

NOT REPORTABLE



CASE NO: LCA 69/2011

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

CENTRAL TECHNICAL SUPPLIES (PTY) LTD

APPELLANT

and

HELGA KAZONDUNGE

1ST RESPONDENT

MOSES SHITALENI INANE

2ND RESPONDENT

CORAM: Smuts, J

Heard on: 9 March 2012

Delivered on: 22 March 2012

JUDGMENT

Smuts, J

[1] This is an appeal against the an arbitrator's award made under s87 of the Labour Act, 2007 (the Act) on 15 July 2011 in which he found that the first respondent's dismissal was unfair and reinstated her to her position or in a

comparable position with effect from 1 August 2011 and directed that the appellant pay her the amount which she would have earned had she not been unfairly dismissed. The appellant, a concern which repairs and services laundry machines, appeals against that award, raising a number of different grounds which have undergone amendment.

[2] The first respondent, whom I refer to as respondent, was employed by the appellant as a cleaner. (The arbitrator has been cited as second respondent. This is not necessary as this is an appeal. I refer to him in this judgment as the arbitrator.)

[3] The incident which gave rise to disciplinary action being taken against the respondent occurred on 23 February 2010. It is common cause that one of the one of the appellant's clients, Safari Hotel and Conference Centre (Pty) Ltd (Safari) had provided linen to the appellant for the purpose of conducting tests on Safari's laundry machines which had been repaired by the appellant. One of the appellant's technical staff, a certain Douglas Dedig had indicated to the respondent that the linen provided by Safari could be taken by her, although he later stated to her that he had said this in jest. The respondent then proceeded to take the linen with her from her work place and was apprehended by the appellant's Managing Director when exiting from the premises at the end of her working day. The respondent was then charged in disciplinary proceedings for theft alternatively removing items without permission.

[4] The respondent was found guilty by the chairperson of the disciplinary

proceedings on the second or alternative charge of removing of the linen from her employer's premises without authorisation. The chairperson of the disciplinary enquiry specifically found that the respondent did not have permission from management to remove the linen from the premises and found that the second or alternative charge against her was established and not theft. He specifically found that an intention to deprive her employer of the use and possession of the linen and knowledge of unlawfulness had not been established in the proceedings. Hence he did not find the respondent guilty of theft.

[5] It was common cause that the respondent had been in the employ of the appellant for approximately 15 years and had a clean disciplinary record. The chairperson of the enquiry also found that the respondent believed that the linen was of no use to the company and had decided to take it home with her after her discussion with Mr Dedig. At the disciplinary enquiry, Mr Dedig admitted that he had told the respondent that she could take the linen but stated at the enquiry that this was told to her in jest. The respondent was found to be under the impression that the linen was of no use to her employer and was for testing purposes (presuming this purpose had been fulfilled and would not be of any further use after use of this exercise) and that she could thus take the linen home with her. The chairperson of the disciplinary enquiry then proceeded to recommend as sanction either a final written warning valid for 12 months or dismissal.

[6] The appellant however decided to dismiss the respondent who then

made a claim under the Act which resulted in the arbitration proceedings.

[7] Both the respondent and the witnesses for the appellant testified under oath in the arbitration. The respondent was represented by a union official and the appellant was represented by an external human resource practitioner or labour consultant.

[8] Much of the evidence was not essentially in dispute. The respondent testified that in the course of her working day, Mr Dedig had approached her. He would appear to be a technically qualified person in the employ of the appellant and thus her superior (as she was a cleaner earning a salary of N\$2 174.25 per month at the time of her dismissal), although this was not initially accepted by Mr Vlieghe, who appeared for the appellant, when I put this to him. Mr Dedig informed her that he had been provided with linen as testing material by Safari and that the respondent could take some of that linen for herself. She placed some of the linen in a plastic carry bag and at 17h00, when knocking off from work, was called back and required to open the plastic bag which contained the linen. She stated that she was under the impression that she could take the linen following her conversation with Mr Dedig. She was made to sign a piece of paper at the time by the management of the appellant which stated that she had taken the linen.

[9] In the course of cross-examination, the respondent first stated that the linen belonged to Mr Dedig who she referred to as Douglas, having been given it by Safari for testing purposes. She accepted that she had not obtained the

permission from her supervisor to remove the items, although she was later not entirely clear as to whether the linen belonged to Mr Dedig or Safari when pressed about the issue in cross-examination. What was however clear was that she was aware that the linen had been obtained by Mr Dedig from a client of the appellant, namely Safari. She considered that she had sufficient permission to take the linen because it had been brought by Mr Dedig to the appellant's premises and she understood him to indicate to her that she could take it. When the arbitrator enquired from her as to whether Mr Dedig had made a joke of this nature on any previous occasion, she answered that question in the negative. She also stated that she understood Mr Dedig to be serious at the time (in stating that she could remove the linen). These aspects of her testimony were not disturbed during her cross-examination by the appellant's representative.

[10] The appellant called four witnesses. The senior members of its management made it clear that they had not given any permission for the respondent to take the linen and set out the circumstances under which the respondent had been apprehended and the contents of her carry bag discovered. These aspects are not in issue.

[11] Mr Dedig was also called to give evidence. When asked by the arbitrator as to what exactly he had told the respondent he stated:

"Come and check these 'lakens'. Do you want it or what"

He had previously stated that when he had returned to the workshop and off loaded a machine, he had called to her and said *"Helga there are nice 'lakens' here"*. When she had further asked about them, he stated that she should not

take them, after first stating that said she should wait for him. The following was put to him in cross – examination by the respondent’s representative in the arbitration proceedings:

“Did I understand you well, when you brought the linen you came to her, and its on record. You came to her and said there are linen and if she is interested”.(sic)

Mr Dedig confirmed this by saying “ja” in response.

[12] Mr Dedig also confirmed in cross-examination that the respondent would be interested in the linen. He stated that the linen was for the purpose of testing spinning machines which the appellant repaired. The arbitrator put to Mr Dedig that if he had not made the statement jokingly to her that she would not have removed them. He appeared to agree with that. He however further stated that he had subsequently indicated to her that she could not take the linen. When the arbitrator pursued this line of questioning, the appellant’s representative objected and contended that it favoured the respondent. The arbitrator correctly pointed out to that representative that it was his duty to ask relevant questions in order to establish the truth in respect of a dispute referred to him. I do not consider that his questioning was improper. It did not in my view constitute a descent into the arena. It was rather directed at ensuring that an issue pertinent to the proceedings should be clarified, particularly in the circumstances where the respondent was represented by a union official with limited cross-examination skills, as is apparent from the record.

[13] The Managing Director of the appellant also gave evidence on its behalf.

He denied that there was any coercion in requiring the respondent to write down a statement straight after she had been apprehended and to state in it that she had taken the linen. I do not need to address that issue as it was in any event common cause and certainly did not amount to any admission of theft. What weighed heavily with the Managing Director was the fact the respondent subsequently did not plead guilty in the disciplinary proceedings. He would appear to have been affronted by that conduct on her part. This would appear to have made an impact upon his decision to opt for the sanction of dismissal rather than a final written warning valid for 12 months. He was referred to the disciplinary code of the appellant which provides for a final written warning as the prescribed or contemplated sanction for removal of items without authorization for a first offender and a dismissal in the case of a second offence whereas dismissal is contemplated for theft for a first offender. But he did not interpret the code in that way and denied that he acted outside the ambit of the disciplinary code.

[14] Mr Vlieghe, who appeared for the appellant, argued that the appellant's Managing Director in fact changed the finding of the chairperson of the disciplinary enquiry to that of theft and treated the finding as theft for the purpose of sanction. He submitted that it was for this reason that the Managing Director dismissed the respondent. The provisions of the code which contemplated a written warning and not a dismissal for removal without permission would appear to have given rise to this approach. I asked Mr Vlieghe to refer me to the portion of the record in which such a finding was made. He did not refer to an express statement to that effect but rather to the Managing

Director's answer to a question in the arbitration that he had essentially treated the respondent's case as one of a finding of theft in deciding upon the sanction, when placed with the two alternatives proposed in the chairperson's recommendation. But this is not borne out by the contemporaneous documentation. In the dismissal notice given to the respondent, the following was stated:

"Subsequently to the disciplinary hearing held on the 1st of March and concluded on the 9th of March 2011, respectively, management has considered the options submitted by the Chairperson of the hearing and have decided to enforce the penalty of a dismissal with notice".

There was thus no suggestion of altering the finding of guilty to that of theft but rather accepting that finding and selecting one of the two options recommended pursuant to such a finding.

[15] When I asked Mr Vlieghe if it was open to the employer to justify the respondent's dismissal on the basis of theft when she had only been found guilty of the lesser infraction of removing property without permission, Mr Vlieghe argued that the arbitrator is entitled to revisit the charges afresh in deciding whether or not the respondent had been dismissed unfairly or not. He further submitted that the arbitrator in this instance considered himself to be bound by what the chairperson of the disciplinary enquiry had found and that he had erred in this regard. I turn now to the arbitrator's finding and award and deal with this approach below.

Arbitrator's award

[16] On the issue of substantive fairness, the arbitrator referred to the applicant's version that she was told by a fellow employee that she could take the items if she wanted to do so. He referred to the fact that this statement was confirmed by that witness, Mr Dedig. He also referred to Mr Dedig's evidence that he had subsequently said to her that he was joking and thus sought to retract his earlier statement to her. The arbitrator also referred to the evidence that the linen had been provided by Safari for the purpose of testing and that the respondent was inclined to accept that the linen was not the property of the appellant and that it may have been either for Mr Dedig to allocate it or was in a essence redundant and no longer required, having fulfilled the purpose of testing (even though this was not expressly stated). For that reason, he found that there was, on a balance of probabilities, doubt that it had been established that the respondent had intended to remove items belonging to the appellant. The arbitrator had found that the dismissal was substantively unfair.

[17] He found the ruling of the chairperson of the enquiry, by proposing two alternative sanctions of a written warning or dismissal, to be perplexing and not in accordance with the appellant's disciplinary procedures. He went further and found that by recommending the two alternatives sanctions rendered the disciplinary hearing void for vagueness. He further found that the chairperson did not apply his mind to appellant's disciplinary procedures which provided for a written warning in a case of a first offence for removing company property without permission and a dismissal only in respect of a second offence. The arbitrator found that the dismissal was procedurally unfair

[18] The arbitrator accordingly found that there was neither procedural nor substantive fairness and set aside the dismissal and ordered the reinstatement of the respondent. In doing so, he dealt with the issue of a trust relationship, which had been raised. He referred to the respondent's 15 years of service as a cleaner without a disciplinary infraction during that period. He also referred to the sanction for removing company property without authorization which would usually attract a final warning for first offenders and thus not one where there would necessarily be a breach of a trust relationship. The arbitrator also awarded payment of the amount which the respondent would have earned had she not been dismissed.

Attack upon the arbitrator's award

[19] I have already referred to some of Mr Vlieghe's criticism of the arbitrator's award. He also submitted that arbitrator had erred in accepting the respondent's version, concerning her intention, after not disturbing Mr Dedig's evidence that he had been joking and thus recanting the invitation to the respondent to take the linen. But this does not essentially encapsulate what the arbitrator found. He instead found that the infraction had not been established on a balance of probabilities, in taking into account the incidence of the onus in the dismissal proceedings.

[20] I am inclined to agree with the arbitrator's finding in that regard. Despite Mr Dedig's evidence that he retracted his earlier invitation to the respondent to take the linen, it is clear that he had prior to that impressed upon her that she

could in fact take the linen. He also accepted that she would have not taken the linen had he not first indicated to her that she could do so. He further indicated, in answer to a question by the arbitrator, that he had not previously made a joke of this kind to the respondent. I agree with the arbitrator that one should have regard to the respondent's position as that of a cleaner. I have already pointed out that she earned approximately N\$2 000.00 per month after 15 years of service. Her position in relation to that of Mr Dedig would have been subordinate, despite the fact that Mr Vlieghe disputed that there was evidence to this effect in the proceedings. This can in my view be inferred, even though this was raised. I bear in mind that the respondent was represented by a union official at the arbitration. I have already referred to this aspect which in my view has a bearing in this context. I also noted that the respondent made use of an interpreter to give her evidence in the proceedings.

[21] Considering the evidence as a whole and particularly Mr Dedig's statements to the respondent and the fact that he had not jested in this way with her before, and bearing in mind the incidence of the onus, I do not consider that the arbitrator erred in his finding that the infraction had not been established on a balance of probabilities. I am in fact inclined to agree with that finding.

[22] There is a further basis upon which the dismissal of the respondent would in my view be found to have been unfair. That concerns the question of procedural fairness. Whilst I do not agree with certain of the arbitrator's reasoning on this issue, I am of the view that procedural fairness was not established in the dismissal of the respondent.

[23] My disagreement with the approach of the arbitrator is in respect of his finding that the chairperson's recommendation was void for vagueness, by recommending two alternative sanctions. This would not in my view meet the test for being void for vagueness and thus be impermissibly vague. This is because it refers to two forms of sanction whose meaning is clearly ascertainable. It would in my view in principle not have been incorrect for an external chairperson of a disciplinary enquiry, brought in to deal with an issue by virtue of the involvement of members of management as witnesses, to determine the question of guilt and then to make a recommendation, as occurred in this matter to the top management, with regard to sanction. Recommending two alternatives would in principle not amount to vagueness as his mandate would be to determine the guilt and make a recommendation concerning sanction. If those alternatives are both authorised and contemplated by the employer's code, he would thus be leaving it to the employer to decide what would be the most appropriate sanction, leaving it for them to take into account the personal circumstances of the employee, the nature of the infraction and the demands of the workplace.

[24] The procedural unfairness of the respondent's dismissal rather arises from the application of the appellant's code and the way in which the sanction was ultimately imposed upon the respondent. The appellant's disciplinary code provides for specific sanctions in respect of infractions. The sanction specified in the code for a first offender for removing company property without permission is that of a final written warning. As I have already pointed out, only in respect of

a second offence would a dismissal be the given sanction.

[25] Mr Vlieghe however submitted that these are mere guidelines and not binding upon an employer. But even if there were merely non binding guidelines, (which is does not appear to me from the document in question), it would seem to me at the very least that the chairperson of the enquiry should have motivated why a sanction in excess of that contained in the code should be one of his recommendations. In the absence of the motivation in that regard, it would seem to me that his recommendation in respect of sanction was not in accordance with the code. But furthermore, it would also seem to me that if an employer would want to impose a sanction more severe than that contained in its own disciplinary code, then an employee should be entitled to be heard in respect of that issue and be entitled to address an employer as to whether the more severe sanction than that contained in the code should be apply to her. That did not occur. The failure to do is in my view procedurally unfair.

[26] There is yet a further reason why the imposition of the sanction in question was procedurally unfair. Mr Vlieghe on behalf of the appellant contended that the appellant's Managing Director treated the question of sanction on the basis of a finding of guilty for theft. In my view, it was not open to him to change the finding to a more serious infraction without affording the respondent a hearing before doing so. The reason for requiring that such a hearing should take place in circumstances such as these is self evident. The sanction contemplated by the code for theft is dismissal for a first offender. An employee would in my view be entitled to be heard if an employer would seek to

change a finding of guilty to a more serious offence or regard it in that light because of the far more deleterious consequence for that employee. The failure to do so in my view amounts to procedural unfairness. It is not necessary for me to address the further question as to whether such a purported change to a finding in this way was procedurally unfair by reason of the fact that the Managing Director was himself a witness in the enquiry. It was presumably for this reason that he had correctly decided that an external person should head the disciplinary enquiry, determine guilt and then make recommendations on a sanction. But to then change the finding to theft after he had expressed his dissatisfaction concerning her plea of not guilty would not seem to me to have been open for him to do so and would in any event amount to procedural unfairness. But as I have already indicated, it did not appear from the contemporaneous letter of dismissal that he did had in fact altered the finding. In the absence of doing so, it was certainly not open to him to treat the infraction as one of theft.

[27] I accordingly conclude that the arbitrator did not err in reaching the finding that there had been procedural unfairness even though my reasons differ somewhat from those provided by him.

[28] Mr Vlieghe also contended that there was a breakdown of trust as a consequence of the incident and that there should not be reinstatement even if the appeal were not to succeed. In that event, he submitted that a financial award should be made instead of an order of reinstatement. In taking into account the respondent's record and the circumstances of the specific incident

as well as her position as a cleaner, I also do not consider that the arbitrator erred in finding that the relationship of trust would not be have been irretrievably disturbed. I do not consider that he erred in re-instating the respondent.

[19] The order I accordingly make is that the appeal is dismissed, with no order as to costs.

Smuts, J

ON BEHALF OF APPELLANT

MR. VLIEGHE

Instructed by:

KOEP & PARTNERS

ON BEHALF OF THE RESPONDENT

ADV

BOESAK

Instructed by:

BD BASSON INC.