

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: JA 105/97

In the matter between:

PEP STORES (PTY) LTD (SILVERTON)
Appellant

AND

**SOUTH AFRICAN COMMERCIAL CATERING
AND ALLIED WORKERS UNION**
First Respondent

R SEKWATI
Second Respondent

JUDGMENT

Nicholson JA

The parties

[1] The parties in this matter are Pep Stores (Pty) Ltd (Silverton), the

appellant, South African Commercial Catering and Allied Workers Union ('the union'), the first respondent and R Sekwati, the second respondent. The appellant operates a retail business and is involved in the selling of merchandise, including clothing. The second respondent is a member of the union. The second respondent was employed by the appellant in 1989 as a shop assistant. Her duties included helping customers, opening boxes, cleaning the floor and operating the tills.

- [2] At a disciplinary hearing held on 4 March 1996 the second respondent was charged with two offences; gross negligence, consisting of having rung up goods on a till on 26 January 1996 at a cheaper price than marked on the price tag, i.e. under-ringing on the till. The second charge related to giving goods to a client on 30 January 1996 which were not rung up on the till. She was found guilty on both counts and was dismissed by the appellant on 11 March 1996. An appeal hearing took place on 2 April 1996 and due to "the nature and complexity of the case" the chairman of the appeal hearing ordered a re-hearing. On 18 April 1996 the union rejected the right to a re-hearing.

Industrial court hearing

[3] The second respondent then instituted proceedings in the industrial court. That court made a determination, in terms of section 46(9) of the Labour Relations Act, no 28 of 1956, that second respondent had been unfairly dismissed, both procedurally and substantively. The court re-instated her in the employ of the appellant and ordered that she be paid six months wages. The appellant was represented by Mr Beaton, both in the industrial court and in this court. The respondent was represented by Miss Mamabolo in the industrial court and by Mr van Graan in this court.

Procedural unfairness

[4] The second respondent, who gave evidence first in the industrial court, made no mention of any procedural irregularity, nor was any cross-examination directed at that aspect. The evidence of Ms Boikanyo, the only other witness called by second respondent, also contained no mention of procedural unfairness. The first mention of procedural unfairness arose during the cross-examination, by Miss Mamabolo, of Mr Erasmus, who testified on behalf of the appellant. Miss Mamabolo put to

Erasmus that the refusal by the chairman to grant second respondent time to prepare her case was procedurally unfair. Mr Beaton objected to this questioning on the basis that the case was being fought on substantive unfairness alone. His objection was overruled. There was further cross-examination on the fact that the proceedings at the disciplinary enquiry were recorded in Afrikaans, despite being conducted in English.

- [5] With regard to the issue of procedural fairness, appellant submitted in this court that this was not alleged by respondent in her statement of case. In her opening address Miss Mamabolo indicated that only the substantive part of the dismissal would be contested. By this I understand her to be excluding any procedural unfairness. The appellant further submitted that as a result of this it would be improper for the court to give relief to the respondent on the basis of procedural unfairness. See **Yskor Bpk v Meyer 1995 (16) ILJ 864 at 875 (LAC)** and **Sentraal Wes (Kooperatief) Bpk v Food & Allied Workers Union & Others 1990 (11) ILJ 977 (LAC)**.

- [6] In the **Sentraal-Wes** case at page 991 E-F the court found that an issue which was not pleaded can be taken into account

providing that such issue was fully canvassed at the trial.

[7] The industrial court was of the opinion that, even though the issue of procedural unfairness was not specifically pleaded, the issue was traversed in the disciplinary hearing, the appeal hearing and at the industrial court hearing.

[8] I am of view that the industrial court was clearly wrong in overruling the objection to the cross-examination on procedural unfairness and in finding for the second respondent on this ground. As second respondent and Ms Boikanyo gave no evidence it is impossible to ascertain what the true nature of the procedural unfairness was and whether there was any prejudice to second respondent. The nature of the procedural unfairness; namely, the failure to grant a postponement and the recording of the proceedings in Afrikaans, when they were conducted in English, are both matters which would require evidence as to the consequences or prejudice suffered by second respondent. It would be manifestly unjust to the appellant to even consider the question of procedural unfairness when it was not foreshadowed in the pleadings and had been expressly abandoned in the opening address by Miss Mamabolo. Furthermore no attention

had been given by the appellant to this issue in the preparation of its case. It follows that the only consideration in this appeal is whether the industrial court was correct in deciding that there was substantive unfairness and granting reinstatement.

Substantive unfairness

[9] The appellant's case depended entirely on the evidence provided by a video which had been installed without the knowledge of the second respondent. The video was shown at the disciplinary hearing and to the industrial court. What emerges from the video tape is that the second respondent was operating a till on 26 January 1996. A customer approached her holding a school shirt, the value of which was at least R9.99. Second respondent rang R 1.99 on the till which resulted in what was termed 'under-ringing'. This was proved by production of the relevant till slip. There is a time difference of 5 minutes between the time on the video and the time on the till slip. The evidence proved conclusively, however, that the two records related to the incidents in question.

[10] The video provided the evidence of the second count which took

place on 30 January. It emerges that a customer brought clothing to second respondent which the latter did not process through the till i.e. the customer did not tender any form of payment.

[11] The second respondent testified as did her shop steward Boikanyo. With regard to the first charge (under-ringing) the industrial court found that deliberate under-ringing or possible theft was not proved. The court found that second respondent and Boikanyo were evasive witnesses and had contradicted themselves in their evidence. I am of the view that these strictures were justified. Both these witnesses were very uncomfortable when dealing with evidence as to their understanding of what constituted under-ringing and also as to whether training took place.

[12] The till slip and the video provide unimpeachable evidence that under-ringing did take place. The question remains whether such under-ringing was deliberate or unintentional. The industrial court found that there was no evidence that a balance was struck at the end of the day or that there was a cash surplus at the till. These findings were not challenged before us. As a result thereof the court could not say on a balance of probabilities that

the respondent made a deliberate underringing.

[13] Mr Beaton submitted that it had never been the second respondent's case that she had made a bona fide error. She made no mention of such error at the disciplinary hearing and her evidence at the industrial court was that she rang up a shirt which cost R19.99. The till slips revealed quite clearly that she could not be correct in so alleging as the only transaction relating to the sum of R19.99 related to two items.

[14] The second respondent, despite much prevarication, did concede that she knew what under-ringing was and that "the employer regards persons who do it as a crook". Erasmus testified that under-ringing is regarded as a serious offence which warrants dismissal. He suggested that the end result of under-ringing is that there is a surplus in the till which is pocketed by the employee. When there is shrinkage in a store, under-ringing is often the cause. Mr Beaton therefore submitted that it follows that this offence, even if not done deliberately, carried with it the penalty of dismissal and that this was known to the second respondent.

[15] That deliberate under-ringing with the object of later pocketing the excess in the till is a serious offence warranting dismissal, admits of little debate. In proving such misconduct the employer would be required to prove the underringing, coupled with the misappropriation for own benefit, either by direct or indirect evidence. On the other hand few would quibble with the principle that a mistaken under-ringing with no such intent should not warrant dismissal. The very act of striking the keys of a till is a motor skill which is subject to error. If the correct price of the goods in this matter was indeed R19.99, then the ringing up of the amount of R1.99 omits one digit, a nine, and places the decimal point in the wrong place. This error could easily have arisen from faulty striking of the keys on the cash register. To make erroneous under-ringing, without any dishonest misappropriation, a dismissable offence seems to me to be an unfair labour practice.

[16] The appellant's case is that the most plausible inference is that an intentional under-ringing was committed. In the absence of proof of any appropriation of the proceeds to second respondent such inference is difficult to draw. There is nothing revealed in the video which justifies such an inference nor does a rejection of

second respondent's evidence necessarily implicate her in a deliberate act. I therefore conclude that a deliberate underringing was not proved. It was clear, however, that second respondent negligently under-rang goods.

[17] In regard to the gross negligence charge (the exchange) the industrial court found that the respondent's evidence and that of her witness Boikanyo was evasive and that the two contradicted each other. The court went on to state, however, that, in the absence of evidence contradicting that of the second respondent, the court could not say on a balance of probabilities that she committed the offence.

[18] The appellant submitted that the conduct of giving the items to the customer was clearly established on the video. The appellant submitted that this transaction was not an exchange because the second respondent remembered everything about it except the one vital link in the chain, that was, the identity of the member of staff who told her to do it. The evidence revealed, so the argument ran, that there were only four employees, plus possibly a temporary worker on weekends, and this incident occurred on 26 January 1996, which was a Friday. The second respondent

ought to have remembered this employee and the failure to do so does her no credit.

[19] Furthermore, second respondent's evidence at the disciplinary hearing differed from her evidence in the industrial court, as her testimony in the former tribunal was that "it might have been an exchange". The second respondent was first shown the video at her disciplinary hearing some 6 weeks later. This probably accounts for her explanation. It is probable that she dealt with upwards of 50 customers a day and it would be surprising if she remembered each and every one of them. It is correct that she had difficulties under cross-examination, more especially dealing with the timing of her conversation revealed on the video. Initially, prompted no doubt by the video, she maintained that the conversation took place before the customer left and related to checking that a genuine exchange had taken place. She then changed this evidence to reveal that the conversation took place after the customer had left the till. This latter version was clearly false, given what was recorded on the video.

[20] My assessment of her behaviour on the video is that it is more consistent with innocence than guilt. There is an absence of

furtiveness which might have been expected were she involved in defrauding the appellant. While it is not entirely clear that she is seeking confirmation that an exchange has taken place, I have difficulty excluding such a possibility. What is manifest is that she did not have the branch manager's approval for permitting such an exchange. Although she initially denied in her evidence that approval was necessary, she was constrained under cross-examination to concede that approval was required when the exchange involved reimbursement of money to the customer. Her denial is contradicted by paragraph 5.3 of her application where she states that the normal practice is for approval from the manageress. In her disciplinary enquiry she also said "[Ek] is nie seker of dit 'n omruil is nie. As dit was sou [ek] na JB gegaan het". I am of the view that she knew that approval was necessary from a branch manager. She was therefore clearly guilty of negligence in connection with her duties. We were informed from the bar by Mr Beaton that the disciplinary code provides for such an infraction.

- [21] I am of the view that the industrial court erred in finding that second respondent did not commit the misconduct complained of. She was guilty of negligence in connection with her duties in

regard to both counts. Taken together for the purposes of sanction I believe that a final written warning, valid for six months, would have been the appropriate punishment.

[22] The appellant has been partially successful in this appeal. The result does not effect the reinstatement order made by the industrial court. The fairest order in my view is that there should be no order as to the costs of the appeal.

[23] The order of the industrial court is set aside. There is substituted the following order:

“(a) The dismissal of the second applicant by respondent on 11 March 1996 was substantively unfair;

(b) The second applicant is reinstated in her former position, provided that,

(i) her disciplinary record reflects the offence of negligence in connection with her duties,

(ii) a final written warning is imposed for the offence for the purposes of sanction.

(c) The order set out in (b) above shall be retrospective for a period of six months prior to 13 October 1997. The amount payable to the second applicant in terms of this subparagraph is R 7 800.

(d) There shall be no order as to costs.”

[24] There shall be no order as to the costs of appeal.

[25] The final written warning referred to in paragraph 23(b)(ii) is valid for six months from the date of this judgment.

[26] The second respondent shall present herself for duty on or before 8 June 1998.

Nicholson J

I agree

Myburgh J P

I agree

Froneman D J P

Date of Hearing :27 May 1998

Date of Judgment :2 June 1998

Counsel for Appellant :R G Beaton instructed by Rooth and Wessels

Counsel for Respondent :Van Graan instructed by Lephoko Attorneys

