IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 70/2018

In the matter between:

SWEET JAMES **Applicant**

and

NAMCON LOGISTICS (PTY) LTD **Respondent**

Heard: **09 June 2020**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10 September 2020.**

JUDGMENT

MAHOSI J

Introduction

[1] The applicant approached this Court by way of a statement of claim challenging his dismissal by the respondent based on allegations of misconduct. He claims that his dismissal constitutes an unfair dismissal as contemplated in section 188, read with section 189 of the Labour Relations Act[1] (LRA) and further that his dismissal extends to an automatically unfair dismissal as envisaged in section 187 (1)(d)(i) of the LRA.

Material background facts

[2] The respondent operates in the freight industry and provides import and export transport services to its clients between the Republic of South Africa and Namibia. Its warehouse is based in Kempton Park. It makes use of trailers attached to trucks to load client's consignment.

[3] The applicant was employed by the respondent on 20 August 2016, and at the time of his dismissal, he held the position of warehouse manager.

Applicant's case

[4] The applicant's case is that his demise was set in motion when he, on 21 January 2017, whilst moving air conditioning units on a trailer, fell and injured his right shoulder.

[5] He reported the incident to the depot manager, Mr. Brendon Beck (Mr. Beck), his assistant Mr. Lawrence Solomon (Mr. Solomon) and subsequently Ms. Tania Wilson (Ms. Wilson) the respondent's chief operating officer. He did so with the object of getting assistance with the injury on duty claim as provided for in the Compensation for Occupational Injuries and Disease Act[2] (COIDA). This was done on the Monday of 23 January 2017. According to him, Mr. Wilson and the owner of the business Mr. Gerhard Rheeder (Mr. Rheeder) advised him that instead of laying a claim in terms of COIDA, he should claim from his medical aid fund.

[1] Act 66 of 1995 as amended.
[2] Act 130 of 1993.

[6] On 22 March 2017, the applicant underwent surgery on his shoulder. Following that, and on 15 May 2017, he sent an email to Ms. Wilson and Mr. Rheeder compelling them to submit his claim in terms of COIDA. According to him, the respondent had failed to comply with its statutory obligations as envisaged in section 39 (1) of the COIDA in that it had not submitted his claim within the prescribed seven days as envisaged in COIDA.

[7] The applicant received a response from Ms. Wilson on 19 May 2017, stating that the matter had already been reported to the Compensation Commissioner in CL2 form on Monday of 23 January 2017, when the applicant had initially reported the matter.

[8] It was following these events, on 31 May 2017, that the applicant was summoned to a disciplinary hearing and given a written warning. No disciplinary hearing was taken against Christine Steenkamp (Ms Steenkamp) who broke the wheels of the trolley and it was only after the applicant informed the chairperson of the disciplinary hearing that Albert Seakamela (Mr Seakamela) welded the wheel on the trolley that he (Seakamela) was issued with a warning

[9] Although he was promoted to the warehouse manager position in October 2016, he was presented with his job description on 06 June 2017 after the lodgment of his grievance.

[10] On 10 July 207, the applicant lodged another grievance against the respondent and Ms Wilson for, *inter alia*, failing to attend to his injury on duty claim and for being issued with unfair disciplinary warnings as a result of lodging the previous grievance.

[11] On 19 July 2017, the applicant was issued with a final written warning for an alleged negligence in the performance of his duties and responsibilities in that on 30 June 2017, he loaded clothing meant for the respondent's Winhoek branch without the respondent's permission.

[12] On 20 July 2017, the applicant's trade union representative forwarded an email to Ms Wilson in terms of which she was requested to furnish certain outstanding information to finalise the applicant's claim with the Compensation

Commissioner. Ms Wilson respondent on 24 July 2017 by providing a claim number.

[13] On the same day, the applicant was issued with a notice to attend a disciplinary hearing for a charge relating to negligence in the performance of his duties and responsibilities

[14] The disciplinary hearing was held on 31 July 2017 and the applicant was issued with a notice of summary dismissal on 7 August 2017. The applicant filed an appeal on 14 August 2017, but it was dismissed on 31 August 2017.

[15] Aggrieved with the respondent's decision to dismiss him, the applicant referred an automatically unfair dismissal to the National Bargaining Council for the Road Freight Industry for conciliation. However, the dispute could not be resolved through conciliation. It was for that reason that the applicant launched his claim, which is the subject matter of this application.

The respondent's case and the disciplinary hearing

[16] In its opposition of the applicant's claim, the respondent denied that the applicant's dismissal was procedurally and substantively unfair and set out the following defence:

16.1 The applicant was dismissed for a series of acts of misconduct arising from negligence in the performance of his duties. This relates to the written warning of 31 May 2017, after the applicant failed to report a broken wheel of a trolley as per the respondent's rule. According to the respondent, instead, the applicant instructed his subordinate Mr Seakamela, to fix the wheel without reporting it. Mr Seakamela, together with the applicant received written warnings for their transgressions.

16.2 On 30 June 2017, the applicant allowed clothing which was to travel outside the borders of the Republic of South Africa, to be loaded in a vehicle without listing these clothing in the applicable manifest. For this infraction, the applicant received a written warning.

16.3 On 17 July 2017, the applicant indicated that the correct number of boxes (four) and goods were loaded whilst other boxes were left behind in the warehouse.

[17] It was the incident of 17 July 2017 that led to the applicant's formal disciplinary inquiry, which resulted in his summary dismissal on 31 August 2017.

[18] In response to the applicant's claim of inconsistency in the application of discipline, the respondent asserts the following:

18.1 In respect of the written warning, the respondent stated that the breaking of the wheel was not the thrust of the applicant's charge, but failure to report same. Therefore, the argument that Ms. Steenkamp who was the person who rode on the trolley resulting in the wheel breaking, was never disciplined is not correct.

Issues before the Court

[19] In the pre-trial minute, the parties placed the following facts in dispute requiring the Court's determination:

19.1 Whether the applicant's dismissal was as a result of the lodging of the grievance with respect to his injury on duty claim.

19.2 Whether the applicant's dismissal constitutes an automatically unfair dismissal in terms of section 187(1)(*d*)(i) of the LRA.

19.3 In the event that the Court finds that the applicant's dismissal was automatically unfair, whether the applicant is entitled to compensation and the quantum thereof.

The applicant's evidence

[20] The applicant testified that he was first employed by the respondent as a code 14 driver in August 2016. He was, two months into the job, promoted to the position of warehouse manager. At the time of his dismissal, he was earning R 30, 500 per month. He was never guided or received any counseling on this position. He asked the owner, Mr Rheeder whether he would be offered

training but did not receive any. He had no prior experience as a warehouse manager.

[21] On Saturday 21 January 2017, whilst climbing a trailer to move air conditioning units on the trailer to prevent it from damage whilst in transit, he fell and injured his right shoulder. The following Monday, 23 January 2017, he reported the incident to Mr Beck, his assistant Mr Solomon and Ms Wilson.

[22] Following the injury that he sustained, he asked Mr Lawrence and Ms Wilson for assistance in claiming for injury on duty, but was told to claim from his medical aid. However, as he had not been with the medical aid for three months, his claim was rejected.

[23] He had surgery on his shoulder and following that, he enquired from Ms Wilson as to the status of his injury on duty claim. Ms Wilson provided him with an email which purported to be proof of submission of his claim. He was not satisfied because the purported submission was made to an unknown individual with email address: dewiekus@mweb.co.za. He was not satisfied that the respondent complied with section 39 of COIDA.

[24] The cost of his surgery amounted to R 150 000.00. As he did not have funds, he had to get a loan from Sanlam and used some savings to cover the cost of the surgery.

[25] The respondent was aware that he had underwent surgery because even when he went for surgery, he called the respondent a couple of times to ask for assistance regarding his injury on duty claim. However, no one came to his aid.

[26] Following his surgery, he was unable to use his right hand and needed to walk in a sling as he had torn his muscles during the fall. As regards his ability to perform his duties, he struggled as he would be alone and had no assistance. His testimony was that 'I had to struggle alone'[3] He was never provided training and could only recall Ms Wilson coming to show him how to use the computer and how to send things to Cape Town and back and nothing more. He denied that he refused training.

[3] Transcript at page 17 line 20.

[27] To the second misconduct, which is a charge that he had failed to load all boxes that were transported to Namibia, but which were ticked on his manifest, he explained that when he took the manifest, he would check if the goods are marked on the weigh bill on the floor and then the goods would be loaded onto the trucks. The goods on the manifest must correspond with the goods on the weigh bill. The forklift drivers are responsible for loading the goods on the trucks. He was adamant that the goods were loaded on the truck that was travelling to Namibia. Following this incident, he was informed that not all boxes were delivered to the client.

[28] He was arraigned to a disciplinary hearing. Present at the hearing were Mr Beck, the depot manager and someone from SEESA. He enquired why there was no one from Human Resources and protested that 'this is wrong'. He was informed to just answer questions with a 'yes' or 'no' and given a written warning which he refused to sign.

[29] Following this, he lodged a grievance regarding victimisation and intolerable working conditions. To this, he complained that he had been disciplined unfairly for conduct of other employees. He gave examples of the trolley issue, that Santie, who was the person who loaded the boxes to Namibia and others were not disciplined as him.

[30] The proverbial nail in the coffin was the charge of negligence in that on 30 June 2017, he loaded clothing meant for the Windhoek branch without permission. His evidence to this charge was that it was Mr. Beck who came to him and requested him to load the truck as he was sending Mr. Solomon to pay VAT. He told him how to pack the clothing on top of the uniforms so that if something happens on the road and the truck encounters thieves, it would be the clothing that gets stolen instead of the uniforms. He agreed and did as instructed by Mr. Beck. His evidence was that the practice at the respondent was that once a truck is loaded, photographs would be taken. On this occasion, Mr. Beck took the camera and they both went to the truck where he showed Mr. Beck how the clothing was packed to his specifications. According to him, Mr. Beck was satisfied and continued to take pictures.

[31] On 20 July 2017, the applicant's attorney Ms. Bongi Zulu wrote to Ms. Wilson and in short, recorded the following:

31.1 That she has met with senior personnel at the Compensation Commissioner and that it was revealed that the respondent failed to register the applicant's claim on time.

31.2 The respondent only registered the applicant's claim on 27 May 2017 after he lodged a grievance, still, the respondent did not provide all the information required.

31.3 Although a claim number was provided, the respondent still had to provide reasons for the late submission, confirm the applicant's earnings, signed accident claim form, doctors report and invoices on the system.

[32] Ms. Zulu signs off by requesting the respondent to capture all required information and to activate and finalise the claim and advises that the applicant was due to undergo another operation and has no financial means to do so.

[33] The applicant testified that he still had to go for a complete shoulder replacement operation. He reiterated the claim that he sent an email to Ms Wilson compelling her to submit his injury on duty claim. At the time of the sitting of the trial, he was not aware as to whether the respondent had provided the reasons for the late submission of his claim to the Compensation Commissioner.

[34] This triggered the series of disciplinary charges against him. According to his evidence, if anything wrong had happened before, nothing much would be make out of it and management would not even take care of it. According to him, since he kept on enquiring about his claim, the disciplinary charges started.

[35] The applicant's union representative sent an email to Ms Wilson requesting the respondent to capture certain information, which was outstanding in order to activate and finalise the applicant's injury on duty claim with the Compensation Commissioner because the applicant needed to undergo

another surgery on his shoulder. This request was met with a response of a claim number from Ms. Wilson.

[36] An email from Ms. Wilson was read into the record. The crux thereof is captured at the close of the email as follows:

> 'I would never advise you not to report the matter to the Compensation Commissioner and use your medical aid, as you stated. Mr Rheeder also advised you to report it to the Compensation Commissioner on a couple of occasions, and you said you do not want to work through them'.

[37] The applicant refuted Ms. Wilson's claim that he did not want to work through the Compensation Commissioner. He explained that because he had not been three months on with the medical aid, he could not decline claiming from the Compensation Commissioner as his claim was rejected already in March 2017.

[38] He would not have reported the injury if he had not wanted to work through the Compensation Commissioner. He had wanted and believed that the respondent would register his injury with the Compensation Commissioner. He denied shunning the opportunity to use the respondent's doctors and the Compensation Commissioner.

[39] He testified further that post his injury, two of his colleagues were injured at work and that the respondent had helped these employees with their claims.

[40] Frustrated by the situation, the applicant went to report the matter to the department of labour. His evidence is that whilst still there, an official of the department of labour called Ms. Wilson and asked why the applicant was not registered. Shortly thereafter, Ms. Wilson registered him.

[41] It is after the steps he had taken that according to him, the disciplinary issues began. It is common cause that between the period 31 May to 31 July 2017, a total of four disciplinary actions were taken against the applicant, ultimately leading to his dismissal.

[42] Regarding his alleged transgressions, the applicant testified that the first incident was not his fault but that Ms. Steenkamp had climbed and rode on the

trolley breaking a wheel. He reported the incident to Mr. Beck and his response was a 'thank you'. Ms. Steenkamp was never disciplined for breaking the wheel.

[43] It was at the backdrop of this incident that he was given the job description by Ms Wilson. He subsequently wrote an email to Ms. Wilson which was read into the record, basically giving an undertaking that he would do his work to the best of his abilities, do some basics on electronics and drawing Ms. Wilson's attention to the fact that his working arm was injured.

[44] Prior to the fall, the injury and the grievance, the applicant enjoyed a clean disciplinary record.

[45] During cross-examination, the applicant reiterated that he was not given training or assistance.

The respondent's evidence

[46] The respondent presented its case through two witnesses. First on the witness stand was Ms. Wilson who testified that the reason that the applicant was issued with the job description in June 2017 was that he was given all instructions verbally about what was expected of him. It was after there were some 'sudden issues there and there' that she gave the applicant his job description.

[47] She conceded that the respondent only reported the applicant's injury in May 2017. She explained that this was because when the applicant first reported the injury, he wanted to use his own doctors and did not want the respondent to report the injury to the Compensation Commissioner. She could not force the applicant to report the injury if he did not want to.

[48] The applicant never submitted any medical reports or any medical bills to the respondent.

[49] Asked why the respondent decided to dismiss the applicant, her response was that the applicant was becoming a liability and the respondent was scared that there would be fines at the border if the applicant kept on making mistakes.

[50] When asked in cross-examination as to why would the applicant report the injury to the respondent if he insisted on using his own doctors, Ms Wilson said that she did not know why but admitted that the applicant did report the injury and that the respondent only reported it to the Compensation Commissioner in May 2017. She admitted that 'we made a mistake there, yes'.

[51] It was put to Ms. Wilson that failure by an employer to report an employee's injury to the Compensation Commissioner amounts to committing an offence, and so goes for acceding to the employee's demands not to report same.

[52] Ms. Wilson admitted that even if an employee insists on using his own doctors, the employer has a legal obligation to still report the injury. She admitted guilt for not reporting the applicant's injury but explained that even the Compensation Commissioner did not fine the respondent for so doing.

[53] She did not request the applicant's medical bills because he had insisted on using his own doctors. The respondent did not offer to assist the applicant with his medical bills because it was paying him his full salary without deductions during his time off work.

[54] The applicant requested assistance with his medical bills and that is when the injury was reported to the Compensation Commissioner.

[55] The applicant's wife sent the respondent details of the applicant's doctor and she requested medical reports from the applicant's doctor but the doctor refused because they do not work with the Compensation Commissioner.

[56] It is common cause that the applicant was, at the time of his dismissal, on a final written warning for negligence in the performance of his duties. The charge leading to his dismissal stems from the applicant's loading of clothing meant for the respondent's Windhoek branch without permission.

[57] Following this, and on the same day, the applicant received another notice to attend a disciplinary hearing. The charge again was negligence in the performance of his duties and responsibilities.

[58] According to Ms. Wilson, the applicant started having a little bit of issues and this prompted the respondent to give the applicant a job description. For eight months, the applicant did a great job and there was no need to provide him with a job description.

[59] She testified that the applicant's injury was only reported in May 2017. She stated that the applicant refused to let the respondent report the injury but instead wanted to use his own doctor. Further that she had not seen any of the applicant's medical bills.

[60] In respect of the applicant's claim that following his injury, he was never given assistance, Ms. Wilson testified that the applicant reported for duty. Further that although he was on a sling, he performed light duty and therefore, the respondent could not tell whether he was in pain or needed assistance.

[61] Pressed on this issue by the applicant's counsel Ms. Wilson had this comment[4]:

> ' MS WILSON: it is not, he did not need assistance. What must somebody do, just walk behind him the whole time with the manifest, the paper in his hand? That is what I do not understand'

[62] The respondent's second witness was Mr. Beck, the warehouse manager at the respondent. At the time of the applicant's dismissal, he was the depot manager. Mr. Beck explained that the applicant's responsibility was to tick off all the documents that were correctly loaded on the manifest and the weigh bill. This evidence spoke to the incident that led to the applicant's written warning. He was informed by the Windhoek branch that the goods were short on the manifest and he then advised the applicant of same.

[63] On the trolley incident, he testified that he received a claim from a customer who had received a trolley with a broken wheel. He went to check surveillance footage, and there he observed Ms. Steenkamp riding the trolley. In watch were the applicant and Mr. Seakamela. He saw the wheel brake and observed as the applicant and Mr. Seakamela fixed the wheel. The applicant did not

[4] Transcribed record at page 119

inform him about this incident. He handed this information to Human Resources to institute disciplinary proceedings.

[64] Ms. Steenkamp did not work for the respondent but was only based at their depot as an employee of a client of the respondent CC Logistics, hence she was not disciplined. It was Mr. Seakamela and the applicant who were disciplined.

[65] On the applicant's claim that he was never assisted, Mr. Beck refuted this and stated that he had offered the applicant assistance and training at every point but the applicant refused his help. He stated that whenever he wanted to help the applicant his answer would be 'it is okay, I will manage.' Furthermore, he stated that the applicant came with knowledge of the job and what he needed to do. Had the applicant accepted the offer of assistance, he would have been the one to help him.

[66] He stated that after the year end, the company decided to issue everyone with job descriptions although no one's job and description changed. This was because the respondent was having issues with staff members. The issuing of job descriptions was across the whole organisation.

[67] Testifying on the applicant's final written warning; Mr. Beck stated that he was the one who issued the final written warning to the applicant. The respondent's representative's from SEESA decided that after similar offences, disciplinary action should be taken against the applicant.

[68] He confirmed that at the hearing, it was only he, the applicant and SEESA representative present. The representative of SEESA is used by the respondent to ensure impartiality and fairness. He only meets with the representative chairing the hearing for the first time at the hearing. He denied that the applicant was not allowed to ask questions but only to answer 'yes' or 'no'.

[69] He further denied giving the applicant instructions to load the boxes without the correct paperwork. If such instruction was given, it would be to offload

something or load something. This is so because VAT would have been paid and such instruction would be communicated to all staff members via email.

[70] He testified that anyone including himself who commits any act of misconduct has been disciplined in the past and further that Human Resources has warned that any offence as simple as loading the wrong box can close down the whole company.

[71] He did not know about the applicant's grievance until after a while as it was sent to Ms. Wilson. He only found out about the applicant's grievance when they went for arbitration at the Commission for Conciliation, Mediation and Arbitration (CCMA). Although he never knew about the grievance 'at all', he testified that the three (Ms. Wilson, Mr Rheeder and the applicant) dealt with it amongst themselves.

[72] On the working relationship with the applicant, he testified that he and the applicant spoke more, became more friendly after the grievance, to an extent that the applicant even started asking him for help. The applicant paid more attention to his work. He was of the view that the applicant was more social and asking for help because he had lodged a grievance.

[73] He testified that it was SEESA's recommendation to dismiss the applicant. He denied that the applicant reported the injury to him. Instead, the applicant made a pronouncement on the lobby of the reception area where Mr Solomons sits. If the applicant had reported the injury to him directly, there are procedures which he would have followed and he would have made the applicant to complete the Workmen's Compensation form. Whenever an employee is injured, he would have known which hospitals to take them to because his wife worked at a hospital which deals with Road Accident Fund (RAF) and injury on duty.

[74] He was not on duty when the applicant got injured and he only received all the information from Mr. Solomons who was the person the pronouncement regarding the injury was made to and who was told whenever the applicant went for specialist treatment. He was never included in the applicant's injury

issues. According to him, Ms. Wilson and Mr. Rheeder dealt with the issue with the applicant amongst themselves.

[75] In respect of the job description, Mr. Beck testified that the company decided to rollout job descriptions to employees after the year end and that it was not only the applicant who was provided with a job description.

[76] As the warehouse manager, the applicant was good at loading, he decreased the number of damages the respondent had.

[77] Regarding the applicant's claim that he was never offered assistance, Mr. Beck testified that the applicant had previously refused assistance but that it was only following the injury and grievance, did the applicant accept help. He needed help only once.

[78] On issues of discipline, he testified that whenever there was a complaint, he investigates, digs deeper, makes findings and submits his evidence to Human Resources. SEESA would then advise on the matter right up to the point of dismissal. SEESA decides on the disciplinary measures an employee must receive.

[79] When he was questioned as to why there was no evidence of his investigations regarding the applicant's manifest and only an email from Ms. Wilson engaging the applicant about the incident, his response was that Ms. Wilson could have found out about the box incident from Erasmus.

[80] Regarding the procedure of transportation of goods, his evidence was that there would be a handwritten weigh bill, with three copies (white (the respondent's original), yellow (Namibian Customer) and green (respondent's customer). Boxes are received and weighed and dimensions done. An invoice is created and the box would go into the warehouse. A sticker would be printed according to the number of boxes and for each box. Each weigh bill captured is added to a specific manifest. Once added, it would go to the person loading it. In this case, it would be the applicant who would check the weigh bill and tick off and move it to an area, a staging area where it would be loaded onto a truck. Where there are single or multiple boxes, a pallet would

be made consisting of different clients on one pallet. There the boxes would be packed loose. The applicant would point out the goods to a forklift driver who would load the goods on the truck. During this process, the applicant would have to verify that the specific weigh bill number matches the manifest.

[81] Any goods that do not have a weigh bill sticker are not loaded on the truck but are moved to an area called 'jail'. Also, this is an area where goods that have issues lie for example when the VAT number is not working or there is no invoice. As the depot manager, the applicant would be called to verify when the truck is loaded and take pictures of it. Further that the pictures are not for individual boxes but for the whole 18-meter truck.

[82] Since taking up the position of warehouse manager, he made a mistake while loading three trucks and received a written warning for that transgression. He admitted that any human being could make mistakes in that job.

[83] He denied that at the disciplinary hearing, the applicant was the initiator and the only witness for the respondent. He could not accept that he never said the applicant could no longer be trusted as an employee of the respondent.

[84] He never knew about the applicant having lodged a grievance. The first time he learned of the applicant's grievance was when the applicant was dismissed.

Analysis

[85] The crux of the issue before this Court is whether the applicant was dismissed as a result of misconduct or whether his dismissal was the result of him lodging a grievance and thus automatically unfair and falling within the realm of section 187 (1) (d) of the LRA.

[86] This line is drawn by the fact that the applicant alleges that his dismissal was preceded by a series of disciplinary processes initiated by the respondent after the respondent failed to report his injury to the Compensation Commissioner on time and after he had lodged a grievance.

[87] Summing up the evidence, the applicant stated that since the time of his injury, and lodging a grievance, he became a target of disciplinary action. He referred an unfair labour practice dispute as a result.

[88] Following his dismissal, he referred an automatically unfair dismissal to the National Bargaining Council for the Road Freight Industry. The dispute remained unresolved at 25 October 2017.

[89] Mr. Deviliers for the respondent urged this Court not to decide the unfairness but only to the extent that the dismissal was automatically unfair. If not, then remit the matter or let the applicant re-refer an unfair dismissal dispute.

[90] To pass muster, I have to decide this dispute in line with the evidence presented before me. I must at the outset, point out that it was frustratingly difficult to follow the respondent's witnesses. From the unwillingness to answer simple questions, being evasive and making out new defence as the trial developed.

[91] The applicant, although not rendering award-winning performance, was consistent in his testimony and under cross-examination. Much of the evidence was spent on arguments with the applicant's counsel and I deal with the evidence in turn.

[92] Ms. Wilson was liquid in her evidence and downplayed the respondent's role in the applicant's failure to receive compensation as envisaged in COIDA. On more than one occasion, she could not recall events. She blamed her memory for not being able to answer simple questions. For example, it was only when confronted with an email that she sent contents which read:

> 'Dear Reader
>
> 'Attached find the first medical report in respect of an accident that must please be completed.'

[93] It took some pressing cross-examination that she conceded that she received medical reports and was aware that the applicant had to undergo surgery on 22 March 2017.

[94] The respondent mounted an attack on the authenticity of the applicant's injury suggesting that the respondent had injured himself in another incident. This was only mentioned at trial and nowhere in the pleadings and pre-trial minute was this the respondent's case. To me, this is disingenuous. Ms. Wilson, in her email to Mr. Beck and Mr Solomon, asks '*Toe Sweet van die trok af deval het in Januarie, wat het gebeur? Hy se hy het jou gebe*l'

[95] It is mind-boggling why the response to this email was not testified to, nor was it discovered. She admits in her evidence that the reason she was enquiring about the incident was because the applicant had lodged a grievance. She further testified that the applicant was becoming a headache, he wanted money and that he was seeking assistance.

[96] There can be no argument that the issuing of the job description coincided with the grievance. Ms Wilson's attempts to talk down the respondent's failure to report the applicant's injury on duty claim with the Compensation Commissioner is startling. Her testimony changed from one moment she had not seen any medical reports, to the applicant's doctor refusing to share same but eventually admitting to being the author of the email attaching the applicant's medical reports.

[97] Equally so, Mr. Beck was constrained to distancing himself with the applicant's injury and grievance. Mr. Beck's evidence that he only got knowledge of the applicant's grievance was at the CCMA is hard to believe. It is harder to believe that as depot manager, he would not know or may not have been told by Ms. Wilson that the applicant had lodged a grievance.

[98] Regarding the misconduct that led to the applicant's dismissal, Mr. Beck himself admitted that certain boxes do not have arrows indicating top or bottom and that one of the boxes which the applicant was disciplined for leaving behind had a sticker at the bottom. If his earlier evidence is to be accepted, such boxes would be left at the jail area.

[99] In material respects, both Mr. Beck and Ms. Wilson contradicted each other's evidence. Mr. Beck managed not much for the respondent's case but to place almost all issues on Ms. Wilson's proverbial table.

[100] Whether or not the applicant was guilty of the misconduct which ultimately led to his demise is vitiated by the flimsy evidence mounted by the respondent's witnesses. In the end, even if I am wrong, this Court was not called to decide the disciplinary charges against the applicant.

[101] All in all, Mr. Beck left nothing to the imagination that he was the judge, jury and executioner in the applicant's alleged misconduct. In my mind, Ms. Wilson was correct in stating that the applicant had become a problem for the respondent. Whether he stood a chance after persistently asking questions about his injury on claim is anyone's guess.

Legal principles

[102] Section 187 of the LRA provides categories for which employees may not be dismissed Section of the LRA provides:

> '(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-
>
> (a) …
>
> (b) …
>
> (c) ..
>
> (d) that the employee took action, or indicated an intention to take action against the employer by-
>
> (i) exercising any right conferred by this Act; or
>
> (ii) participating in any proceedings in terms of this Act'

[103] Subsequent to the hearing of this matter, and while preparing this judgment, my attention was arrested by the recent judgment of the Labour Appeal Court (LAC) in the matter of *DBT Technologies (Pty) Ltd v Mariela Garnevska*[5]. In similar fashion, the respondent employee had lodged a grievance and referred a dispute to the CCMA. In overturning the Labour Court's decision that the

[5] Unreported judgment under case no. JA 61/2018 handed on 18 May 2020.

dismissal was automatically unfair as contemplated in section 187 (1) (d) of the LRA. The LAC laid down the test in section 187 (1)(d) disputes thus:

'[13] Section 187 of the LRA lists reasons for which employees may not be dismissed and categorises such specific reasons as automatically unfair. The categorisation of the reasons specified in section 187(1) of the LRA as automatically unfair means that they cannot be conceived as reasons related to misconduct, incapacity or operational requirements. If it is established on the evidence that the reason for the dismissal was one of those proscribed in section 187(1) of the LRA, there are two advantages. The employer can raise no general justification based on general principles of fairness, and the employee can claim increased compensation in terms of section 194(3) of the LRA (24 months of remuneration) in the event that she does not want reinstatement. Additionally, in terms of section 191(5)(b) only the Labour Court and not the Commission for Conciliation, Mediation and Arbitration ("the CCMA") has jurisdiction to determine an automatically unfair dismissal.

[14] To reiterate: the respondent's pleaded cause of action is that she was dismissed on the prohibited ground in section 187(1)(d) of the LRA. The appellant says the reason for her dismissal was dishonest misconduct. Whether a dismissal is automatically unfair is essentially an enquiry into its causation and whether the reason for the dismissal was one of the grounds listed in section 187(1) of the LRA. The essential inquiry under section 187(1)(d) of the LRA is whether the reason for the dismissal was "that the employee took action, or indicated an intention to take action, against the employer" by exercising any right conferred by the LRA or participating in any proceedings in terms of the LRA. The test for determining the true reason is that laid down in *SA Chemical Workers Union v Afrox Ltd*. The court must determine factual causation by asking whether the dismissal would have occurred if the employee had not taken action against the employer. If the answer is yes, then the dismissal is 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 the taking of action against the employer

> was the main, dominant, proximate or most likely cause of the dismissal.'

[104] This reasoning by the LAC is on the finding that there had been no evidence that the respondent had taken action or indicated an intention to take action against the employer and that the only action that she took was her unfair dismissal referral post her dismissal.

[105] I have made my findings above, and in my view, although the principle in *DBT* is clear, the facts in this matter differ. Not intending to be repetitive, the applicant lodged a grievance against the employer when it failed to submit his injury on duty claim as contemplated in section 139 (1) of COIDA. He would later approach the department of labour and attorneys to enforce his rights. Further, he lays claim on section 188 of the LRA. To my mind, it is reasonably sensible that the applicant would mount his case as he did.

[105] Both parties filed closing arguments and both relied on the *DBT* decision. In doing so, the applicant urged this Court to refer the matter to be arbitrated by the Bargaining Council and the respondent submitted that whilst it agreed that this Court lacks jurisdiction, the applicant was not entitled to any relief whatsoever as he failed to make out a case that he was dismissed on account of having filed a grievance.

[106] I disagree with both parties, read in whole, *DBT* does not close the door on a party, simply because they had not lodged a grievance. In considering the characterisation of provisions in section 187(1)(b) of the LRA, the Court found that to an extent that the filing of a grievance about the behaviour of another employee does not amount to taking action against the employer, the employee in that matter had not taken action or intended to take action against the employer. In clarifying the legal principles concerned, the Court stated as follows:

> 'As said, the filing of a grievance about the behaviour of another employee does not amount to taking action against the employer. It is a request by an employee for action to be taken to resolve an internal problem. Nor does it involve the direct exercise of a statutory right against the employer. Section 187(1)(d) of the LRA is not concerned with the filing of a grievance. It is directed rather at situations such

> as an employee exercising a right to refer a dispute to the CCMA or another governmental agency concerning the employer's conduct. A request by an employee to discipline another employee for alleged misconduct does not fall within the ambit of conduct targeted by the provision.' My emphasis

[107] In this matter, the applicant not only took action demonstrating that he intended taking action against the respondent. The complaint to the department of labour and the involvement of his attorneys brings his case within the categories under section 187(1)(b) of the LRA.

[108] It is clear that the respondent failed to lodge the applicant's injury on duty claim as contemplated in COIDA. Before this Court, Ms Wilson testified that although the respondent did not comply, it was never fined by the Compensation Commissioner, this by no means rights it's wrong. Further, the contention that the applicant was insistent on using his own doctors led to the non-compliance is fatal to its case. Nowhere in COIDA does it state that an employer must sit idle and fold its arms and not report an injury because an employee insists on using his/her own doctors. This would be a fallacy.

[109] Once again, when the applicant persisted on his questioning about his claim, suddenly he could do no right. Ms Wilson testified that the applicant became a problem for the respondent. Mr Beck testified that the applicant had done well prior to his injury and subsequent surgery. His evidence was that he could not use his right working hand and that he was never given assistance. Furthermore, he had to make loans to pay for his medical expenses. Ms Wilson disavowed this stating that no one could follow the applicant behind holding things for him.

[110] I can reach no conclusion than that the applicant's dismissal was automatically unfair.

Relief

[111] This leaves the Court with the issue of relief. The applicant sought compensation. Section 193(1)(c) of the LRA empowers this Court to order the employer to pay compensation to the employee in the circumstance that it finds the dismissal of the employee unfair. What is reasonable compensation in the case of an automatically unfair dismissal is 24 months. It would

undermine the drafters of legislation if I were to deviate from this provision. I, therefore, grant the applicant, compensation of 24 months.

Costs

[112] This Court has a discretion in awarding costs in terms of section 162 of the LRA. This principle has been qualified by a consideration of law and fairness. In *Zungu v Premier of Kwazulu-Natal and others*[6] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[113] I have considered the manner in which the respondent has handled the applicant's matter and I am of the view that this is a case where costs should follow the result.

[114] In the premises, I make the following order.

Order

1. The dismissal of the applicant by the respondent is automatically unfair.
2. The respondent is ordered to pay the applicant compensation equal to 24 months of his salary.
3. The respondent is ordered to pay the applicant compensation so ordered in 2 above within 10 days of the date of this order.
4. The respondent should pay the applicant's costs.

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D. Mahosi

Judge of the Labour Court of South Africa

[6] (2018) 39 ILJ 523 (CC).

Appearances

For the Applicant	:	Advocate Groenewald
Instructed by	:	Higgs Attorneys Incorporated
For the Respondent	:	Mr. Johannes Micheal De Villiers of De Villiers and Du Plessis Attorneys