
IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No. C701/99

In the matter between:

Kohler Flexible Packaging (Pty) Ltd

APPLICANT

and

Commissioner H Mofsowitz, N O

FIRST RESPONDENT

Commission for Conciliation, Mediation

& Arbitration

SECOND RESPONDENT

South African Typographical Union

(On behalf of A Leo)

THIRD RESPONDENT

JUDGEMENT

PIENAAR, A J

INTRODUCTION

1. This is a review in terms of section 145 of the Labour Relations Act No 66 of 1995, as amended

("the Act").

2. The Applicant, Kohler Flexible Packaging (Pty) Limited, seeks to review the award of the First Respondent, given under the auspices of the Second Respondent, the Commission for Conciliation, Mediation and Arbitration ("CCMA").
3. The First Respondent found the dismissal of the member of the Third Respondent, A Leo ("the Employee") to have been substantively unfair and reinstated the Employee in a lower position. No compensation was granted in respect of the period from date of dismissal till date of the award insofar as the First Respondent felt that the Employee was not entirely blameless.
4. The First and Second Respondents did not oppose the application for review.

BACKGROUND

5. The Employee was employed by the Applicant for approximately 24 years – The first 22 years as an Assistant Laminating Operator and the last 18 months as a Laminating Operator.
6. The Employee was dismissed for gross negligence and had a valid final warning on his file for the same offence.
7. The Applicant instituted 3 charges of gross negligence against the Employee. The charges, in particular, referred to faulty lamination done by the Employee for 3 customers of the Applicant, i.e. Dairy Belle, Avondale and E W Kings.

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8. According to the Applicant, the gross negligence of the Employee, resulted in losses of approximately R100 000. It was not disputed that the Applicant had to dump all the material laminated by the Employee for such customers.
9. The Applicant was furthermore at risk of losing some of its customers (some from overseas) and had to take precautionary measures in that regard. No customers were, however, lost as a result of the Employee's alleged misconduct.
10. The Employee pleaded guilty to the charge of gross negligence at the disciplinary enquiry and was dismissed. Two appeal hearings were held and in both appeals, the Employee did not dispute his guilt, but in essence submitted that the punishment was too harsh.
11. At the arbitration, the Third Respondent, who acted on behalf of the Employee, submitted that the dismissal was both procedurally and substantively unfair.
12. The First Respondent, inter alia, determined that the dismissal was not procedurally unfair and I do not intend to deal with issues pertaining to the procedures.
13. During the arbitration proceedings, the Third Respondent argued that the Employee was not guilty of the offence insofar as "he never came to work to wilfully cause gross negligence". The Applicant was furthermore blamed for difficult working circumstances and lack of trained personnel.
14. Four Employees testified on behalf of the Applicant at the arbitration proceedings. Mr Collin Geldenhuys, the Laminating Manager, testified that the operator (i.e. the Employee) is ultimately responsible for the quality and quantity of work produced.

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15. He referred to the specific incidents of gross negligence and said that it was “due to bad operating practices”. According to Mr Geldenhuys, the Employee could have rectified the errors, but failed to do so. The material eventually had to be dumped and none could be re-used.
16. Mr Geldenhuys furthermore referred to the minutes of the disciplinary enquiry where it was admitted that the Employee was, in fact, informed by the Quality Controller (“QC”) that the material was substandard and that the Employee had to stop running it. This was in respect of the Gouda contract for Dairy Bell.
17. According to Mr Geldenhuys, the Employee’s representative at the disciplinary enquiry specifically stated at the end of the enquiry: “nothing I can say, the jobs messed up. Pure negligence. He had a warning from QC and carried on. It’s difficult for me to defend him.”
18. Most of the above was disputed under cross examination at the arbitration proceedings and the problem was, in particular, blamed on the assistant laminator, poor training of staff, lack of supervision by the management of the Applicant, etc.
19. Mr J Jacobs, the Store Manager and Chairperson of the enquiry, was the second witness called to testify on behalf of the Applicant. Mr Jacobs testified that the Employee pleaded guilty at the enquiry and admitted that he had committed the acts of gross negligence.
20. Mr Jacobs took into consideration that the Employee was informed that his work on the particular day was of a substandard nature, but continued with the lamination. Given the damage suffered by the Applicant and the final written warning the Employee had on his record for the same offence, Mr Jacobs decided to terminate the Employee’s services.

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21. Mr Jacobs furthermore referred to the damages suffered by the company and more in particular with regard to one job where 750 kilograms of material had to be destroyed at a cost of R50.00 per kilogram. (This amounts to R37500.00).
22. Mr Q T Augustyn was the third witness to testify on behalf of the Applicant. He is the Technical Director of the Applicant and presided over the appeal hearing. Augustyn confirmed that the appeal was essentially based on the severity of the punishment and furthermore that the Employee had a new assistant on the machine.
23. According to Mr Augustine, the Employee, however, only objected to the harshness of the sentence at the appeal enquiry.
24. Mr Wessels was the last witness to be called on behalf of the Applicant. He presided over the second appeal lodged by the Applicant. The appeal was based on the harshness of the penalty and that the Machine Assistant was not fully trained. This witness again confirmed that the company suffered well over R100000.00 damages due to the Employee's negligence and dealt with the potential loss of further customers - in particular, the risk of being delisted by supermarkets. The factors listed above and considerations of the previous chairpersons, were also considered by Mr Wessels, who upheld the dismissal.
25. Mr H S Makka, who represented the Applicant at the disciplinary enquiry, testified on behalf of the Employee. Mr Makka testified that the Employee was a good worker, but that operators were under pressure because the Applicant constantly employed new people. He also complained about the Applicant's structure that collapsed because of the flattening thereof.

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26. According to Mr Makka, the Employee also had a new assistant, which caused some of the problems. Mr Makka disputed the fact that the Employee was advised by the QC to stop running the machine when the material became faulty. He, however, confirmed that the operator is ultimately responsible for the quality of work on the machine.
27. Mr S K Johnson, a Laminating Operator, was the second witness to be called on behalf of the Employee and essentially testified about alleged inconsistency by the Applicant, which allegations were not accepted by the First Respondent.
28. The Employee himself testified. According to the Employee, the QC never advised him to run the machine slower or to stop the machine. He, however, admitted that the QC informed him that there were blisters on the material.
29. The Employee denied the charge and, inter alia, stated, "I am not a person that is negligent or do something on purpose." He admitted that he had to take full responsibility as an operator for the lamination of material on the machine. According to the Employee, he pleaded guilty at the disciplinary enquiry because he was shocked and it was "so sudden".
30. The Employee used the PTM sheets to corroborate his version that there was no instruction from the QC to stop the machine. The PTM records were not placed before this Court.
31. In closing arguments, Mr D Fredericks, the representative of the Employee at the arbitration, inter alia, argued that "Mr Leo hasn't got the ability to express himself and that his innocence comes through in that he has got more ability obviously with his hands, than to understand terminology, etc."

AWARD

- 32.The First Respondent set the dismissal aside and ordered that the Employee be re-employed in the capacity of an Assistant Operator. Insofar as the Employee was not entirely blameless, the First Respondent did not award any compensation for the period of unemployment.
- 33.The First Respondent furthermore found that the Applicant mechanically followed the route prescribed by the Disciplinary Code and Procedure without consideration of the merits of the case. She then stated that if she had found the Employees guilty of gross negligence, she could not easily interfere with the decision to dismiss. However, she did not find him guilty of gross negligence. The Employee's conduct according to the First Respondent was at worst negligence or careless or at best as poor work performance arising from an inability to perform the work satisfactorily. The First Respondent was furthermore not persuaded that the Employee fully understood the Applicant's interpretation of gross negligence, but rather pleaded guilty of "messing up the work".
- 34.The First Respondent surprisingly found that the Applicant did not present evidence at the arbitration in respect of the damages it suffered "to tilt the balance of probabilities in their favour".
- 35.The First Respondent furthermore found that no details were provided by the Applicant in respect of the material that was dumped and that same could also be caused by inadequate work instructions and inaccurate master folders. According to the First Respondent, the Applicant failed to provide sufficient evidence to convince her of the Employee's contribution to waste in the company, or the Employee's contribution to the financial losses suffered by the Applicant.

36.The First Respondent held that the Laboratory Technician, Mr Roy Collins, should have been called as a witness in respect of the allegation that he instructed the Employee to stop the particular job. The testimony of Mr Collins was important, insofar as this allegation was disputed at the arbitration proceedings.

37.The First Respondent held that the dismissal was a “scapegoat” dismissal as the Applicant had to make an example of someone.

GROUND FOR REVIEW

38.The Applicant’s specific grounds for review as argued related to:

38.1.The First Respondent’s finding that the Employee was not guilty of gross negligence.

38.2.The opportunity to allow the Employee and his representative to make a reference and submit a PTM Report, without affording the Applicant an opportunity to respond thereto.

38.3.The First Respondent was wrong in finding that no evidence was led with regard to the damages.

38.4.There was no basis for the First Respondent in deciding that the dismissal was a “scapegoat” dismissal of the Employee.

TEST FOR REVIEW

39. The test for review are set out in the decision of the Labour Appeal Court Carephone (Pty) Limited v Marcus NO & others (1998) 19 ILJ 1425 (LAC). According to the Labour Appeal Court the reviewing court must ask itself, amongst other things, the following question:

“Is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him/or her and the conclusion he or she eventually arrived at?”

40. The essence of the enquiry is whether the First Respondent’s award can be supported by the facts properly presented to her or not. If the award is so supported, it is impermissible for the review court to interfere.

41. I am aware of the criticism raised by some of my brothers in this Court in respect of the test applied in the Carephone case, but am obliged to follow this decision of the Labour Appeal Court.

FINDING

42. The First Respondent found that no evidence was led in respect of the financial loss caused by the Employee. According to her award, such evidence could tilt the balance of probabilities in the Applicant’s favour.

43. It is difficult to see on what basis the First Respondent made such findings, particularly given Mr Geldenhuys and Mr Jacob’s evidence as set out above, which in fact, detailed how the losses in one particular incident were made up.

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44. One must further bear in mind that section 138 of the Act requires the commissioner to determine a dispute fairly and quickly and furthermore deal with substantial merits of the dispute with the minimum of legal formalities. I do not think it was ever the intention of the legislator to require from an employer, in a case such as this, to present further or additional evidence than what was presented. One must also bear in mind the damage to the Applicant's name and reputation. It was clear from the evidence that the damages suffered by the Applicant, were substantial.
45. This finding is material to this matter given the First Respondent's own view that this could have tilted the balance of probabilities in the Applicant's favour. The First Respondent's finding that no evidence was led in respect of the financial losses suffered cannot be justified. The First Respondent's award can furthermore not be supported by the facts properly presented to her and constitutes a gross irregularity in terms of the Act. The award should be set-aside on this basis alone.
46. Given my finding in respect of the above, I will briefly deal with the other grounds for review.
47. In determining the nature of the conduct of the Employee, the First Respondent found that the Employee was not guilty of gross misconduct, but at worst that he was negligent or careless. It was submitted on behalf of the Applicant that the First Respondent was not entitled to interfere in such decision of the Applicant, more in particular given the Employee's plea of guilty at the enquiry, the submissions made by the Employee's representative in this regard, the fact that the Employee did not rely on same during both the appeal hearings and lastly, that the First Respondent is bound by the standards, set by a particular industry with regard to negligence, gross negligence or otherwise as long as it is fair.
48. According to the Applicant, the Employee could not give a proper explanation during the

arbitration proceedings why he pleaded guilty and his representative merely referred to the Employee's inability to express himself well.

49. I can find no basis for the First Respondent's interference in the Applicant's decision and finding given the factors set out above. The First Respondent classified the conduct of the Employee as "at most negligent" and stated that the Employee pleaded guilty of "messing up the work". This decision can simply not be justified on the evidence led at the enquiry as well as during the arbitration proceedings. Although, the arbitration proceedings are of a *de novo* nature, the First Respondent could not ignore the evidence led at the disciplinary enquiry, particularly where it was not disputed.

50. Insofar as the PTM reports are not before this Court it is not possible to make a finding in that regard. Given the evidence led at the enquiry, it was in any event up to the Applicant to call its own witness to corroborate the QC's versions. The PTM report is a document of the Applicant and the particular witness could have been cross-examined on that, insofar as it was necessary to do so.

51. Lastly, the First Respondent referred to the dismissal as a "scapegoat" dismissal. She relied on the argument advanced by the Employee's representative in making this assumption insofar as no evidence was put before her to substantiate this finding. It is uncertain what value the First Respondent attached to this inference. This finding can, however, also not be justified on the evidence led.

APPROPRIATE RELIEF

52. The relief sought by the Applicant is that the award be set aside and be referred to the CCMA to be

adjudicated before a new commissioner.

ORDER

53. It is ordered as follows:

53.1. The award dated 12 November 1999 under Case No WE22606 is hereby reviewed and set aside.

53.2. The matter is referred to the Second Respondent to be dealt with de novo before a different commissioner in light of the Court's findings.

53.3. There is no order as to costs.

CASE LAW REFERRED TO:

54. The following case was referred to in the above-mentioned judgement:

Carephone (Pty) Limited v Marcus NO & others (1998) 19 ILJ 1425 (LAC).

ACTING JUDGE PIENAAR

15 September 2000

PARTIES APPEARING BEFORE THE COURT:

APPLICANT:

Adv P B J Farlan
(Instructed by Cliff Decker Fuller Moore Inc)

THIRD RESPONDENT:

Attorney J White
Chenells Albertyn