



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JS 830 /2012

In the matter between:

DONNE GUNN

Applicant

And

BIDVEST PRESTIGE CLEANING SERVICES (PTY) LTD

Respondent

Heard: 28, 29 and 30 April 2015

Delivered: 28 May 2015

Summary: Applicant alleges automatically unfair dismissal for reasons related to a protected disclosure and as provided for in section 187(1)(h) of the Labour Relations Act. No nexus between the disclosure and dismissal.

JUDGMENT

PRINSLOO, AJ

Introduction

- [1] The Applicant, Donne Gunn, approached this Court for relief on the basis that she was subjected to an occupational detriment after she made a protected disclosure

in terms of the Protected Disclosures Act¹ (the PDA). She claims that her dismissal was automatically unfair, as provided for in section 187(1)(h) of the Labour Relations Act² (LRA).

- [2] The Applicant disclosed information relating to fraudulent claims submitted by cleaners. She disclosed that hours were claimed for which the individuals did not work.
- [3] The Respondent disputed that any disclosure as contemplated in the PDA was made and submitted that the information disclosed was nothing but management information. The Respondent denied that the Applicant was dismissed for reasons related to the alleged disclosure. The Respondent's case is that the Applicant was dismissed for misconduct and that her unfair dismissal dispute should have been adjudicated by the CCMA.
- [4] The Respondent raised a point *in limine* namely that the Court does not have jurisdiction to determine this matter as the Applicant was dismissed for reasons related to misconduct. Mr Hutchinson for the Respondent wanted the point *in limine* to be heard and determined prior to the commencement of the trial.
- [5] I was of the view that this Court has jurisdiction to hear a matter referred in terms of section 187(1)(h) of the LRA. Whether the Applicant would be able to show that she made a protected disclosure and suffered an occupational detriment as a result of the disclosure, is a different question and an issue for evidence.
- [6] It is impossible to divorce the merits of the case and the question whether the Applicant was dismissed for reasons related to misconduct or because she made a protected disclosure from the question whether this Court has jurisdiction or not.
- [7] I ordered that the merits of the case be presented and the trial proceeded.

Background and evidence adduced

- [8] It appears that the substantive facts of the matter are mostly common cause.

¹ 26 of 2000.

² 66 of 1995.

- [9] The Respondent renders cleaning services to its clients. The Respondent employed the Applicant at Monte Casino and since 10 April 2012 was she employed as operations manager at Gallagher Estate (GE). She was placed at GE with the clear and specific instruction to put systems and control measures in place.
- [10] At GE there are two types of employees namely permanent employees and fixed term contract employees who are referred to as 'variables'. The permanent employees work fixed hours per month and are paid a salary for that and there were no problems with this category of employees. In the event that GE needed additional cleaners for a specific reason, for instance a conference or expo, GE would request a specified number of cleaners for a specified number of hours on specified dates and the Respondent would then appoint variables for the period and purpose so specified. The request from GE will be in the form of a client request booking form and the Respondent could invoice GE accordingly.
- [11] The problem the Respondent experienced with the variables was as follows: GE would for example request 10 cleaners and 15 would show up and report for duty. They would sign time sheets and claim payment for the hours they worked but the Respondent can only invoice GE for 10 cleaners and is then responsible to pay the five additional employees from its own pocket.
- [12] The Applicant was tasked to put systems in place to avoid the situation where more cleaners than what was requested by GE would show up for work and the Respondent had to pay them.
- [13] The Applicant testified that she put systems in place and this was not disputed. She further testified that she discovered that there were fraudulent claims for hours the employees never worked. This, she explained, happened with the cooperation of the supervisors who were supposed to check and verify that the employees were indeed at work and working. The employee or the supervisor would sign a time sheet and submit a claim for hours worked when the employee was in fact not at work at all and not supposed to be working in accordance with the client request form.

- [14] The issue of fraudulent claims were disclosed in the middle of May 2012 and the supervisors who were involved, were issued with final written warnings.
- [15] The Applicant had her first pay run at GE at the end of June 2012, implementing the systems she introduced.
- [16] On 29 June 2012 the ANC had a conference at GE and on this date the Applicant was phoned by Vusi Nkosi, who told her that staff refused to work as they were either not paid at all or were paid short. The Applicant went to GE and found the employees who refused to work. She had a meeting with Charles Wilson, the general manager. Shannon Kriel, her direct supervisor, told her to meet with the employees. The Applicant subsequently spoke to one Karabo, a supervisor of the cleaners, who told her that approximately 50 employees had pay queries. She investigated the matter and at around 08:15 on 29 June 2012 she found out that the queries were related to wages and Karabo handed her a name list, indicating the name of the employee and the nature of his / her complaint. The Applicant was instructed to meet with the employees and to resolve the issue.
- [17] The Applicant testified that she was in a very difficult position as on the one hand staff members in critical areas refused to work on a day that the Respondent was not able to afford a strike as the ANC congress was taking place and on the other hand she had to verify the complaints and she needed documents to do so. The complaints were different and she had to verify each and every claim.
- [18] The Applicant is of the view that the employees saw a window of opportunity on 29 June 2012 with the ANC congress to stage a strike with maximum impact.
- [19] On 29 June 2012 the Applicant interviewed approximately 15 of the employees who had wage queries. She said that it was impossible to interview everyone and to deal with all the queries and that she asked for assistance but nobody assisted her. She testified that Shannon was furious and angry when she heard that not everyone was interviewed on 29 June 2012.
- [20] In the afternoon of 29 June 2012 the Applicant once again met with Charles Wilson and when she arrived at his offices, she was met by three of the cleaners who were part of the earlier strike. Charles Wilson told her that the situation was

not sorted out and that the employees were still irate about the non-payment or short payment of their wages. Charles Wilson said that the employees were treated like mushrooms in that they were kept in the dark. The Applicant told Wilson that it was impossible to have a discussion with all the employees in the available time, but he was irate and upset about the way the strike and the wage queries were handled and he made it clear that the Respondent would not want to lose the GE contract. Wilson requested that the Applicant be removed from the premises with immediate effect and she was escorted off the premises.

- [21] On the following Monday, 2 July 2012, the Applicant did not report at GE but reported at the Respondent's head office in Midrand. She reported at Shannon's office and they met with the employees one by one. After they met with some of the employees she was told to go to the Greenstone offices to meet with John van Deventer. He was extremely upset, angry and rude and he offered to pay the Applicant two months salary to leave the Respondent's employ. She refused and returned to the Midrand offices, where Shannon was still busy with the employees and they were paid one by one.
- [22] Shannon paid the employees after she met with them and the number of hours they were paid, were captured. The Applicant testified that this was wrong as one cannot simply pay employees on claims they make without proof that they actually worked the hours they claim. The Applicant conceded that there were people who indeed had valid claims.
- [23] The employees were paid on 2 July 2012 as their pay queries were discussed and considered and a total amount of R 49 601 had been paid out to the employees.
- [24] On 11 July 2012 the Applicant was handed a notice to attend a disciplinary enquiry on 16 July 2012 and the charges levelled against her were 'dereliction of duty' and 'gross negligence'. On 12 July 2012 the Applicant requested further particulars and clarification as to what the charges were and what she did wrong. The Respondent stated that 'dereliction of duty' referred to the fact that the Applicant is the operations manager and she is required to control expenses and follow company policy / instructions on the site. "Gross negligence" referred to the fact that the Respondent had to pay a further R 50 000 to employees for their

wage enquiries where there was no timekeeping available to prove whether the employee was in fact booked by the client or arrived on their own.

- [25] The charges were dereliction of duty and gross negligence and related to the period April – June 2012 and incident of 29 June 2012. It was stated that the Applicant committed dereliction of her duties as she was required to control expenses and to follow company policy and she failed to do that. The charge of gross negligence was that the Respondent had to pay R 50 000 to staff for wage queries where there is no timekeeping available to prove whether the staff members were booked by the client or arrived on their own accord. The Applicant testified that there was no urgency when Shannon paid the employees on 2 July 2012 as the strike action did not continue on that date.
- [26] After the conclusion of the disciplinary hearing, the Applicant was dismissed.
- [27] It was the Applicant's testimony that she asked why was she the one taking the blame, but her question remained unanswered. She testified that she was the only person disciplined for the strike of 29 June 2012.
- [28] The Applicant's case is that her dismissal was automatically unfair as the real reason for her dismissal is related to the protected disclosure she made.

The disclosure made by the Applicant:

- [29] In *Tshishonga v Minister of Justice and Constitutional Development and another*³ it was held:

‘The PDA is conceived as a four-staged process that begins with an analysis of the information to determine whether it is a disclosure. If it is, the next question is whether it is protected. The third stage is to determine whether the employee was subjected to any occupational detriment and lastly, what the remedy should be for such treatment. It is not an enquiry into wrongdoing but about whether the employee deserves protection. Structured in this way the inclination to shift the emphasis from the conduct and credibility of the wrongdoer to that of the whistleblower is real.’

³ [2007] (4) SA 135 (LC); [2007] 28 ILJ 195 (LC) at para 176.

- [30] I have to follow the four-staged approach and the starting point is to consider the disclosure made by the Applicant.
- [31] The Applicant's case is that she disclosed information relating to fraudulent claims submitted by cleaners. She disclosed that hours were claimed for which the individuals did not work and the supervisors cooperated with the cleaners to submit the fraudulent claims.
- [32] The Respondent did not dispute that the Applicant made these disclosures. In fact, it resulted in final written warnings for fraudulent time keeping being issued to the supervisors.
- [33] The Respondent however disputed that any disclosure as contemplated in the PDA was made.

Analysis of the disclosure made by the Applicant:

Is the information disclosed by the Applicant a 'disclosure' as defined in the PDA?

Section 1 of the PDA defines a disclosure as follows:

- (i) **"disclosure"** means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:
- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
 - (d) that the health or safety of an individual has been, is being or is likely to be endangered;
 - (e) that the environment has been, is being or is likely to be damaged;
 - (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or
 - (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed'.

[34] The Applicant's case is that she disclosed fraudulent claims for hours not worked. In my view the definition of a 'disclosure' would include the disclosure of fraud.

[35] I am satisfied that the Applicant made a disclosure of information regarding conduct as contemplated in section 1(i) (a) of the PDA.

Is the disclosure protected?

Section 1 (ix) of the PDA defines a protected disclosure as a disclosure made to:

- (a) a legal adviser in accordance with section 5;
- (b) an employer in accordance with section 6;
- (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
- (d) a person or body in accordance with section 8; or
- (e) any other person or body in accordance with section 9,

but does not include a disclosure-

- (i) in respect of which the employee concerned commits an offence by making that disclosure; or
- (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;

[36] The Applicant reported the fraud to her divisional manager, Bern Pienaar and her general manager, Shannon Kriel. I accept that the disclosure was made to the Applicant's employer in accordance with the provisions of section 1(ix) and section 6 of the PDA.

[37] It follows that the disclosure made by the Applicant was a protected one as provided for in the PDA.

Was the Applicant subjected to any occupational detriment?

[38] The PDA defines an occupational detriment to include being subjected to any disciplinary action and being dismissed. The PDA provides specifically that no employee may be subjected to any occupational detriment on account or partly on account of having made a protected disclosure.

- [39] There ought to be some nexus between the disclosure and the alleged occupational detriment.
- [40] The Applicant's case is that she was disciplined and dismissed as a result of the disclosure she made.
- [41] The Respondent's case is that the Applicant was dismissed for misconduct and that the disclosure she made in respect of fraudulent claims played no role in the decision to dismiss her.
- [42] The Respondent called Karin Reid, the chairperson of the disciplinary hearing, as a witness. She testified that she did not know the Applicant prior to the disciplinary hearing, she considered the evidence that was placed before her during the disciplinary hearing and she made her findings in respect of the charges, the misconduct and the evidence. There was no ulterior motive to get rid of the Applicant and she was not influenced in any way. Ms Reid was unaware of the disclosure the Applicant made in May 2012.
- [43] In cross-examination Ms Denton on behalf of the Applicant could not resist the temptation to pose questions to Ms Reid in respect of procedural fairness that belong to an unfair dismissal dispute in the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council. The questions were not focused and related to a claim for automatically unfair dismissal and did not assist the Applicant's case before this Court.
- [44] I have to point out that this is the result of having to make an election in respect of a cause of action and forum in which to pursue such an elected cause of action. The Applicant could have referred an unfair dismissal dispute to the CCMA or bargaining council and there she could have challenged the substantive and procedural fairness of her dismissal on the grounds that tried to make their way into the trial, for instance the Applicant's right to present documents, the right to be informed fully about the charges or to be afforded sufficient time to prepare. Unfortunately for the Applicant she did not pursue her case at the CCMA and she cannot be allowed to raise all the issues in respect of the fairness of her dismissal before this Court.

[45] The Applicant elected to refer an automatically unfair dismissal case in terms of section 187(1)(h) of the LRA to this Court and she has to prove that the reason for her dismissal was the protected disclosure she made.

[46] In *SA Chemical Workers Union and others v Afrox Ltd*⁴ the test to be applied in determining whether a dismissal was automatically unfair was formulated as:

'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here (compare *S v Mokgethi & others* 1990 (1) SA 32 (A) at 39-41A; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34).

The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue (see para [33] below). Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.'

⁴ (1999) 20 ILJ 1718 (LAC).

[47] In *Van der Velde v Business and Design Software (Pty) Ltd*⁵ the Court confirmed the test in instances where automatic unfair dismissal is alleged and it was held that:

“.....If the applicant succeeds in discharging these evidentiary burdens, the employer must establish the true reason for dismissal, being a reason that is not automatically unfair.

When the employer relies on a fair reason related to its operational requirements (or indeed any other potentially fair reason) as the true reason for dismissal, the court must apply the two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements.

The test for factual causation is a 'but for' test - would the dismissal have taken place but for the transfer?

If the test for factual causation is satisfied, the test for legal causation must be applied. Here, the court must determine whether the transfer is the main, dominant, proximate or most likely cause of the dismissal. This is an objective enquiry. The employer's motive for the dismissal, and how long before or after the transfer the employee was dismissed, are relevant but not determinative factors.”

[48] The Applicant has to establish causation and the test for factual causation is a 'but for' test - would the dismissal have taken place but for the fact that the Applicant made a protected disclosure?

[49] The answer to this question *in casu* is yes – the Respondent instituted disciplinary action for issues not related to the disclosure she made and would have done so irrespective of whether the Applicant made a protected disclosure or not.

[50] Once the test for factual causation is satisfied, the test for legal causation must be applied. Here, the Court must determine whether the protected disclosure is the main, dominant, proximate or most likely cause of the dismissal. This is an objective enquiry.

⁵ (2006) 27 ILJ 1738 (LC).

- [51] In my view the test for factual causation has not been satisfied and there is no need to consider or apply the further test for legal causation. In the event that I am wrong on this and that the test for legal causation has to be applied, I am not convinced that the protected disclosure made by the Applicant was the main, dominant or most likely cause of the termination of her employment.
- [52] In summary, applying the two-fold test for causation the first question is: would the dismissal have occurred if the employee did not make the protected disclosure? The answer to this question is yes. The next question is: was the protected disclosure the main or dominant cause of the dismissal? The answer is no.
- [53] In the absence of any *nexus* between the disclosure and the dismissal the Applicant did not suffer an occupational detriment as per the provisions of the PDA.
- [54] It follows and I accordingly find that the dismissal of the Applicant was not automatically unfair as contemplated in section 187(1) (h) of the LRA.
- [55] This raises the issue of jurisdiction. In the absence of an automatic unfair dismissal this Court does not have jurisdiction to adjudicate the dispute.

Costs

- [56] Mr Hutchinson for the Respondent submitted that there is no merit in the Applicant's case before this Court. He argued that the Applicant was warned of the risks of costs should she proceed with her case in the Labour Court. She was advised that her case belonged in the CCMA, but she elected to proceed on the basis of an automatic unfair dismissal and it would be unfair to burden the Respondent to incur costs to defend this matter that is nothing but an abuse of process.
- [57] Mr Hutchinson submitted that the jurisdictional point be upheld and that the matter be dismissed with costs.
- [58] Ms Denton submitted that the Applicant elected to pursue her case in the Labour Court as she truly believed that section 187(1)(h) of the LRA was her cause of action and she should not be punished for that.

- [59] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In considering whether costs should be awarded, the requirements of law and fairness become applicable.
- [60] The requirement of law has been interpreted to mean that the costs would follow the result.
- [61] In considering fairness, the Court has held that the conduct of the parties should be taken into account and that *mala fide*, unreasonableness and frivolousness are factors justifying the imposition of a costs order. Another factor to be considered is whether there is an ongoing relationship that would survive after the dispute had been resolved by the Court. If so, a costs order may damage the ongoing relationship. In my view fairness would include fairness to both parties.
- [62] The Applicant instituted proceedings against the Respondent because she believed that the protected disclosure she made was the reason for her dismissal. This was the case the Respondent had to answer. The Respondent however held the view that the matter should have been referred to the CCMA as the reason for dismissal was misconduct.
- [63] In her evidence before this Court the Applicant was able to show that the disclosure she made was a protected disclosure for purposes of the PDA. She was however unable to show the nexus between the disclosure and her dismissal.
- [64] After a careful consideration of all the relevant facts and the submissions made by Mr Hutchinson and Ms Denton, I am of the view that the Applicant was misguided in pursuing her case in this Court rather than the CCMA but I cannot find that the Applicant acted vexatious or frivolously in instituting this claim. In my view the interest of fairness are best served by making no order as to costs.
- [65] In the premises I make the following order:

Order

1. The Applicant's dismissal was not automatically unfair as provided in section 187(1)(h) of the Labour Relations Act;

2. The Applicant's case is dismissed for lack of jurisdiction;
3. No order as to costs.

C Prinsloo AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms Denton

DHD Attorneys

For the Respondent: Advocate W Hutchinson

Instructed by Moodie & Robertson Attorneys