REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN PORT ELIZABETH

JUDGMENT

CASE NO: P 117/12

In the matter between:

ADT SECURITY (PTY) LTD **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION **First Respondent**

COMMISSIONER F FAIZEL *N.O.* **Second Respondent**

SATAWU obo ARTHUR BAAITJIES **Third Respondent**

Heard: 02 September 2014

Delivered: 03 September 2014

Summary: (Review- arbitrator misconstruing application of principle of consistency and approach to determining gross negligence).

JUDGMENT

LAGRANGE, J

Introduction

[1] In this matter, the third respondent was dismissed for gross negligence after he discharged a firearm without making sure the weapon was safe by checking it is visually and physically and without using the so-called 'bullet trap' to complete the procedure.

[2] The common cause facts for the sake of contextualising the matter are as follows:

2.1 the third respondent had made his firearm safe and placed it in the gun safe approximately an hour before he attempted to remove it;

2.2 he was unaware that there was another firearm placed in the safe, which had not been made safe by the person depositing it in the safe and the third respondent removed believing it was his own;

2.3 the identity of the person who had placed the unsafe weapon in the same safe as the third respondent's weapon could not be identified;

2.4 the third respondent was retrieving his weapon from the safe because he had been called out to attend to a break-in;

2.5 the bullet trap which should have been near the gun safes was about 30 m away and required a person to leave the room where the gun safes were and walk outside with the weapon around the building to test the weapon at the bullet trap;

2.6 it was common practice for personnel from moving weapons from the gun safe to check the safety of the weapon without proceeding to the bullet trap,and

2.7 another employee, known only as 'Songelwa', who had discharged his own firearm in a vehicle had been given a final written warning apparently in the mistaken belief that because of a procedural flaw in the disciplinary hearing relating to the presentation of opening statements and closing argument, a sanction less serious than dismissal ought to be imposed.

The arbitrator's findings

[3] The arbitrator's findings may be summarised as follows.

[4] The arbitrator accepted that there was a rule against negligence and that the third respondent had been negligent in not doing the visual and physical checks of the weapon. In so doing he'd failed to exercise a duty of care and skill expected of someone in his position and created a risk of severe injury when the weapon was discharged.

[5] The arbitrator found that the applicant had been inconsistent in not dismissing the other employee mentioned above. In arriving at this conclusion the arbitrator found that the point of comparison for the purposes of evaluating consistency was not the procedural issue but the substantive fairness of the sanction. The arbitrator concluded that it was arbitrary for the employer to have distinguished the other case on procedural grounds.

[6] Having found the third respondent was negligent, the arbitrator decided that dismissal was not an appropriate sanction and expressly considered the following factors:

6.1 the third respondent had been remorseful for what he had done, a fact which the chairperson of the disciplinary enquiry had agreed with;

6.2 the employer's failure to locate the bullet trap where it should have been next to the gun safes was a contributory factor that might have prevented the unsafe discharge of the weapon had it been properly located where weapons were checked;

6.3 in order to construe the third respondent's negligence as gross, it would have to have been serious enough to warrant the conclusion that the employment relationship had become intolerable, but no evidence had been led to conclude that the relationship had become intolerable and therefore could not be said that the third respondent's negligence was gross.

[7] Consequently, the arbitrator decided that given that the negligence committed by the third respondent was not gross and given that the

applicant was inconsistent in applying the sanction of dismissal, the third respondent's dismissal was unfair.

[8] As the arbitrator found there was no basis to refuse reinstatement, but excepting that the applicant was negligent, the arbitrator ordered the third respondent's reinstatement without retrospective effect and imposed an alternative sanction of a final warning for negligence valid for 12 months.

Grounds of review

[9] The two principal grounds of review persisted with by the applicant related to the arbitrator's finding that the third respondent was only guilty of negligence and not gross negligence, and the arbitrator's treatment of the consistency question.

[10] In relation to the arbitrator's finding of negligence, the applicant contends that the arbitrator could not have reasonably considered the degree of negligence entailed by the third respondent failing to conduct a proper visual and physical check of the firearm which he removed from the safe. In this regard, the applicant contends that the arbitrator failed to consider that it would have been obvious to the third respondent simply from the shape of the weapon in the safe position that the weapon he had retrieved from the safe was not in the safe position. It was also argued that it should have been apparent that the weight of the weapon was different with a magazine loaded in it as opposed to a weapon without a loaded magazine. Consequently, the applicant submitted that the arbitrator could not reasonably have come to the conclusion that the third respondent's conduct was merely negligent rather than grossly negligent.

[11] On the question of consistency, the applicant readily agrees that the reduction of the sanction of dismissal in the case of the other employee who had discharged a firearm was an erroneous approach given that the basis for doing so was a procedural flaw in the disciplinary enquiry, rather than an issue having a bearing on the substantive fairness of the sanction.

Evaluation

Finding of negligence

[12] The arbitrator's approach in determining whether or not the third respondent was guilty of gross negligence was somewhat roundabout. The arbitrator determine the issue by asking whether the degree of negligence was such that it would be intolerable for the third respondent to remain in the applicants employment based on his act of negligence. While the severity of misconduct may no doubt affect the ability to continue the employment relationship, the severity of the misconduct should be determined before deciding whether in consequence of that conduct and other factors, the employment relationship could endure. In effect, the arbitrator collapsed the consideration of two distinct, if related, issues.

[13] On the approach in ***Herholdt v Nedbank*** [1] and ***Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA*** [2] patent errors in the arbitrator's reasoning or approach do not end the enquiry on review: what matters is if the conclusion is sustainable on the evidence before the arbitrator.

[14] In this instance it is difficult to escape the conclusion that the third respondent was grossly negligent in failing to notice the obvious configuration of the weapon that was inconsistent with what the third respondent knew it ought to have been having made his own weapon safe just an hour earlier. Even if his act of negligence was not the sole cause of the event which could have had serious consequences, it does not mean his conduct merely amounted to negligence. I do not think, in the circumstances that the arbitrator could reasonably have concluded that the third respondent's conduct was not grossly negligent.

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[1] (2013) 34 ILJ 2795 (SCA) at 2806, para [25]

[2] (2014) 35 ILJ 943 (LAC) at 950, para [21]

Consistency

[15] A useful summary of the courts' approach to the issue of consistent treatment as an element of substantive fairness is set out in the judgment in ***Mphigalale v Safety & Security Sectoral Bargaining Council & others***[3], in which the learned judge stated:

> *"As a general rule, fairness requires that like cases be dealt with alike, whether in the consistent enforcement of a rule or in the imposition of a penalty. As pointed out by Brassey in 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229:*
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> *'The parity principle, a basic tenet of fairness, requires that like cases should be treated alike: if two employees are caught committing much the same wrong, one should not be disciplined if the other goes free; nor, if their personal circumstances are much the same, should one be more severely punished than the other.'*
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> *[19] Inherent in making the decision as to whether to dismiss or not, there exists inevitably the potential for some degree of inconsistency. Conradie JA in SACCAWU & others v Irvin & Johnson Ltd found that -*
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> *'the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision ... a wrong decision can*
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> *only be unfair if it is capricious, or induced by improper motives, or worse, by a discriminating management policy'.*
>
> *[20] The LAC continued:*

[3] (2012) 33 ILJ 1464 (LC)

'[I]t must be so that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency.... While the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias.'

[21] In Southern Sun Hotel Interests (Pty) Ltd v CCMA & others, Van Niekerk J reiterated that there existed no confusion in the jurisprudence as it relates to the consistency requirement, nor any conflict between the decisions of the Labour Appeal Court in SACCAWU & others v Irvin & Johnson and Cape Town City Council v Masitho & others. Nugent JA in Masitho cites with approval the conclusion in SACCAWU that an employer 'cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency' but indicates that the proper course is to let employees know 'clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future'."[4]

[16] What the arbitrator did in this instance was to compare the sanction imposed on the third respondent with the sanction imposed on another employee, which on the arbitrator's own reasoning had been erroneously determined. As such, the arbitrator misconstrued the application of the principle of consistency.

[4] At 1471-2 (footnotes omitted)

Relief

[17] It follows from the above that the two pillars on which the arbitrator's finding of substantive unfairness to rests cannot be sustained on a reasonable basis. The appropriateness of the third respondent's dismissal can only be evaluated on the basis that he was guilty of gross misconduct and that there are no issues of inconsistent treatment which should have affected the substantive fairness of his dismissal.

[18] Nonetheless, it is by no means a foregone conclusion that an arbitrator would find that dismissal was the appropriate sanction, and this issue requires reconsideration. There are a number of factors, some of which were considered by the arbitrator, which have to be weighed up in this regard. It may be that this court would be in a position to determine that on the record, but I am concerned that the parties ought to be given an opportunity to make fresh submissions in the light of the findings which I am substituting for those of the arbitrator.

Order

[19] The arbitrator's finding that the third respondent was guilty of negligence is set aside and replaced with a finding that the third respondent was guilty of gross negligence.

[20] The arbitrator's finding that there was inconsistent treatment of the third respondent in relation to the sanction of dismissal imposed on him, is set aside and replaced with a finding that he was not inconsistently treated in relation to the sanction imposed on him by the applicant.

[21] In consequence, the arbitrator's finding that the third respondent's dismissal was substantively unfair is reviewed and set aside.

[22] The matter is remitted back to the first respondent for a hearing before a Commissioner other than the second respondent to determine the substantive fairness of the third respondent's dismissal on the record in these proceedings and after hearing the parties' submissions on whether or not dismissal was an appropriate sanction.

[23] No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	H Schensema of Hogan Lovells (SA) incorporated as Routledge Modise Inc.
FIRST RESPONDENT:	M Niehaus of Minnaar Niehaus Attorneys