

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case no: JA9/97

In the matter between:

SOMYO P.

Appellant

and

ROSS POULTRY BREEDERS (PTY) LTD

Respondent

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JUDGEMENT

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The appellant, Ross Poultry Breeders (Pty) Ltd, breeds boiler chickens. It imports chicks from Scotland, selects the most genetically suitable chicks for breeding, breeds with them, and supplies chickens to about 60% of the companies in South Africa which produce chickens for consumption. The appellant carries on business on four farms: Rainchick, Welverdiend, Schickfontein and Klipvail.

The respondent, Mr P Somyo, commenced employment with a predecessor of the appellant as a farm labourer in 1974. Over a period of time he was promoted to supervisor and then in 1990, to be the manager of Rainchick Farm. In January 1995 he was transferred as a manager to Schickfontein Farm. The respondent was responsible for the management of houses 21/21, 27/28 and 29/30. The senior manager, Mr BTC Browning, was responsible for houses 23/24 and 25/26, and for

the general administration of the farm as a whole.

On 26 October 1995 a disciplinary enquiry was held before Mr IJ Breytenbach, the production director, in which the respondent faced four charges:

- failing to vaccinate chicks in time;
- failing to order feed;
- failing to adhere to the feeding schedule;
- failing to be present when day-old chicks were delivered.

Breytenbach found that all four charges were proved and he dismissed the respondent.

The respondent appealed against that finding to Mr CF Saunders, the chairman of the appellant, on 21 November, 1995. The appeal was dismissed.

The respondent thereafter instituted proceedings in the industrial court in terms of s46(9) of the Labour Relations Act, act 28 of 1956. He sought a determination declaring that his dismissal was an unfair labour practice, directing the appellant to reinstate him, and an order that the reinstatement operate retrospectively to date of dismissal.

The respondent gave evidence on his behalf. Breytenbach and Browning testified for the appellant.

The industrial court accepted the evidence of Breytenbach and Browning and rejected the evidence of the respondent where it conflicted with that of the appellant's witnesses. The court found that the dismissal was not procedurally unfair. The court held that all four charges were proved against the respondent. The court nevertheless held that the sanction of dismissal was too severe. The relief granted by the court was that the dismissal was declared to be an unfair labour practice; an order of reinstatement was granted; the respondent was given a final warning; and the appellant was directed to pay the respondent his wages from date of dismissal to date of order.

A reading of the record reveals that the industrial court's findings

- that the dismissal was not procedurally unfair;
 - that the evidence of the appellant should be accepted in preference to that of the respondent;
 - and that the four charges against the respondent were proved, are unassailable.
- The sole enquiry, therefore, is whether the respondent should have been dismissed or not.

On 7 August 1995 Browning fell ill. He returned to work on 2 October 1995. During the period of his absence the respondent assumed responsibility for Schickfontein Farm, including the management of houses 23/24 and 25/26. At the time he fell ill, Browning informed the respondent, that he, Browning, was a week late with the Newcastle Reo Oil vaccination.

Each manager had a management program which gave the particulars of the vaccination and the due date. A lee-way of a week was allowed, ie a vaccination could be done up to a week later than the due date.

The vaccinations at houses 23/24 and 25/26 were not done on time during the period the respondent was responsible for those houses:

House 23

<u>Vaccination</u>	<u>Due date</u>	<u>Date done</u>
Fowl Cholera	16/8/95	6/10/95
Fowl Pox	30/8/95	12/10/95
Epidemic Tremor	11/9/95	27/10/95

House 24

<u>Vaccination</u>	<u>Due date</u>	<u>Date done</u>
NCD-Oil-Reo	17/8/95	20/9/95
IB	25/8/95	17/10/95
Fowl Cholera	8/9/95	10/11/95
Fowl Pox	20/9/95	7/11/95.

The vaccinations were done between 5 and 12 weeks late.

The respondent gave a number of explanations for his failure to ensure that the vaccinations were timeously done: that Browning had not told him in good time when the vaccinations were to be done; that vaccination guns were not available; and that he was too busy.

The first explanation is unacceptable: at the time Browning fell ill he was told that he was to take over all Browning's responsibilities and it is common cause that Browning specifically told him that he, Browning, was a week late with the one vaccination. The other explanations are equally unacceptable because it is common cause that the respondent did not raise any problems at the monthly "bio-security" meetings which he attended or at the meetings which Breytenbach held with the respondent every Monday morning or at the meetings Saunders held with the "farm managers" every Wednesday.

The potential prejudice to the appellant and its customers as a consequence of the

failure to vaccinate timeously was enormous. The following opinions of an expert, Prof L Coetzee, were common cause between the parties:

“SUB STANDARD IMMUNITY AS A POULTRY HEALTH RISK

INFECTIOUS BRONCHITIS

Reduced egg production by up to 60% losses and reduced egg quality that can lead to additional hatchability losses of up to 15% can be expected.

NEWCASTLE DISEASE

Mortality of up to 70% in sub standard protected flocks and reduced egg quality leading to reduced hatchability of 30%.

REO VIRUS

Sub standard levels of antibodies in breeding fowls can lead to unprotected offspring to runting and stunting disease that can devastate the early life of the offspring.

AVIAN ENCEPHALOMYELITIS

Susceptible breeding stock can become readily infected - in 1994 this happened at RPB - reduced egg production by 15-20% and losses in the offspring due to egg transmission of the virus leading to mortalities of up to 30%.

CHOLERA

Sub standard protection can lead to mortalities of 5 to 10% in young breeding stock.

SALMONELLOSIS

Unprotected breeding flock can pass the Salmonella to the offspring resulting in mortalities, and a carrier state in recovered birds, that can eventually lead to food

poisoning and even death in susceptible human consumers of boiler products.”

It was the responsibility of the respondent to order feed for day old chicks approximately two days before 12 October 1995, when it was required for humigation, but he failed to do so. When Browning asked the respondent why he had not ordered the feed, the respondent said that he had forgotten to order the feed and that he had not been sure how to order bagged feed.

The respondent said in the industrial court that the feed had to be ordered only on 9 October 1995, a day that he had been on leave. That had not been the respondent’s version when Browning called for an explanation at the time.

Chicks are fed with feed with different levels of coccidiostat; Grower 1, Grower 2 and Grower 3. During Browning’s absence, the respondent skipped feeding Grower 2.

In the industrial court, the respondent admitted that he had not fed Grower 2 to the chicks, said that there was sufficient Grower 1 left for the chicks and that he did not know how to dispose of the excess Grower 1 feed. Once again the respondent did not seek assistance from his superiors.

On 24 October 1995 day old chicks arrived at Schickfontein. The respondent was obliged to be present. It is common cause that he was absent. In the past, when he was unable to be present at the delivery of chicks, he had phoned Browning, who had assumed his responsibilities. On the day in question, the respondent did not telephone Browning. Luckily for the respondent, Browning was available to receive the day old chicks on his behalf.

The industrial court came to the conclusion that, from the appellant’s point of view, the primary reason for dismissal was the respondent’s failure to ensure that the vaccination program was carried out in time and that the other three charges were of secondary concern.

The assessment of the industrial court is probably correct. What was an aggravating factor, however, in regard to the three lesser charges, was that on 24 July 1995 Browning called for a meeting with the respondent. The meeting was attended by Mr Mamabolo, the human resources manager. The purpose of the meeting was to discuss the respondent’s performance. After the meeting, Browning addressed a memorandum to the appellant in which he stated: “Thank you for joining Mr Mamabolo and myself to discuss certain worrying points of your performance. We identified the following points:

1. To be more pro-active.
2. To be more reliable and responsible in your actions.
3. Not to allow your personal commitments to interfere with your work.
4. Instructions to your staff to be followed up.”

The respondent did not take that advice to heart. His failure to ensure that the chicks

were timeously fed and that the feeding schedule was adhered to, are examples of unreliability and irresponsibility. The respondent's failure to be present when the day old chicks arrived was an example of an occasion where the respondent's personal commitments (to fetch his children from school) interfered with his work.

The focus of the inquiry, nevertheless, must be on the vaccinations which were performed late.

An employer who is concerned about the poor performance of an employee is normally required to appraise the employee's work performance; to warn the employee that if his work performance does not improve, he might be dismissed; and to allow the employee a reasonable opportunity to improve his performance: Craig v Rubdec (Pty) Ltd t/a Guys and Girls (1992) 1 LCD 29 (IC); James v Waltham Holy Cross UDC [1973] IRLR 202. Those requirements may not apply in two cases which are relevant to this matter. The first is the manager or senior employee whose knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer: Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318 (IC) at 324F-G; Blue Circle Materials Ltd v Haskins (1992) 1 LCD 6 (LAC). The second is where "... the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal." :Taylor v Alidair Ltd [1978] IRLR 82. Examples given in Taylor's case are the passenger carrying airline pilot, the scientist operating the nuclear reactor, the driver of an articulated lorry full of sulphuric acid and the chemist in charge of research of the possible effects of, for example, thalidomide.

The appellant did not satisfy the requirements of the appraisal, warning and

opportunity to improve, which would apply in the case of an ordinary employee. But the respondent was not an ordinary employee. He had occupied a managerial position since 1990. He had managed Rainchick Farm for some years and occupied a similar position there as Browning did at Shickfontein. Respondent knew how important it was to adhere to the vaccination program. The vaccination program at houses 23/24 and 25/26 was between five and twelve weeks late, not just a week or two. What is particularly damning is that the respondent did not inform his superiors that he was behind in the vaccination program and ask for assistance despite the opportunities he had to do so at the meetings held twice a week. And as has already been stressed, the potential consequences for the appellant and its customers were very serious.

The respondent deserves one's sympathy. He had advanced from being a farm labourer to a farm manager. He had over twenty years' service with the appellant. He had a clean disciplinary record. The appellant had not complained previously of late vaccinations. The respondent was faced with a crisis in that he was suddenly called upon to assume additional obligations when Browning fell ill and it is only in respect of the houses for which Browning had been responsible, that the vaccinations were late.

At the end of the day, one's sympathy for the respondent must give way to the cumulative effect of the circumstances outlined in above, in particular that the respondent occupied a responsible position; he was aware of the potential consequences to the appellant and its customers if the vaccination program was not adhered to; he kept his superiors in the dark about his failure to adhere to the vaccination program; and he did not provide acceptable explanations for his poor work performance.

The appellant had a valid reason for dismissing the respondent.

The appeal succeeds. The determination of the industrial court is altered to read: "the application is dismissed."

Myburgh JP

I concur

I concur

Froneman DJP

Nicholson JA

Date of hearing

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Date of judgement

:

26 June 1997

On behalf of the appellant :

On behalf of the respondent :