Absenteeism: The importance of record keeping and taking action

*Maksal Tubes v MEIBC & Others (*Labour Court JR2450/07, 24 March 2009 per Van Niekerk J) was an application to review and set aside the arbitration award issued by the second respondent ('the commissioner'), in which the commissioner found that the dismissal of the third respondent ('the employee') was substantively unfair, and ordered his reinstatement.

The employee was absent from work for one day during February 2007 after he received a report that his son had fainted (the employee was a single parent). The employee tried unsuccessfully to contact his supervisor, Hamman, and as a result he contacted another supervisor. On his return to work, the employee failed to provide proof of his son's medical condition. Hamman reviewed the employee's attendance record and was of the opinion that it showed unacceptably high levels of absenteeism. No disciplinary action had ever been taken against the employee for his attendance record. Collective 'special final written warnings' were, however, issued to the employee during April and December 2006 respectively, for his participation in unprotected strike action. Hamman charged the employee with being absent from work without authorization. The employee was found guilty and dismissed.

The arbitrator held that a sanction of dismissal was too harsh and that the employee's record of absenteeism was irrelevant, as no disciplinary action had ever been taken against him.

The review test to be applied was whether the decision to which the arbitrator came was a decision to which no reasonable decision-maker could have come to(*Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC)). The court held that at the arbitration, Hamman was unable to shed light on the status of any of the periods of absence on which the employer relied for proving excessive absenteeism, and also failed to establish any basis to suggest that any of the periods of absence were taken without permission. In contrast, the employee testified that he had on all occasions sought permission to be absent.

The employer argued that the arbitrator failed the *Sidumo* test in relation to the appropriateness of dismissal as the sanction. According to the court, contrary to what the employer asserted, the arbitrator took all factors into account and the award clearly recorded that the arbitrator dealt with the evidence before her in relation to the employee's prior absenteeism.

The employer also argued that the arbitrator failed to consider properly the special final warning against the employee and the fact that it was made clear to union members that they would be dismissed should they commit any act of misconduct during the period for which the warning remained valid.

The court held that it was clear from the arbitration record that there was no evidence to suggest that the employee was personally made aware of the content of the warning and the consequences of future misconduct, that the warning was ever put to the employee at the disciplinary enquiry, or what role it played in the determination of dismissal as the sanction.

Finally, much of the relevant background and other averments crucial to the employer's case were disclosed only in the founding affidavit – they were absent from the record of the arbitration proceedings. The consequences of these shortcomings by the employer at the arbitration hearing could not be blamed on the arbitrator.

In the result, the application was dismissed, with costs.

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