[2007] 12 BLLR 1097 ((2007) 28 ILJ 2405 (CC) 1298