THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN

Not Reportable/Of interest to other judges

Case no: C 113/2022

In the matter between:

ROAN MOSTERT **First Applicant**

and

OVERBERG AGRI-BEDRYWE (PTY) LTD **First Respondent**

MERVIN JOHNSON (*N.O.*) **Second Respondent**

THE METAL AND ENGINEERING BARGAINING COUNCIL **Third Respondent**

Heard: 17 April 2024

Delivered: 20 January 2025

Summary: (Review application – Unfair dismissal for misconduct – protocol for use of cell phone while operating machinery – rule established – employee's awareness - absence of previous final written warning - experienced artisan – phone causing distraction or impeding safe work – employee believing he could exercise his discretion on safety issues – award not reviewable on the basis of reasonableness)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application to review and set aside an arbitration award in which the arbitrator upheld the substantive fairness of the dismissal of the applicant. The applicant, Mr R Mostert, seeks to set aside the finding that his dismissal was substantively fair.

[2] The applicant was dismissed on 12 February 2021, after working for the first respondent ('OAB') for about 20 months. He was a qualified fitter and turner with 17 years' experience. He was found guilty of three charges, namely:

2.1 Charge 1: He failed to comply with standards, rules and regulations related to safety;

2.2 Charge 2. Demonstrating behaviour of bad client service that could potentially damage the good name of the respondent, and

2.3 Charge 3: Irretrievable breach of the trust relationship between the employer and employee.

[3] The charges related to events on 27 and 28 November 2020 when Mostert allegedly used his personal cell phone for private purposes whilst working with machines that were running. The applicant was in fact injured whilst working on his machine on 28 November, though the machine was not in motion on that occasion. His injury resulted in him being placed on light duty. The applicant disputed that he was guilty of the charges and, in the alternative, maintained that the sanction was too harsh in any event.

The arbitrator's findings on substantive fairness

[4] The arbitrator found that since the customer, whom Mostert was speaking to on his phone while he was working, was aware that he was doing so

and saw nothing wrong with that, Mostert could not have brought OAB into disrepute with its customer by doing so. Consequently, he acquitted Mostert on the second charge.

[5] In relation to the existence of the rule and Mostert's knowledge of it, the arbitrator was satisfied there was a rule in the workplace forbidding the use of phones for calls or listening to music whilst operating machinery, which Mostert was aware of. His finding was based on various evidence. There was documentary evidence of a verbal warning issued by Mostert's superior concerning unsafe cell phone use, and that he had attended safety talk meeting eight months prior to the events leading to his dismissal at which the use of cell phones had been discussed. He also held that, as Mostert was a fitter and turner with 17 years' experience, he ought to have known his conduct should have known his actions created unsafe working conditions.

[6] On the first charge, the arbitrator concluded that the evidence showed overwhelmingly that, on 27 and 28 November 2020, Mostert was speaking on a cell phone call whilst operating on a running machine. Video footage also showed he was on cell phone calls whilst operating on his machine on both days in question. On 27 November, the machine was in motion at the time. On his own version he said he had a personal emergency situation relating to his family and needed to converse with his attorney and the police. This supported the firm's version that he was on telephone calls while operating on his machine. The applicant's action on the video footage further corroborated the respondent's version in this regard. Alson, Mostert testified that calls were answered whilst working on a running machine giving further credence to the firm's version. He also admitted listening to music on his phone while operating his machine and video footage showed him listening to earphones attached to his phone.

[7] Overall, the arbitrator found Mostert's evidence about his phone usage was inconsistent, whereas the evidence of Mr F Roodman ('Roodman'), the manager of the engineering division of the business in Bredasdorp, was forthright and credible, and he had no reason to lie about the

existence of the rules. He concluded Mostert was guilty of the second charge of breaching the respondent's safety rules and regulations.

[8] Turning to the question of the sanction, the arbitrator noted that Mostert was guilty of serious misconduct. Moreover, Mostert had deliberately refused to comply on more than one occasion. On 21 Feb 2020 all employees were placed on terms regarding unsafe cell phone use, and he continued to ignore safety rules resulting in an oral warning on 14 October 2020, which was recorded in his supervisor's diary. Mostert's refusal to remove his wedding ring despite knowing it was contrary to the rules demonstrated his disdain for compliance. It concerned the arbitrator that Mostert was still arguing that talking on the phone or listening to music on it was not unsafe.

[9] This tended to show he would breach the rules again in the future. Given that Mostert showed no regret for his actions, the employer was entitled to assume trust was destroyed. In the result, the arbitrator found Mostert's dismissal was justified.

The review application

Grounds of review

[10] The applicant wishes to review the award on grounds that it is not one that a reasonable arbitrator could have reached on the evidence. Essentially it is what has come to be known as a 'fact based' review where it is the arbitrator's evaluation of the evidence which is subjected to scrutiny. It is now trite that an applicant that wishes to do this must show that the alleged error or errors made by the arbitrator were such that the arbitrator could not have arrived at their findings if they had not made those errors. In *Makuleni v Standard Bank of South Africa Ltd and Others*[1] the Labour Appeal Court reaffirmed this approach, which was elaborated on in *Head of Department of Education v Mofokeng & others*.[2]

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[1] (2023) 44 ILJ 1005 (LAC) at paras 3 – 4.

[2] (2015) 36 ILJ 2802 (LAC) at paras [30] - [33].

[11] In brief, the primary grounds of review advanced by Mostert were that the arbitrator failed to consider:

11.1 evidence of the employer under cross-examination which effectively conceded that no misconduct had been committed;

11.2 evidence of his superior that he had received calls from his superior while he was working, but he was not reprimanded;

11.3 evidence that disciplinary action was not consistently applied to other employees for failing to follow safety regulations and was inconsistently applied to him;

11.4 the disciplinary code only recommended a final written warning for a first offence;

11.5 Roodman's testimony that Mostert was only issued with a verbal warning on 14 October for similar misconduct because of mitigating circumstances and accordingly he had never even been issued with a written warning for the offence;

11.6 the third charge was not a separate charge but concerned the existence of aggravating factors;

11.7 whether the rule had been communicated to him, or whether he ought to have been aware of it, and whether the risk of dismissal for a first offence was communicated, and

11.8 that urgent calls could be answered, but private calls should be ended and the employee should get back to work.

[12] Mostert admits that on 27 November he was talking on his phone while working, but there was no accident on that occasion. When he had the accident on 28 November he was working while talking on his phone, but his machine was not in motion.

[13] The employer's main responses were that:

13.1 Some of the issues raised by Mostert were irrelevant to the reason for his dismissal. It did not dispute that employees were allowed to use their cell phones at work, but private calls had to be kept to a minimum. The critical principle is that when a call is taken at work,

the employee is expected to switch off the machine and move away from it.

13.2 It did not follow from the fact that Roodman phoned him while he was working that Mostert could continue working on his machine while he spoke on the phone. He was expected to switch the machine off. This principle applied still applied even when he was given permission to receive certain urgent personal calls at work. Mr H Pietersen ('Pietersen'), the safety representative in the workshop confirmed this practice.

13.3 No evidence was produced to substantiate Mostert's vague allegation that safety harnesses were not worn by staff working at heights and they were not disciplined for that.

13.4 The disciplinary code envisages that sanctions imposed for an infraction might be more severe than what the code suggests and, in Mostert's case he had received at least two prior warnings for the same misconduct.

13.5 The evidence showed that Mostert had a recalcitrant approach when it came to following the rule, which warranted the sanction of dismissal.

Evaluation

[14] It is true Roodman conceded that there could have been occasions when he had been with Mostert at his workstation and when Mostert had taken out his phone when it rang then muted it, Roodman told him to answer it first. However, Roodman said such an instruction never implied Mostert should continue working while answering the phone. He was expected to stop working on the machine and step away from it to deal with the call. Mostert put it to Roodman that, on one occasion, Roodman had phoned him, and he had spoken to him while material was being cut on his machine, which Roodman must have been aware of because it was audible. Roodman's response was that, if it was the case that he continued operating the machine, he should not have done so. Be that as it may, the evidence of Roodman and Pietersen was consistent on the

existence of a rule that one did not speak on the phone without first switching off a machine in operation and standing aside from it.

[15] Although Mostert disputed that it had been specifically stipulated that one could not listen to music on one's phone, he could not seriously refute that when cell phone use had been discussed in the engineers' safety talk meeting on 21 February 2020 that it was clearly explained that cell phones could not be used while working on machinery, without the principle being confined only to speaking on the phone. There was evidence that the prohibition against using cell phones whilst working was a topic of discussion during at least two toolbox meetings, though one took place after the alleged infraction on 27 and 28 November 2020 for which he was dismissed. In the circumstances, it cannot be said there was no rational basis for the arbitrator to conclude that the use of cell phones while working on machinery was prohibited, save that if calls were received, the call could be answered provided the artisan first switched off the machine and stood away from it.

[16] Mostert does not dispute that on 27 November 2020, he spoke on the phone while working on his machine while it was in motion but argued his conduct that he had a serious personal reason to talk on the phone that day. That he had a good reason to take personal calls was not disputed. What the firm objected to, was his failure to switch off and distance himself from his machine when he took the calls. Roodman had shown video material of him doing this on more than one occasion that day. Roodman pointed out at one stage how Mostert was working in a distracted fashion. Mostert disputed that speaking on a cell phone at work was subject to any requirement to switch off the machine, but this was at odds with Roodman and Pietersen's evidence.

[17] Roodman's commentary on the video of the incident on 28 October 2024 was that Mostert was working on the stationary machine with his left hand instead of his right because he was holding his phone in his right hand and this is when the accident occurred, which resulted in him sustaining serious injury and the company losing work to the value of approximately R 6000-00 per day as a result of him being unable to work. Mostert

claimed he had just finished speaking on the phone and was listening to music on the headphones attached to his phone when the accident happened. The accident happened about ten seconds after the call ended. Roodman's response was that Mostert still had his earphones on, and the length of the earphone cord attached to the phone limited the ambit of his movements. Mostert contended that listening to music on the phone was no different to conversing with someone in the workplace and there was no prohibition against using earphones, but Roodman pointed out that this still amounted to using his phone whilst working. Mostert said that, if it had been unsafe for him to have his phone in his hand and using his other hand to loosen the chuck on the machine he would not have done it adding that everything could not always be done one hundred percent by the book and sometimes one had to use one's own discretion. In Roodman's view, if it was difficult to accomplish a task within the safety regulations, Mostert should have phoned him. Although he did not dispute having his phone in his hand when he commenced the task, Mostert claimed he had just ended a call and was only listening to music, when the accident occurred. His machine was stationary at the time.

[18] When he gave his evidence in chief, Mostert elaborated further, saying he had put the cell phone down on the machine so he would not be hindered in what he was doing and in order to not to compromise safety. At the time, he was attempting to apply greater force to dislodge a jammed component. When he forcibly dislodged it, the tommy bar he was using slipped from his left hand. His right hand then caught on the gear levers of the machine tearing ligaments in his smallest finger.

[19] Based on his experience of 17 years' as a fitter and turner, Mostert defended his action of trying to adjust the machine while holding his phone in his hand because he was able to use his discretion to assess the risk of doing so. It does not seem to be in dispute that Immediately before the accident occurred, Mostert had just put his phone down on the stationary machine, so it was no longer in his hand but he was still wearing the earphones which were connected to the phone. Roodman maintained that the length of the earphone cords limited Mostert's freedom of movement.

[20] It was not unreasonable to infer from the evidence that on a number of occasions on 27 October, Mostert had been speaking on the phone without switching off his machine. It was also not untenable to conclude, that Mostert would have had more freedom of movement and would not have been using his left hand to free the jammed component if he had not commenced the task while he still had the phone in his right hand and had also set aside the phone, together with the earphones, before turning all his attention to a task that clearly required significant effort.. Accordingly, it was a feasible inference that his phone had indirectly impeded his efforts to free the stuck component, thereby constituting a risk factor.

[21] Mostert is correct that the third charge of destroying the trust relationship was actually a conclusion to be drawn from the other charges. In any event, this is of no relevance in the review because the arbitrator did not deal with this as a charge, but correctly dealt with this when considering the sanction.

[22] Roodman also testified that there had been another incident in January 2021 when all staff had been expressly instructed to remove jewellery when working but the following day Mostert had to be reminded to remove his wedding ring, yet had subsequently carried on wearing it. This did not form part of the charges but was led as evidence that Mostert did not heed safety regulations. Mostert contested the applicability of the rule to the wearing of a ring.

[23] In any event, Mostert argued that the sanction of dismissal was a departure from the code which recommended a final written warning on the first occasion, in circumstances where he had not even received a verbal warning. It is a fair criticism that the arbitrator should not have accepted that the oral warning was issued based on the strength of a diary entry that was not confirmed by the author. If the arbitrator had accepted that this meant that it was unfair to dismiss him for that reason, that might have been a reasonable decision. But the question to be decided is whether no reasonable arbitrator could have concluded that dismissal was appropriate.

[24] Although Mostert had no written warning and the oral caution by his superior was not properly corroborated, there are factors which provide support for the arbitrator's decision that warnings would not address the problem. Firstly, on 27 October, Mostert repeatedly was on the phone while his machine was running, so it was not as if he had flouted the rule only on one exceptional occasion that day. Secondly, in relation to the 28 October accident, when he cross-examined Roodman, it was clear Mostert believed that because he was an experienced artisan with considerable experience, he was in a position to judge when it was acceptable to flout safety rules and that he was entitled to exercise his discretion in that regard. Simultaneously, he did not acknowledge any wrongdoing or remissness on his part concerning his non-compliance with the normal safety procedures. If one asks the question whether remedial steps were likely to change his attitude about him being best placed to decide when a safety practice could be ignored, and bearing in mind his lengthy experience which ought to have instilled a more cautious approach to safety matters, it cannot confidently be said that no reasonable arbitrator could have concluded that his transgressions, coupled with his recalcitrant attitude towards safety compliance, warranted his dismissal.

[25] In conclusion, I am satisfied that even if there might have been some flaws in the arbitrator's reasoning, they are not such that the result would necessarily be different if those faults were corrected. On the material before the arbitrator his findings on Mostert's guilt on charge one and the fairness of his dismissal, are not ones no reasonable arbitrator could have arrived at. Accordingly, the review application does not succeed.

Order

1. The review application is dismissed.
2. No order is made as to costs.

R Lagrange

Judge of the Labour Court of South Africa.

Appearances

For the Applicant	NF Rautenbach instructed by CK Attorneys
For the First Respondent	W Jacobs from Willem Jacobs and Associates