

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

REPORTABLE

CASE NO: D781/05

Heard: 1-3, 10 August 2007

Delivered: 17 August 2007

Edited: 31 August 2007

In the matter between:

BRIAN THOMAS BOOTES

APPLICANT

And

EAGLE INK SYSTEMS KZ NATAL (PTY) LIMITED

RESPONDENT

JUDGMENT

PILLAY D, J

[1] Was the dismissal of the employee for misconduct, his HIV status, or both? That is the question for this court to answer after a three day trial.

[2] The employee is Brian Thomas Bootes, the applicant. The respondent, Eagle Ink Systems KZN (Pty) Ltd ("Eagle"), employed him as a technical sales representative from 1 October 1999 to 16 May 2005.

[3] Eagle is a subsidiary of Mimetes Holdings (Pty) Ltd. Samuel Walter Hamman ("Hamman") is the majority shareholder of Mimetes Holdings. He handled all the strategic and personnel issues in Eagle.

[4] Central to determining the true reason(s) for the employee's dismissal is the credibility of the witnesses for each party. In this context the circumstances of the termination of the employee's services from his previous employment become relevant. Determining the credibility of the parties on that issue is a curtain-raiser to the main issues.

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[5] The employee had previously been employed by Plascon. Continental, another subsidiary of Mimetes, acquired the business and staff of Plascon with effect from 1 August 2004. Hamman was the managing director of Continental. He became operationally involved in Eagle from 1 March 2005.

[6] The employee's services with Continental terminated. The circumstances of the termination are disputed. The employee alleges that he resigned because he found a job with Eagle. Hamman persists that the employee resigned after being confronted with allegations of misconduct relating to his selling chemicals to customers in competition with Continental.

[7] Hamman testified that in August 1999 the employee was driving him when he accidentally came upon a black note-book in which the employee had recorded his sales of chemicals. Continental also sold those chemicals. Infuriated by his discovery, Hamman returned to his office in Johannesburg. After discussing the matter with Jimmy Brink, the sales director, he summoned the employee to a meeting at the Spur in Durban the following day.

[8] He put to the employee that he was competing with Continental. The discussion became heated. It ended on the note that the employee should meet Hamman the next day with his lawyer to determine the way forward.

[9] The next day the employee and his attorney met Hamman. After Hamman explained the circumstances, the attorney and the employee caucused. The employee agreed to resign. He faxed his letter of resignation, Exhibit D, to Hamman on 3 September 1999. About the same time or soon thereafter Hamman learnt that the employee had secured a job with Eagle, which at that stage was a competitor. Hamman demanded repayment of the additional leave and sick leave and hospital expenses paid on behalf of the employee. This was an attempt to enforce the restraint of trade agreement on the employee. These benefits had been granted out of sympathy for the employee. They totalled R9 600. Continental abandoned this claim after its initial demand.

[10] That was Hamman's version about how the employee's services with Continental ended.

[11] The employee's version was that he had informed Hamman that he used to sell chemicals before he joined Plascon.¹ He denied that Hamman confronted him with the allegations of misconduct and that

¹ Volume 1, page 63, lines 5 – 6.

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he resigned on account of those allegations. He resigned because he got a better job offer from Eagle.² The lawyer present at the meeting at which he resigned represented Continental. So he testified.

[12] The circumstance which resulted in the termination of the employee's services with Continental was a peripheral issue. It was not even pleaded. It became relevant to credibility when the employee was cross-examined without objection from Ms *Ne/*who represented him. She objected for the first time to questions on this issue when Ms *Naidoo*, who represented Eagle, led Hamman's evidence-in-chief. This evidence had already been adduced without objection. It had become relevant to the credibility of both parties. Consequently, the objection was not sustained.

[13] On the third day of the trial Ms *Ne/*introduced Exhibit E, which is a bundle of correspondence exchanged with the employee when his services with Continental terminated. Hamman was recalled to be cross-examined on Exhibit E. The employee did not offer to testify at all about Exhibit E. His version was put to Hamman and Brink.

[13] One of the letters in Exhibit E is a notice dated 8 September 1999

² Volume 2, pages 196 – 7.

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from the employee to Hamman withdrawing and reinstating his resignation in terms of his contract of employment. The stated purpose of the letter was to enforce the three months' notice required on termination of the contract. In his initial resignation, Exhibit D, the employee tendered one month's notice.³ As the employee had failed to testify, his explanation for this change is not before the Court. The only version that the Court can rely on is that of Hamman, which was subjected to cross-examination and reinforced with corroboration from Brink.

[15] When negotiating his resignation, Hamman acceded to the employee's demand that, firstly, there should be no deductions against his salary towards the restraint of trade claim and, secondly, that he should be compensated for the use of Continental's car for one month.⁴ These concessions show that Hamman was keen to release the employee and was prepared to pay to see him go.

[16] The probabilities are that Hamman and Brink did confront the employee about allegations of misconduct. That triggered his resignation on one month's notice. Within days he found a job with Eagle. Even though he was due to start at Eagle on 1 October 1999, Hamman wanted his resignation with immediate effect, so much so that he might have been willing to pay the full contractual notice of three months. That would explain why the employee changed his demand to three months' notice pay.

[17] The employee's failure to take the stand to offer his explanation

³ Volume 2, page 219, line 10 – 25.

⁴ Volume 2, page 199.

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counts

heavily against him on this peripheral issue. His version is not credible.

[18] Hamman also presented as a witness who had a propensity to mislead the Court. In response to the employee's resignation he wrote: "It was with great disappointment that we (CPI) have accepted your resignation". Under cross-examination he explained that his legal adviser had told him to word his response so that the employee would not have a basis to institute a claim for constructive dismissal.⁵ As Hamman wanted the employee to leave his "disappointment" was false. Under re-examination he gave another explanation. He said that he was disappointed because the employee was doing a "positive" job and that he was being lost to the opposition.⁶

[19] The reliability of the witnesses has to be tested for credibility on each issue. A witness who lied about one issue may not be lying about others. The maxims "once untruthful, always untruthful" and "false in one thing, false in all" do not apply in our law of evidence.⁷ However, this curtain-raiser has forewarned the court that both witnesses could

⁵ Volume 2, page 263, line 17.

⁶ Volume 2, page 274, line 5.

⁷ Schwikkard and v d Merwe *Principles of Evidence* (2002) 503; Hoffmann and Zeffertt *The South African Law of Evidence* (1992) 611; *Rex v Levy* 1943 AD 558; *Rex v Kristusamy* 1945 AD 549; *Santam BPK v Biddulph* 2004 (5) SA 586 (SCA)

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be dishonest about the main issues.

Did the employee misconduct himself?

[20] Eagle charged the employee on 5 May 2005 as follows:

“2.1 Gross dishonesty in that you misused the company petrol card
in November 2004 by utilising it for a motor vehicle other than
yours.

2.2 Buying and selling in the first quarter of 2005 used printing blankets during company hours to clients of the company without prior permission or agreement with management.

2.3 Due to the above, causing a serious breach of the trust relationship with your employer and leading to the irreparable break-down of the employment relationship.”

[21] The hearing proceeded on 10 May 2005. On 16 May 2005 Eagle dismissed the employee on the second and third charges. On the second charge Eagle proceeded almost exclusively on the version tendered by the employee.

[22] The employee testified that he noticed that Eagle’s customers were not using some of their printing machines. He learnt that they were waiting for used printing blankets from Taiwan. He offered to supply them with the blankets so that by operating their machines they would buy more ink from Eagle. So it happened that for six years the employee supplied Eagle’s customers with used printing blankets as a “value added service”. Eagle’s customer, Divpac, was eventually his exclusive source for these blankets. When they became a product in demand and difficult to get, he started buying and selling them to Eagle’s customers for the same price at which he had bought them. Dan Naidoo, the coating manager at Divpac, charged him R80 for each blanket. The blankets from Taiwan cost the customers R120 each. Naidoo offered the employee 50% of the price of the blankets as “an act of appreciation”. Altogether the employee received R600 from the sale of the blankets.

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[23] Eagle contended that the transactions were not legitimate because:

23.1 Nampak, as the holding company of Divpac, would not have allowed its production staff to give waste products away. It had contracts for waste removal.⁸

23.2 Naidoo's job would have been on the line if Divpac found out about the deal.

23.3 There was no audit paper trail. If Eagle wanted blankets from Nampak there would be an official purchase order and invoice reflecting zero or a nominal value and a gate release.⁹

23.4 Even if Eagle employees were involved in the transaction for used blankets without the audit paper trail, it was wrong to receive money for waste that was acquired free of charge.¹⁰

23.5 The employee received money in his private capacity. He was moonlighting.¹¹ Hamman described "moonlighting" as "buying and selling blankets without permission and getting money for that".¹²

23.6 The employee was dishonest because he received money about which no one else knew. He made a secret profit.¹³

23.7 He acted against Eagle's interests. If Nampak had discovered the deal, it could have jeopardised the R180 million contract that Eagle was in the process of negotiating with Nampak at the time.

23.8 All in all, the employee broke the parties' trust relationship.

⁸ Volume 2, page 156; Volume 1, page 90, line 17.

⁹ Volume 2, page 157, line 19.

¹⁰ Volume 2, page 158, line 24.

¹¹ Volume 2, page 159, line 7.

¹² Volume 2, page 161, line 11.

¹³ Volume 2, page 163, lines 11 – 12.

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[24] In his defence, the employee contended that:

24.1 Eagle's management knew that he was selling the blankets and had on occasion participated by collecting, delivering and invoicing them and collecting money for them. He produced an invoice which he alleged Trevor Gandy, the general manager at the time, had issued, as proof of Gandy's knowledge of the deal. When he was hospitalised in January 2005 Gandy and Nick Rose, the administration manager, visited him and asked him to source blankets for a customer. For these reasons he contended that Eagle's management was aware of the deal.

24.2 He did not receive any remuneration from the sale of the blankets.

24.3 Eagle was not prejudiced. On the contrary, it benefited as he was able to sell more ink as the customer's printing presses became operational after he had supplied the blankets.

24.4 None of the other employees was disciplined for their role in the transaction.

[25] The Court finds that:

25.1 The employee derived a personal benefit from buying blankets from Naidoo and selling them to Eagle's customers.

25.2 Divpac was not aware of the transaction and would not have sanctioned it if it were. Naidoo would not have feared losing his job if Divpak had authorised the deal, or if he believed that the deal was such that Divpak would have authorised it if it knew.

25.3 Eagle was not aware of the deal. Gandy and other employees knew that the employee had sourced blankets for Eagle's customers. They may even have known that the employee sold the blankets to them. What Gandy did not know until

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February 2005 was that the employee derived a personal benefit from the sale. He learnt of this when Botha of Southpoint, a customer of Eagle, said that he had money for the employee for the blankets.¹⁴

25.5 The deal was underhand because neither Nampak nor Eagle was aware of it at all, or that Naidoo and the employee were deriving a benefit. Neither Naidoo nor the employee disclosed its terms to their respective employers.

25.6 The employee knew that the deal was underhand because he knew that Divpac did not allow Naidoo to sell the blankets and that Naidoo's job was at risk if Divpac found out.

25.7 The employee did not disclose the terms of the deal to Eagle, firstly because he knew that it was underhand; secondly, Eagle might have stopped him from selling the blankets that should have been given away free of charge; thirdly, he would not have been allowed to derive a personal benefit; and, fourthly, Eagle would not have approved of a transaction with Naidoo without Divpac's or Nampak's approval.

25.8 Eagle only became aware of the full terms of the deal after it instituted disciplinary proceedings. It is still not aware of the scale of the used printing blanket deal.

25.9 The deal was not a casual arrangement between Naidoo and the employee. It was a firm deal in terms of which the employee was entitled to 50% of the proceeds of the sale of the blankets. The employee considered himself to be entitled to this amount, hence he deposited a cash cheque from one of the customers into his own account. If his version namely, that payment was an act of appreciation, is to be believed, he would not have deposited the cheque into his own account but handed it to Naidoo.

25.10 The employee was evasive and contradicted himself about when he started selling the blankets. Initially he said that he started selling them in 2003. He changed that to 2004, then to the end of 2003 and, eventually, to June 2004. As it happened, Eagle had produced an invoice for 7 June 2004 which established that at least by that date the employee was selling the blankets. The employee claimed not to have the invoice book for the early period. He did not call Naidoo to corroborate his version about the terms of the deal. As the blankets were sold since 2003, the probabilities are that the employee received more than R600 from the sale of blankets.

¹⁴ Volume 1, page 15, line 5; Volume 2, page 232, line 20; Volume 2, page 234, line 12.

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25.11 It is not the employee's case that he disclosed that he was receiving a benefit from the sale of the blankets, nor is it his case that he obtained Eagle's permission prior to making the deal. The high watermark of his case is that Eagle became aware in 2004 that he was selling blankets to his customers. As the employee did not make disclosure of the full terms of the deal, Eagle could not have authorised it.

25.12 The employee therefore bought and sold printing blankets to Eagle's customers in the course of his work for Eagle without the latter's prior agreement.

25.13 Eagle therefore proved all the allegations that constituted the second charge of misconduct.

Is the charge an offence?

[26] Eagle pleaded that it was not relying on a breach of clause 10 of the contract of employment. Clause 10 provided as follows:

"10.1 The employee shall not enter into other employment without the written consent of the group managing director."

Eagle's case was not that the employee had other employment but that he was moonlighting as Hamman defined the term.

[27] Ms Naidoo submitted that good faith was implicit in every contract of employment. Good faith requires employees to work honestly and faithfully, to work in and not against the employer's interest, to avoid conflicts between their own interests and those of their employer and not to derive a secret profit for themselves.

[28] The Court accepts as a general proposition that a breach of good faith could impair the relationship of trust between an employee and the employer. In this case the employee acted against Eagle's interests by selling blankets to its customers. Eagle's interests would have been better served if the blankets had been given free of charge to its customers. By entering into the deal with Naidoo, the employee created an avenue for Naidoo to dispose of Divpac's waste at a profit. The employee could have resisted the deal and avoided becoming a ready outlet for an underhand deal. That would have served Eagle's interest better, provided the supply of blankets continued. As sourcing the blankets was becoming increasingly difficult, the employee

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claimed that the deal facilitated his access to the blankets. He would have served Eagle's interests better if he had disclosed to Eagle the opportunity that the deal presented for its business. Eagle's relationship with Nampak could only have improved if it tendered for its blankets at a mutual profit. Thus if the employee had elected not to deal with Naidoo but to formalise the deal as between Divpac/Nampak and Eagle, he would have better served Eagle's interests. There is no evidence that he considered either of these two options. The option he exercised is one that favoured him personally. By exercising this option he acted in conflict with the interests of Eagle and, consequently, in bad faith.

[29] The allegations against the employee constitute an offence that resulted in a breach of trust. He is therefore guilty of the misconduct for which he was charged in the second and thirds paragraphs of the disciplinary notice.

[30] There was no need to discipline any of the other employees involved with the blankets as they merely acted as "runners" for the employee. They did not receive any personal benefit from the deal.

The employee's HIV-positive status

[31] The employee was hospitalised on 10 January 2005. On 21 January 2005 he was diagnosed with full-blown AIDS. Gandy and Rose visited him in hospital. He had informed Gandy of his status. Gandy was concerned about the customers that the employee served. The employee testified that if, as Gandy surmised, his status was likely to impair the deal being negotiated with Nampak, Gandy should disclose his status to Nampak. On Gandy's version, even though the employee requested him to disclose his status to all the customers he served, Gandy informed only a few customers who needed to know.

[32] He returned to work on 14 February 2005. He sought and was granted permission to address the staff about his status.

[33] The employee pleaded the facts on which he relied to support his submission that Eagle breached his confidence and privacy by disclosing his status to all its customers without his authority. However, he did not plead the legal issues arising from the facts nor did he claim any relief arising specifically from the alleged

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unauthorised disclosure. One can get past this technical hurdle as

Ms Naidoo not raise any objection on this ground.

[34] The employee alleged that Gandy broke his confidence because a customer had informed him that Gandy had told the customer about his status. The employee did not lead the evidence of this customer. The court disregards the evidence as hearsay.

[35] As to whether Eagle's management made any other unauthorised disclosure, the court takes into account that the employee himself disclosed his status to the entire staff. He created a situation in which his confidentiality could be breached easily by any staff member. Furthermore, he was not concerned about many people knowing about his status. He did not testify that he had asked the staff he addressed to keep his disclosure confidential. Even if he had, he cannot hold Eagle responsible if any of the staff other than management broke his confidence. In the circumstances the employee has failed to prove that Eagle disclosed his status without his authority.

[36] On the afternoon of his first day back at work after his hospitalisation, Gandy offered the employee an internal position at the same package he was receiving in his capacity as a technical sales representative. Gandy was unsure of the way forward as it was the first case he had to deal with of a white person with AIDS. He informed the employee that he and the directors of Eagle felt that Nampak, amongst other customers of Eagle, would be uncomfortable working with a sales representative who had AIDS.¹⁵ Hence Gandy placed him in a desk-bound position. The employee was not happy about being desk-bound.

[37] On 19 February 2005 he was hospitalised again. Upon his return to

¹⁵ Gandy denied saying this to the employee.

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work on 28 February he received a letter dated 24 February 2005. It read:

“Dear Brian,

In light of the fact that your job requires a lot of driving and as the company insures your car, the company and insurance company require written confirmation from your doctor stating that the medication you are currently taking will not impair your ability to drive. I have telephoned your doctor twice requesting this information but he does not return my call. The receptionist advised me he will only give this information to us with your consent. Based on your information given to us that some of the medication you are taking makes you drowsy, we did offer you an internal sales co-ordination/liaison post with no change to your package. This offer was not acceptable to you as you indicated that you did not want to be desk-bound and needed to be out of the office.

I believe the company has been very generous to you in the situation but need to advise that we as a company cannot and will not be held responsible for any situation that you find yourself in as we are in no way forcing you or requiring you to undertake strenuous driving in your current state of health. Should you not be able to obtain a clearance certificate from your doctor stating that you are capable of performing your normal duties as defined in your job description, all risks and responsibilities lie with yourself. I believe that the company has and will continue to assist you where possible but requires a commitment from yourself.”

[38] Gandy had annoyed the employee’s doctor by seeking information without the employee’s consent. In his letter dated 1 March 2005 the doctor firmly declined to communicate with Gandy unless the employee authorised him to do so. On the employee’s version, Gandy reacted abusively to the doctor when he, Gandy, discussed his letter with the employee. Gandy denied this when he testified.

[39] After consulting his doctor about his fitness for work, the employee was satisfied that his condition and the medication he took did not create a risk for Eagle. He tendered the inserts from the medication he was taking to Rose on 2 March 2005, but Rose no longer wanted to see them.

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[40] The employee replied to Gandy's letter as follows:

"I refer to your letter dated 24 February 2005 (hand delivered on Monday 28 February 2005) and acknowledge the company's request for a risk, if any, assessment of my driving capability in terms of my prescribed medication. Your request has been taken under advisement and medical information relevant to the above has been sought from my doctor. Note that the offer of an alternative position the company referred to in your letter has not been formally considered by myself as the offer and the details pertaining thereto have not been made available to me in writing by the company. I confirm that I am and will continue to be a committed employee to the company."

[41] Whether the employee was well enough to do his normal job was disputed. Eagle's witnesses alleged that he looked and said that he was weak. He did not work a full day. They had the impression that he would not live long. The employee insisted that he was well enough to work normally. He denied going home early on account of his health.

[42] In the opinion of the Court the employee was not fit immediately after he returned to work on 28 February 2005 to do his normal work. On this issue the corroborated evidence of Eagle's witnesses outweighs his evidence as a single witness. The fact that he had to be readmitted to hospital four days after returning to work on 14 February also points to him not being well enough for normal work. At that stage, he needed an accommodation. A desk-bound job was an appropriate temporary accommodation.

[43] Subsequently, his health improved. Eagle subjected him to a disciplinary enquiry without any doubts about his fitness to defend himself. The transcript shows that he represented himself ably. In court, he manifested no sign of the infection. He attempted to persuade Eagle that he was well enough to drive and retain his position as a technical sales representative, but Eagle was not interested in knowing about his condition. At no stage did Eagle get a prognosis from a doctor about the employee's health status. Despite this omission, Eagle proceeded to act against the employee in the manner described below.

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[44] On 14 March 2005 Hamman and the employee met. There is a dispute as to whether Hamman or the employee requested the meeting. Hamman testified that he received a call from Gandy, informing him that the employee wanted to see him. In his evidence-in-chief Hamman testified that he did not know what the meeting was about until it emerged during the discussions that the employee was unhappy with the letters that he received from Gandy.¹⁶

[45] Under cross-examination, Hamman reflected that Gandy would have informed him that the purpose of the meeting was to discuss the employee's illness.¹⁷ Hamman prepared extensively for the meeting by getting information from Old Mutual about medically boarding the employee.

[46] Eagle admitted in its pleadings that Rose required the employee to meet Hamman.¹⁸

[47] The Court finds that Eagle initiated the meeting of 14 March 2005 with the employee. This finding is fortified by Hamman's evidence on the content of the discussion. Hamman began the meeting. He started discussing the employee's health and urged him to apply for medical boarding. He drew the employee's attention to Eagle's group life benefits and urged him to apply for them.

[48] On the employee's version, Hamman insisted on getting the name

¹⁶ Volume 2, page 172, line 7.

¹⁷ Volume 2, page 170, line 3.

¹⁸ Paragraph 25, page 39; paragraph 25, page 74 of the pleadings bundle.

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and number of his attorney, Mr Rob Casasola, and called him immediately to discuss the disability claim as an option. On Hamman's version, the employee simply gave him Casasola's number and he, Hamman, left a voice message for Casasola.

[49] The employee then informed him about Gandy's letter offering him the desk-bound job and his unhappiness with that offer. Hamman did not know about the letter and the offer. He continued to tell the employee that Eagle wanted him to do his job diligently, that, for Eagle to succeed, its employees must give "above average results and (they) must move the average performance upwards. Alternatively, (they) are dead". Hamman re-emphasised the need for "above average results" and likened it to playing rugby or soccer with sick people. Sales people, Hamman said, had to go out and see people from 9.00 in the morning to 8.00 in the evening. They should not be sitting in the office taking calls. Eagle could "get a girl for that", he said.¹⁹ On that basis, he initially testified, he retracted the offer of the desk job. Later he watered it down to say that he did not retract it but merely did not agree with it. He left the medical boarding application forms with the employee. On his version, the meeting ended on the note that the employee would consider medical boarding. For the employee, medical boarding was not an option. It was common cause that nothing was agreed at that meeting.

¹⁹ Volume 2, page 179, lines 1 – 5.

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[50] On 22 March 2005 Gandy told the employee to take leave until 1 April 2005. On Gandy's version, he did so on Hamman's instruction. On Hamman's version, he was merely agreeing to Gandy's request to pay the employee during his leave. In any event, after the employee returned to work on 1 April he was again told to go on involuntary paid leave "until it was all over".²⁰

[51] The probabilities favour Gandy's version because he was willing to accommodate the employee in a desk job and would not have chosen to impose involuntary leave on the employee. Hamman did not agree with the accommodation and retracted it by instructing Gandy to put the employee on paid leave.

[52] In the meantime, Hamman held discussions with Casasola. On Hamman's version, Casasola had proposed on behalf of the employee that Eagle pay him the equivalent of three years' remuneration which Eagle could reclaim when the employee's death benefits were paid. Hamman rejected the proposal. The employee denied instructing Casasola along those lines.

[53] Annexure G2 to the employee's amended statement of claim records at paragraph 32 that there was a meeting between Hamman and Casasola to settle the matter but that their attempts were unsuccessful.

[54] The Court accepts that Casasola had asked Eagle to advance the employee's death benefits. The tenor of Hamman's evidence as regards this proposal has a ring of truth. Furthermore, as such discussions took place between Casasola and Hamman in the absence of the employee, the latter could not rebut Hamman's evidence unless he called Casasola to testify. The employee had terminated Casasola's mandated on unfriendly terms and could not secure his co-operation for the trial

[55] The proposal could have been with the employee's instructions. Alternatively, in the nature of discussions of this kind it could have emerged as an option. If the employee did give such a mandate, he either did not recall it or selectively chose to forget it as it was not in his interest to advance a case that he was prepared to accept the termination of his service on some basis.

²⁰ Volume 3, page 300, lines 5 – 10.

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[56] Hamman testified that the employee had said in February that he would not last another two months and that he wanted to retire to the Berg. From that Hamman gathered that the employee had a limited time to live and that he wanted to “die in quiet”.²¹ Hamman’s perception persisted during the meeting of 14 March 2005.

[57] However, the employee maintained that he always tendered to work his normal job and that he did not want to be medically boarded. Sensing that his job security was threatened, he instructed his attorney to write to Eagle. An advocate drafted a letter which recorded the events up to 4 April 2005, pointed out that the employee was not disabled, that his medication did not make him drowsy during the day and that his ability to drive was not impaired, that he was opposed to being medically boarded and that Eagle was discriminating against him on the grounds of his HIV status. The employee demanded that he be allowed to continue working normally, failing which his dismissal would be challenged as being automatically unfair.

[58] Eagle denied receiving this letter. As he had terminated Casasola’s mandate, the employee could not prove that he had sent the letter. The draft letter is nevertheless relevant as a contemporaneous record of the employee’s mindset.

[59] On 5 May 2005 the employee was summoned to work and served with the notice to attend a disciplinary inquiry on 10 May 2005. The inquiry concluded with the dismissal of the employee.

What was the true reason for dismissing the employee?

[60] About February 2005 Gandy discovered that the employee was receiving money from the sale of blankets to Eagle’s customers. He investigated the matter by checking to whom Eagle supplied the blankets and how payments were made. He spoke to the dispatch staff who informed him that the blanket sales had been going on for some time. He did not say when he began doing the investigation. However, it could not have been

²¹ Volume 2, page 174, line 24.

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immediately after his discovery in February as he was busy with more pressing issues that arose from Mimete's take-over of Eagle. He explained further that he alerted Hamman to the offence in April because he had only completed the investigation by then. He did not testify to taking any further steps to investigate the matter other than those mentioned above.

[61] If Eagle had considered the offence to be so serious and one that could result in an irretrievable break-down of the employment relationship, it would have investigated the matter sooner. If it viewed the offence as seriously as it subsequently claimed, it would have prioritised the investigation.

[62] Objectively viewed, the nature of the offence was not one that involved any loss to Eagle, nor were large amounts of money involved. It impinged on the question of good faith and ethics. Dishonesty was not obvious. The position would have been different if Eagle had asked the employee for an explanation and he lied. The first and only occasion he was asked for an explanation was at the enquiry.

[63] Another mitigating factor was that the employee had skills which Eagle needed. He testified that whilst he was at his desk-bound job he had to go to Nampak as he was the only one who could attend to that problem.

[64] A sanction short of dismissal would have been appropriate. The misconduct could therefore not have caused the employee's dismissal. In so far as it did, it was unfair.

[65] The Court finds for the following reasons that Eagle dismissed the employee because it did not want to employ an HIV-positive technical sales representative:

65.1 Hamman did not want to employ anyone who could not render above-average performance. That was the central theme and overriding message that he conveyed to the employee at the meeting of 14 March 2005. He had set a precedent by having an employee who had lost his arm medically boarded. Persons

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with disabilities were not his concern.

65.2 Eagle's management believed that its customers would be

fearful and unwilling to be served by an HIV-positive person.

Rose conceded this but Hamman and Gandy denied that this was a concern.

65.3 Eagle tried to keep the employee away from his work for as long as possible. His leave from 22 March 2005 was not at his instance; it was imposed on him. Eagle was prepared to pay to keep him away. If Eagle wanted to employ him, it would have accommodated him in the desk-bound job, for then it would have been getting some value in return for paying him.

65.4 Eagle would have made some effort to obtain a prognosis of his condition before acting against him if it had any intention of retaining his services

65.5 By May the employee was still employed at his normal package.

He had not died within two months, as Hamman had expected.

He was not willing to apply for medical boarding and Eagle was

not prepared to accommodate him in an alternative position. The

only option left for Eagle to get rid of him was to dismiss him.

Dismissal for incapacity would have been hard to prove as the

employee was not incapacitated. Dismissal for misconduct then

presented itself as the only option.

65.6 Eagle embarked on the misconduct proceeding determined to

dismiss the employee. It "threw the book" at him, so to say.

The discrepancies which founded the first charge relating to the

petrol expenses came to light during a due diligence which

ended in March 2005. They could have been cleared quite

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easily, as Ms *Naidoo* conceded, by simply asking the employee for clarification. At the inquiry Eagle accepted the employee's explanation without question. In fact, it was only when the employee pointed out to Hamman, who chaired the inquiry as one of three panellists, that they had not dealt with the first charge, that Hamman elicited the employee's explanation. Equally, Eagle could have asked the employee for an explanation for the sale of blankets as soon as Gandy made the discovery. Obtaining a statement from the employee should have been done in the normal course of conducting his investigations. Eagle was set on holding the inquiry to justify the predetermined dismissal.

65.7 The court's view is fortified by the belligerent attitude that Hamman maintained throughout the inquiry. He conceded during the trial that he should not have chaired the inquiry. His explanation for his behaviour was that he had only been involved in two hearings and was therefore inexperienced. Inexperience is no excuse for being abusive. Hamman had remarked at the beginning of his evidence at the trial that he took charge of the personnel function personally because his philosophy was that Eagle's most important asset was its people. These remarks ring hollow in the light of his behaviour at the inquiry and after he learnt of the employee's HIV status.

The Law

[66] Today many jurisdictions prohibit discrimination based on a person's HIV status. Dismissal of employees because of their HIV status is widely acknowledged as discrimination unless the employer can

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show that being free of HIV is an inherent requirement of the job.²² Some jurisdictions elevate the protection of persons with HIV to constitutional²³ or statutory law²⁴, whilst for others it remains soft law in codes and policy²⁵. Disconcertingly, not a single international labour Convention or Recommendation specifically regulates HIV in the workplace.²⁶ Hopefully, the momentum that is developing amongst member states of the ILO will cause its Governing Body to amend its Discrimination (Employment and Occupation) Convention, 1958 No 111, amongst others, to list HIV as a prohibited ground of discrimination. In the meantime, the ILO's Code of Practice on HIV/AIDS and the World of Work will have to suffice.

[67] Relative to people living with HIV in many other jurisdictions, people in South Africa have the advantage of a constitutionally entrenched right not to be discriminated on the grounds of their HIV positive status. Furthermore, legislation facilitates proof of discrimination firstly by defining discrimination to include HIV as a prohibited ground of differentiation.²⁷ Secondly, dismissal of the employee on account

²² Jane Hodges *InFocus Programme on Social Dialogue*, Labour Law and Labour Administration ILO Geneva 2004

²³ Such as the constitutional right to equality in the South Africa; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)

²⁴ Hodges above; *Marie-Claude Chartier Legal Initiatives to address HIV/AIDS in the World of Work*. The protection may be couched in specific aids laws, labour laws, anti-discrimination and human rights laws, disability laws and insurance laws.

²⁵ E.g. Botswana, Hodges above 31

²⁶ Hodges above 9

²⁷ Section 6 of the Employment Equity Act No 55 of 1998

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of his HIV status is, by definition, an automatically unfair labour practice.²⁸ These three measures together impose an enormous burden on anyone who discriminates against an HIV positive person. Justifying discrimination on the grounds of an employee's HIV positive status is a hard row to hoe. Not surprisingly, employers try to avoid basing a dismissal on an employee's HIV status.

[68] Despite these formal advances in South Africa and internationally, in reality, dismissal remains a major side effect of HIV infection.²⁹ The pressure to dismiss may be external e.g. from customers or internal e.g. when other employees in the enterprise demand the dismissal of an infected employee. Often these demands stem from fear that is either rational or irrational.³⁰

[69] In 1995 the Tokyo District Court issued a landmark decision in a case which academics generally refer to as the Aids Dismissal Case.³¹ The court rejected the employer's attempt to justify the dismissal on the ground of the employee's "defiant" attitude and refusal to come into

²⁸ Section 187 (1)(f) of the Labour Relations Act No 66 of 1995

²⁹ Hodges above 32

³⁰ R A Watt *HIV, Discrimination, Unfair Dismissal and Pressure to Dismiss* HeinOnline 21 Indus. L.J. 280 1992

³¹ Marc Lim *The First Step Forward--The Aids Dismissal Case And The Protection Against Aids-Based Employment Discrimination In Japan* Pacific Rim Law and Policy Journal March, 1998

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the office. It found that the underlying reason for the dismissal was the employee's HIV status. It declared the dismissal to be "feeble," totally divergent from any common societal expectations, illegal, and thus a tort.

Finding

[70] Camouflaging discrimination under the cloak of misconduct is one of the most insidious forms of unfair labour practices. Quick to perceive the unfairness, employees struggle to prove it. As Eagle denied that the reason for dismissing the employee was his HIV positive status, it bore the onus of proving the true reason for dismissing the employee to justify its fairness.³² It failed to prove that misconduct was the real reason for dismissing the employee. Eagle's management created a pattern of conduct that leads to only one reasonable conclusion: Eagle dismissed the employee on account of his HIV status. As it denied that that was its reason for the dismissal, questions of rationality and justification do not arise. In the circumstances, Eagle failed to discharge the constitutional and statutory onus of proving that the dismissal was not discriminatory.

Compensation

³² Section 192 of the LRA.

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[71] In assessing the amount of compensation payable to the employee, the Court takes into account the following:

71.1 Eagle impaired the dignity of the employee by instructing him to take leave when he wanted to work, by subjecting him to an abusive disciplinary inquiry, by dismissing him and finally, by attempting to camouflage its unfairness, lack of compassion and insensitivity under the employee's misconduct.

71.2 HIV remains a highly stigmatised infection that continues to marginalise its weak and vulnerable victims. Employers must be deterred from discriminating against employees on the basis of their HIV positive status.

71.3 The employee has been found guilty of two counts of misconduct for which he was charged.

The misconduct was not such that it did or could reasonably have caused a breakdown in the relationship.

71.4 Both parties tailored their evidence when it suited them.

71.5 The employee has found alternative employment.

[72] The order the Court grants is the following:

72.1 The dismissal of the applicant was automatically unfair.

72.2 The employee is awarded compensation being the equivalent amount of sixteen months' remuneration at the rate of R20 772,80 per month.

72.3 Eagle is ordered to pay the employee's costs.

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PILLAY D, J

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: **D781/05**

DATE: 2007/08/17

In the matter between

BRIAN THOMAS BOOTES

Applicant

and

EAGLE INK SYSTEMS KZN (PTY) LTD

Respondent

BEFORE THE HONOURABLE MADAM JUSTICE D PILLAY

ON BEHALF OF THE APPLICANT:

MS C NEL

ON BEHALF OF THE RESPONDENT:

MS L NAIDOO

EXTRACT

Judgment delivered on 17 August 2007

CONTRACTOR

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