

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)**

In the matter between:

Case No: C873/08

TRENTYRE (PTY) LTD

Applicant

and

LOUIS BASSON

First Respondent

SARAH CHRISTIE N.O.

Second Respondent

MOTOR INDUSTRY BARGAINING COUNCIL

Third Respondent

JUDGMENT

Cheadle AJ:

Introduction

- [1] This is an application to review and set aside an arbitration award handed down by the second respondent (the arbitrator) under the auspices of the third respondent (the Council) on 15 October 2008 in terms of section 145 of the Labour Relations Act, 66 of 1995 (the LRA). In terms of the award, the applicant's dismissal of the third respondent (Mr Basson) was found to be substantively unfair and the applicant was ordered to reinstate him retrospectively.

- [2] The documents in this matter are divided into two parts: the pleadings and the record. The record includes the transcript of the arbitration hearing. The pleadings are cited as P with the accompanying page or paragraph number. The record is cited as R with the accompanying page and line number.

Background

- [3] The applicant conducts the business of supplying and fitting motor vehicle tyres and has branches situated around the country.
- [4] Mr Basson commenced employment with the applicant on 15 November 1974. During the course of his 34 years of employment with the applicant, he held various positions. In 2005, he applied for and was appointed as the warehouse manager at the applicant's Epping Warehouse.
- [5] In his position as warehouse manager, he was responsible for ensuring that adequate and reasonable procedures, processes and controls were in place to safeguard the stock which was received by, stored in and dispatched from the warehouse and to prevent and minimize stock losses.¹
- [6] There had been no warehouse manager six months prior to his appointment. When he started, he found that there were few systems in place to safeguard the stock. He introduced various measures as a result.
- [7] In September 2007 he was disciplined for the stock loss of 27 tyres amounting to R93, 000. He was found to have been negligent in signing receipt of the stock without verifying that the stock was actually received. He received a final warning.
- [8] He was advised to introduce a system of spot checks in order to minimize the number of thefts. The use of spot checks had been successful in minimizing stock loss at the applicant's other warehouses. He did not heed this advice because he considered it to be impractical and that the other warehouses were differently situated.

¹ This is a broad summary of his responsibilities described in the Founding Affidavit at P7 para 13 based on or implied from the evidence presented at the arbitration. This description is admitted (with qualifications that do not affect the broad description of his responsibilities) by Mr Basson see P55 at para 31.

- [9] In November 2007 111 raw tyre casings (valued at approximately R67,000) were discovered to be missing during a stock take. Mr Basson had signed receipt of the raw tyre casings into the warehouse but was again, after investigation, unable to explain it. As a result he was charged with gross negligence, disobeying a lawful instruction, not complying with company policy and procedures and sustained unacceptable work performance.
- [10] The disciplinary enquiry was chaired by Mr Van Niekerk, an area sales manager of the applicant. Mr Basson was found not to have committed the misconduct alleged in respect of disobeying a lawful instruction and not complying with company policies and procedures. He was found guilty of the other two charges namely gross negligence and sustained unacceptable work performance. His appeal against this finding was unsuccessful.
- [11] Mr Basson referred the dispute to the council. After conciliation failed, the dispute was referred to arbitration. The arbitrator found that the dismissal was substantively unfair. Her award is the subject of this review.
- [12] Since the institution of these proceedings, Mr Basson has secured employment elsewhere. If he is successful in having this application for review dismissed, he accordingly seeks alternative relief to reinstatement namely an award of compensation.

The award

- [13] The arbitrator begins her analysis by holding that not much turns on whether the matter is more about poor performance than misconduct because the 'central question is not whether the employee was negligent or guilty of poor performance but whether he had properly been put on terms that any substantial losses would jeopardize his future employment with his employer'.
- [14] She then states that she is not persuaded that Mr Basson was 'primarily responsible' for the loss of the 111 raw tyre casings in November 2007 'although it happened on his watch'. She arrives at this conclusion because she holds that in order for an employee to be found negligent 'the employer bears the onus of establishing a standard that the employee ought to have adhered

to, the steps he should have, but did not take and that the loss arose because of the employee's negligence.' The applicant failed to prove this.

- [15] She elaborates on this by noting that the employer did not allege 'strict liability in which the loss can be ascribed to management without showing any connection between failure to act and the loss sustained'. Instead, the applicant claimed 'that it was as a result of Basson's gross negligence that it suffered the loss'. It did not prove that.
- [16] She notes too, in this regard, that she accepts (without deciding) that Mr Basson was advised that he should undertake spot checks 'but that that this advice had not ripened into an instruction let alone a standard operating procedure'. The applicant failed to tender evidence that if spot checks had been conducted, the loss of the tyre casings would not have occurred.
- [17] Later on in the analysis, the arbitrator states that 'At the heart of this case is the employer's decision that the loss of the tyres was Basson's fault and that but for his failure to do the spot checks the loss would not have occurred. The evidence does not support such a conclusion...'
- [18] The arbitrator then deals with the argument that as a manager he was responsible for devising his own standard operating procedures. She finds that although he made a start, he may not have been as assertive or efficient as ought to have been. Her answer to this is that he was appointed as a result of a restructuring exercise and to a post in which he had no experience particularly in respect of supervising staff. Moreover she finds that 'even at the level of middle management a person in the position of Mr Basson should have been given guidance and development'.
- [19] The arbitrator finds that 'apart from failing to conduct spot checks there was no evidence that Mr Basson was neglectful of his work or that his performance was inadequate'.
- [20] The arbitrator's assessment of the evidence tendered by the applicant in respect of the applicable performance standards was 'vague' and 'amounted to little more than he should have 'done more' and specifically that it ought to have done spot checks'.

[21] Although the arbitrator appears to recognise the operational justification for reconsidering the appointment of Mr Basson as warehouse manager, in the circumstances of the case she does not consider it to be fair to dismiss him. The applicant had failed to consider his long service nor whether additional training or instruction may not have improved his performance. Given his length of service, the employer ought to have considered alternatives to dismissal.

The grounds of review

[22] The grounds of review as they are set out in the founding affidavit have been clustered under five heads in Mr Malan's heads of argument on behalf of the applicant. I have however combined the second and third grounds because they traverse the same issues.

First cluster of grounds: The failure to correctly identify the issues to be determined

[23] The applicant contends that the arbitrator misconstrues the issues before her by characterizing the central issue to be decided in the following way:

‘the central question is not whether the employee was negligent or guilty of poor performance but whether he had properly been put on terms that any substantial losses would jeopardize his future employment with the employer’.

[24] This the applicant contends, fails to correctly identify the issue which the arbitrator was called upon to determine, namely whether Mr Basson was guilty of gross negligence and sustained poor work performance following stock losses at its Epping warehouse while he was the warehouse manager.

[25] Mr Badenhorst on behalf of Mr Basson argues that it is clear from other parts of the award that the arbitrator applies her mind to the issue of whether or not Mr Basson is guilty of gross negligence or sustained poor work performance. She says for example later in the analysis that ‘at the heart of this case is the employer's decision that the loss of the tyres was Basson's fault and that but for his failure to do the spot checks the loss would not have occurred’.

[26] While the force of the final warning may not be the ‘central question’, it is part of that question. The arbitrator applies her mind to both the question of Mr

Basson's negligence and poor work performance and the question of the impact of the final warning on her assessment of the fairness of the dismissal. This ground of review accordingly fails.

Second and third clusters of grounds: The failure to properly take into account relevant considerations concerning Mr Basson's negligence

[27] These clusters concern the arbitrator's finding that the Mr Basson was not primarily responsible for the November loss and her finding that he was not guilty of gross negligence. The applicant criticizes the award on the basis that she ignored or attached insufficient weight to a range of facts relating to the fact that Mr Basson was a manager and responsible for the security of the warehouse; that he had he had sufficient time to address the problems of security; and that he had failed to introduce measures including some that he had been advised to take.

[28] The reason why the arbitrator does not give sufficient weight to these important issues is her approach to negligence as a species of workplace misconduct.

[29] The arbitrator states that '[at] the heart of this case is the employer's decision that the loss of the tyres was Basson's fault and that but for his failure to do the spot checks the loss would not have occurred'. She concludes that the 'evidence does not support such a conclusion...' Earlier on in her award she draws a similar conclusion, namely that she was not persuaded that Mr Basson was 'primarily responsible' for the loss of the stock.

[30] These conclusions flow from her approach as to what must be proved in order for negligence to constitute a ground of misconduct::

'the employer must establish the standard to be adhered to, the steps that should have been taken and that the loss arose because of the employee's negligence'.²

[31] I wish to deal with the conceptual difficulty first. The arbitrator equates negligence as a species of workplace misconduct with negligence in the law of delict. Although there may be similarities and the development of a coherent

jurisprudence on workplace misconduct may draw on delictual principles, the fact is that the standard of care required in assessing workplace misconduct is largely defined by the employment contract, the nature of employment and the rules of the workplace (although always mediated by the principle of what steps a reasonable person in that position would take to obviate the harm) and the fact that even if the negligence in the workplace causes no loss, the negligence may still constitute misconduct and if serious enough justify dismissal³.

[32] The arbitrator finds that the standard to which Mr Basson had to subscribe was 'extremely vague'. But Mr Basson was a manager. As a manager, he was given discretion to introduce measures to prevent and minimize stock loss. The delegation of a managerial discretion arises precisely because it is not possible to flexibly manage an institution by inflexible rules alone. If it was possible to think through and draft rules for every conceivable contingency, there would be no role for managers. It is precisely because rules cannot rule the roost, that there are managers to take and adapt measures to meet the exigencies of specific situations.

[33] The standard to which they must comply is qualitatively different from those who operate a machine or drive a truck. The standard of conduct of a manager is necessarily general in nature and assessed very often by reference to the performance of the entity itself – whether the manager has reduced costs, improved efficiencies or, as in this case, prevented loss. The focus is more on the effect of the measures rather than an assessment of what the manager should or should not have done. No standard prescribes what system he should have put in place just that the system should be effective against thefts involving a large quantity of bulky items requiring several employees, a large truck or a number of small trucks to remove from the warehouse.

[34] The next major difference between workplace negligence as a species of misconduct and negligence in delict is that no loss need be proved in the former. All that needs to be proved is that the loss might have occurred. In the context of managerial responsibility to take reasonable measures to protect the interests of the employer, it is not necessary to prove that the failure to take

³ Grogan, *Workplace Law*, Juta at 4.11 at page 226.

reasonable measures 'caused' the loss. Loss in these circumstances is a symptom of a management failure – the failure to put systems in place to prevent loss. Of course, not every loss constitutes a symptom of a failure to put a system in place but in the circumstances of this case, the sheer bulk and quantity of the items stolen constitutes evidence of the lack of an effective system of monitoring and controlling the movement of the items in, on and out of the warehouse. The loss is proof not that he was primarily responsible for the loss but proof of a lack of an effective system, which is what he was responsible for as a manager.

[35] It follows that the arbitrator's approach to negligence in the workplace constitutes a material misdirection because she asked the wrong questions and in so doing failed to give proper weight to relevant evidence before her.

[36] It is important to note though that the arbitrator, albeit tentatively, finds that Mr Basson as manager ought to have devised his own standard operating procedures; that he had made a start; and that he was arguably not as assertive or efficient as he might have been.⁴ Later in the award she again tentatively states that '[i]t may be that the decision to appoint him to the position of warehouse manager was not appropriate and that in the circumstances of the losses the employer would have had good reason to reconsider the assignment'.⁵ These findings though set the context for the arbitrator's finding that his failure to introduce effective measures is exonerated by his lack of experience and the applicant's failure to 'give him guidance and development', which leads into the fourth cluster of grounds.

Fourth cluster of grounds: The finding that the Applicant failed to give Mr Basson guidance and development

[37] This cluster deals with the finding that given the circumstances of Mr Basson's appointment as warehouse manager and the applicant's failure to 'give him guidance and development', it was unfair to dismiss him without considering alternatives including whether or not with additional training or instruction he may have improved his performance.

⁴ P22.

⁵ P24.

- [38] The finding is criticized for failing to place sufficient weight on the fact that he had 34 years of experience with the applicant and almost 3 years experience as Warehouse Manager and accordingly ought to have known what was expected of him; and that he was given some guidance.
- [39] There is uncontested evidence that he was given advice to institute spot checks – the contested issue was whether that the advice had crystallized into an instruction. The arbitrator’s approach however was to consider whether ‘his failure to do spot checks the loss would not have occurred’.⁶ But the point is not whether the advice would have worked, but whether he got advice. To that extent he did get guidance and the arbitrator’s conclusion is accordingly not a reasonable one in the circumstances. It should also be recognized that he had been in the position for almost three years and had long experience with the applicant’s business. His response to the advice indicates just what the nature of his role is: he had to make his own decision based on the exigencies of the particular workplace. The case does not turn on whether he was right or wrong not to institute spot checks but whether he implemented appropriate measures to prevent loss. The issue of spot checks is evidence that there was guidance and illustrative of the Mr Basson’s failure to implement appropriate measures in general.

Fifth cluster: Finding that the applicant did not have a valid and sufficient basis to dismiss

- [40] The attack under this cluster is that the arbitrator failed to take properly into account the fact that Mr Basson was an experienced managerial employee, that he was on a final warning, that he had been given guidance, that he had not put measures in place to prevent large scale theft, and that the decision to dismiss was a sensible operational response to risk management.
- [41] This attack is very similar to the one raised in the second and third clusters of grounds. It turns on the arbitrator’s failure to recognize what is needed to prove negligence or poor performance in respect of a managerial employee. It is

⁶ P23. In this respect she states that evidence does not support such a conclusion despite uncontested evidence on record that the implementation of spot checks at other warehouses had been successful.

because the focus was on what caused the loss rather than the failure to put measures in place to prevent large scale loss of the kind that occurred in respect of the 111 tyre casings. It is because the arbitrator misconceives the true enquiry that she fails to properly take into account the evidence that was placed before her in respect of: his being a manager with responsibility to put measures in place to prevent loss; that he was in the position for almost three years; that he got advice on measures that worked elsewhere; that there were no measures in place to prevent large scale theft; and that he was on a final warning for negligence (also related to a lack of a system).

[42] It follows that under this cluster of grounds, the arbitrator misconstrued her brief and accordingly misdirected herself.

Conclusion

[43] I accordingly hold that the award is reviewable and should be set aside. The applicant seeks an order substituting the relief granted in the award with a finding that the dismissal was fair. I am of the view that it is unnecessary to remit the matter back to the arbitrator.

[44] It is clear that Mr Basson was a manager and as such responsible for instituting measures to prevent loss from occurring. He had a final warning for negligence which itself arose from the lack of a system for the physical check of received goods into the warehouse. Although he had instituted measures, these were manifestly not sufficient to prevent a large scale loss of stock – it was the quantity and the bulk that demonstrated that appropriate systems were not in place. He accordingly did not fulfill the role expected of him after nearly three years in the job. He was accordingly, notwithstanding his length of service, justifiably dismissed for misconduct and sustained poor work performance.

[45] Although costs normally follow the result, I think that it would not be fair to require Mr Basson, an individual employee, to pay the applicant's costs. Costs orders can have a chilling effect on access to justice particularly in the case of employees.

Order

[46] The arbitration award dated 15 October in favour of Mr Basson is reviewed and set aside.

[47] That award is substituted with the following :

‘The employee’s dismissal was for a fair reason related to his capacity and conduct. There is no order as to costs’.

[48] There is no order as to costs in this application.

CHEADLE AJ

Date of Hearing : 20th May 2010

Date of judgment : 30th November 2010

Appearances

For the Applicant : Bowman Gilfillan Inc

Instructed by : Adv L M Malan

For the Respondents: Theron & Partners

Instructed by : N L Badenhorst