REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA4/2013

IN THE APPEAL OF:

DHL SUPPLY CHAIN (PTY) LTD **Appellant**

and

DE BEER N.O. **First Respondent**

NATIONAL BARGAINING COUNCIL

FOR THE ROAD FREIGHT INDUSTRY **Second Respondent**

R DUBE AND E MASINGA **Third and Fourth Respondents**

Heard: **25 February 2014**

Delivered: **13 May 2014**

Summary: review of arbitration award- employees dismissed for alleged theft after failing polygraph test –- polygraph tests not conclusive nor corroborative to establish guilt in the absence of expert evidence to establish cogency of such evidence – previous judicial decisions allowing or weighing polygraph evidence does not mean expert evidence can be dispensed with in a subsequent given case - polygraph evidence is not an 'approved species of evidence' and must in every case be the subject of expert evidence to establish its conceptual cogency and accurate application - Arbitrator's decision holding the dismissal unfair reasonable- Labour Court judgment affirming that decision upheld - no case of misconduct made out at all -

retrospective reinstatement rather than compensation appropriate - Appeal dismissed with costs.

Coram: Ndlovu JA, Molemela and Sutherland AJJA

JUDGMENT

SUTHERLAND AJA

Introduction

[1] The appellant (DHL) employed the third and fourth respondents as workers on a crew handling cigarettes in a dispatching warehouse. Stock losses occurred on five successive days in June 2008. The two respondents were dismissed for being implicated in the theft of this stock of cigarettes. They referred an unfair dismissal dispute to the Road Freight Bargaining Council. An arbitrator, the first respondent, reversed the dismissal on the grounds that guilt was unproven. DHL was aggrieved and sought to review that decision. The Labour court in reviewing the decision, upheld the arbitrator's award that no misconduct was proven and ordered that the two men be retrospectively reinstated. DHL now appeals against that judgment.

[2] The two issues in the case are, first whether guilt was proven and, even if not, was reinstatement appropriate rather than a compensation order. The test on review to evaluate these aspects of the matter is whether the arbitrator's decision was one to which a reasonable arbitrator, upon the body of evidence adduced, could not come. (*Sidumo and Another v Rustenburg Platinum Mines and Others (2007) 28 ILJ 2405*)

Was guilt proven?

[3] The hard facts are barely in dispute. The two respondents and six others who were members of a particular crew working on a line which picked and packed consignments. Unexplained stock losses occurred that were, supposedly, linked to a period when they were on duty. DHL took the view that one or more members of the crew were probably implicated in the thefts. The dilemma that faces all employers in such a predicament is plain: is it all of

them or some of them? An anterior danger, often overlooked by an employer also looms: were they looking in the right place?

[4] Two developments took place. The first was to subject every crew member to a lie detector or polygraph test. At the beginning of the investigation into the stock losses the workers were all asked to agree to such a test and they did so on 7 July.

[5] The two respondents were the only crew members to fail the test. In the arbitration, there was no challenge to the case advanced that the application of the lie detector process was, on its own terms, efficiently carried out. It may be assumed, for present purposes, that whatever was supposed to be done to produce the results that such a device can produce was properly executed and no 'irregularities' occurred in the prescribed procedure. The intrinsic value of such a process is an altogether other issue, an aspect addressed separately.

[6] The second development was that the two respondents were charged with what amounted to theft in an internal enquiry. It is contended by DHL that in that enquiry and again in the arbitration, the two men were poor witnesses and that their testimony, properly assessed, lacked credibility. The arbitrator commented adversely on the two respondents' evidence about their unfamiliarity with the English language and of the value of the stock, which alleged unfamiliarity was considered by the arbitrator to be feigned. However, it was only about these ancillary aspects that criticism was expressed. For present purposes, it may be assumed this criticism was appropriate.

[7] In addition, it was established in the arbitration that after the suspension of the two men, the stock losses all but ceased. There was, however, also evidence that before the five days spate of losses, there were no losses for the previous three months.

[8] On the strength of these factors, cumulatively evaluated, DHL contends that a reasonable arbitrator could not do otherwise than find the two respondents guilty and endorse their dismissal.

[9] The crucial part in the arbitrator's award, at pp 36 -37 of the Record, states thus:

> 'It is trite that polygraph evidence, when coupled with other circumstantial evidence, can be sufficient to discharge the onus in labour disputes. (This is supported by numerous cases, such as SACCAWU obo Chauke v Mass Discounters (2004) 13 CCMA 21.3.1 and MEWUSA obo Mbonamni v S Bruce cc (2005) 14 MEIBC). In both these cases there was additional circumstantial evidence that led the commissioner to conclude that the applicants were dishonest as lying about their whereabouts.
>
> Circumstantial evidence has been defined as 'indirect evidence which creates an inference from which a main fact can be inferred'. Van der Merwe in *Principles of Evidence* (sic) stated that it often formed an important component of cases at the CCMA. It required the commissioner to draw an inference from the set of circumstances but it had to be the *most probable* inference that could be drawn (my emphasis) and must amount to more than a reasonable suspicion of wrongdoing.
>
> If I omit the adverse polygraph test result …the evidence against the applicants is as follows:
>
> They worked on the days the stock went missing
> They were amongst a group of 8 employees who had access to the stock
> The stock is very valuable
> The stock loss dropped off considerably once they were suspended.
>
> do not believe the *most probable* inference to be drawn from the above set of facts is that the applicants were guilty of 'participating in/involvement with/knowledge of' the missing stock. The fact that the applicants were on duty and had access to the stock does not allow me to draw any inference that they were involved in the removal of stick. The same can be said for the value of the stock. At best for the [employer] the final factor suggests some sort of causal link between the applicants and the stock losses but [the evidence was] that the theft had not stopped completely since their dismissal. Indeed, [it was testified to] that it abated for some time but where 'one group left off another one picked up'. It must also be noted that an equally probable inference that can be drawn from this fact is that the real culprits were scared off by the dismissals and decided to 'lie low' for a while. In addition, [it was the

> evidence] that additional security measures had been put in place since June 2008 which might also account for the reduced stock losses.
>
> I certainly do not believe that the evidence cited by the respondent [employer] as 'circumstantial' is indeed circumstantial evidence, as defined, and I also do not accept that any of those 4 factors either individually or cumulatively, is sufficient evidence for me to draw as the most probable conclusion that the applicants were guilty of misconduct. The inescapable conclusion is that the [employer's] case leans heavily on the fact that the applicants failed the polygraph test. Indeed, it is the very reason only two of them were charged, even though the other 6 employees who were on shift met at least 3 of the four factors cited by the [employer] as circumstantial evidence. It seems fairly clear to me that if the applicants had passed the polygraph they would not have been charged or dismissed and that the adverse result was the de facto reason for their dismissal. Given what has already been stated about the legal standing of polygraph test results in the absence of any supporting evidence, I have no choice but to find that the [employer] has not established guilt on a balance of probabilities.'

[10] Several criticisms were advanced on both the award and the judgment. It is unnecessary to traverse the minutiae. The thrust is straightforward: the contention is that the error committed was a failure to appreciate the totality of the evidence leading to an unreasonable outcome. In particular, it is argued that the polygraph evidence was dealt with inappropriately by the arbitrator and the weight due to it was not accorded.

[11] In my view the criticisms are without merit. From the passage of the award, cited above, it is plain that the polygraph case was indeed considered by the arbitrator, and indeed a benign view was taken of the polygraph process. Nor was the Review Court dismissive of the polygraph evidence. Indeed, despite the absence of expert evidence to establish the cogency of the concept of polygraphs and their efficacy, the evidence was taken at face value, an approach apparently based on a willingness by the Labour Court in the past to attribute a degree of respectability to such a process.

[12] What both the arbitrator and the Review Court did was to pose the unavoidable question: *what was polygraph evidence worth in the context of all*

the facts? The conclusion reached was that although it could, in the view adopted in both fora, be fairly inferred that failing a test could fortify a reasonable suspicion, a failure was not weighty in the absence of other evidence demonstrating, objectively, a case that called for a credible rebuttal. In both fora, the conclusion was reached that there simply was not enough evidence from which to infer guilt.

[13] In our view, that finding was, on the body of evidence adduced, a reasonable stance to adopt.

[14] The answer proffered by DHL to try to tip the scales is the alleged lack of credibility of the two respondents. This contention is misplaced. The fact that the evidence given by the two respondents might not diminish the reasonable suspicion harboured by DHL, cannot serve to tip the scales in the least. Such a notion is a non-sequitur. The arbitrator's remark that she questioned their veracity is limited to a finding that they pretended to be unfamiliar with the English language and ignorant about the value of the stock. Such obfuscation is not rare when a person is submitted to the rigours of forensic proceedings and caution must be exercised not to read too much into it. The innocent no less than the guilty are prone to be defensive and evasive when they feel their backs against the wall.

[15] Furthermore, the notion that they offered no real challenge to the facts adduced by the appellant and that this warrants an adverse inference is illogical. An innocent person in the position of the two respondents could be expected to do no more than deny guilt and express ignorance about how and why the losses occurred. Significantly, despite the ostensible best efforts of DHL itself, the means of misappropriation remain unknown and precisely when it occurred in the chain of handling could not be established. The proof that the respondents had the opportunity to steal is valueless without more and it could never be a burden on them to offer alternative theories for the misappropriation in order to achieve exoneration.

[16] Moreover, the partial improvement in stock control after their departure does not warrant the inference that the employer identified the real culprits. As

rightly held by the arbitrator, the risk that the two respondents are innocent and that the true thieves were cunning enough to lie low to manipulate precisely such a perspective is real and that risk defeats the reasonableness of such an inference. Also, the evidence of the tight security, including patrolling guards and cameras, must logically have diminished the opportunity for misappropriation considerably. Of course, the security surveillance was not fool proof. Nevertheless, not a hint of impropriety or ambivalent behaviour on the part of the two respondents could be shown from such surveillance.

[17] Ultimately, what was indeed left as the distinctive and critical element in the belief by DHL in their misconduct was their failure of the polygraph test, and poor performances as witnesses in a forensic process.

[18] The conclusions by the arbitrator and the court *a quo* that the *onus* on DHL to establish guilt was not discharged is, therefore, not vitiated by any unreasonableness because it is plain that other reasonable inferences that do not inevitably implicate the two respondents could not be excluded to account for the losses.

Was reinstatement an unreasonable outcome?

[19] The contention is advanced that the reinstatement order flew in the face of evidence that demonstrated the inappropriateness of a resumption of a working relationship which had broken down irretrievably. The test here is again whether a reasonable arbitrator could seriously conclude that this relationship could be restored.

[20] The case advanced by DHL against reinstatement can be summarised thus:

20.1. Uncompromised integrity is essential for every worker in the warehouse so that the employer can have unqualified confidence in the honesty of every individual.

20.2. Thus, even if a case of theft is unproven, the taint of suspicion has undermined the requisite degree of confidence which is an operational necessity.

20.3. There is thus no room for a worker who falls under such suspicion to be rehabilitated in the eyes of the Management.

20.4. The burden of watching the two respondents carefully would be inappropriate to impose of the employer.

[21] The Labour Relations Act 61 of 1995 prescribes reinstatement unless it is proven to be intolerable or impracticable. (Section 193 (2) (b) and (c)) The evaluation of this question is clinically objective, having regard to the balance of fairness between employer and employees and a decision is the outcome of the exercise of a discretion: (*Equity Aviation Services (Pty) Ltd v CCMA* (2008) 29 ILJ 2507 (CC) at [48]). A decision in terms of this Section is therefore, in part, a value judgment and, in part, a factual finding made upon the evidence adduced about the unworkability of a resumption. Core equitable values demand that a worker who is not proven to be guilty of dishonesty should not forfeit a valuable and scarce employment opportunity. This is precisely the reason why reinstatement is the primary and default remedy, unless it is displaced by factors that serve to outweigh its underlying rationale. Those factors are intolerability or impracticability and set high thresholds.

[22] The point of departure in this case is to ask what a fair minded employer is to do when a crew falls under a reasonable suspicion of dishonesty. The proper defence of commercial interests and a prudent response is not limited to misconduct dismissals. If a misconduct process is unavailable, or fails for absence of proof of guilt, must the employer be forced to just lump the risk of losses? The answer is no. There are other processes, dictated by operational needs, which must obviously be considered too (cf *FAWU obo Kapesi and Others v Premier Foods t/a Blue Ribbon Salt River* (2012) 33 ILJ 1779 (LAC)) It is unnecessary to speculate on the outcomes of such options, nor if all the necessary requirements are indeed present in this case.

[23] However, regardless of these generic considerations, the evidence in this case discloses that other persons in the employ of DHL who, on other unrelated occasions and in respect of other events, failed a polygraph test, remain employed because of the absence of other objective evidence to point

towards culpability. No material distinction exists between those examples and the two respondents, save that in those cases they were cleared for lack of evidence by in-house decisions and in this case, the arbitrator cleared them. Closer to home, are the six fellow crew members who, it is plain, are distinguished only by having not failed the test, and as the evidence, other than that of the polygraph, does not warrant an accusation of misconduct, the mere addition of the polygraph test failure also ought not to warrant an accusation.

[24] Lastly, it must be borne in mind that the critical question is not whether the Appeal Court might have taken a view different to that taken by the arbitrator or the Review Court; the sole issue is whether a stain of unreasonableness marks the award which restored the two respondents to their jobs when no proof of culpability was established. It is difficult to construe that such a decision, giving weight to the relative equities, and the options available to DHL, was perverse and thus unreasonable in the circumstances.

The resort to Polygraph evidence in disciplinary proceedings

[25] Because the arbitrator and the Review court took a benign view of adducing, as a species of evidence, a polygraph process, thereupon admitted the evidence, but nevertheless found that, holistically, together with the other evidence, there was inadequate evidence to establish guilt, it has been unnecessary for this court to pronounce on the propriety of the admission, in principle, of such evidence. Nevertheless, it seems appropriate to record some general observations about the introduction of polygraph evidence into court or arbitral proceedings. These observations have been provoked by the treatment of the polygraph process in these proceedings before the arbitrator and before the Review Court.

[26] As alluded to earlier, in this case, no expert evidence was adduced to establish the cogency of the *concept* of a polygraph nor to establish the *technical integrity* of the process. The say-so of the operator of the device is unlikely to be of such a nature to properly qualify as expert evidence of the validity of the underlying concept or to be convincing if it is tendered because

of an obvious lack of independence and a lack the appropriate credentials. In *FAWU obo Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) and *NUM and Others v Coin Security Group (Pty) Ltd t/a Protea Coin Group* (2011) 32 ILJ 137 (LC) expert evidence was admitted about the process. It seems to me to be a serious omission to consider such evidence in the absence of expert evidence. The fact that courts have, previously, on one or another footing, admitted such evidence, cannot serve as a licence to admit it in all subsequent proceedings. Indeed, a reading of the cases where benign remarks have been made about this species of evidence does not warrant the supposition that it is an '*approved type of evidence'.*

[27] Basson J in *Premier Foods* had to deal with polygraphs as one aid, among others, in determining a fair selection for retrenchment. Persons likely to have participated in violence in a strike were being selected. Statements had been procured alleging their participation. The management invited them to take a test which the retrenches had refused to do. At [90] it was held that:

> 'At best, the polygraph could be used as part of the investigation process to determine wherever or not a further investigation into the conduct of a particular individual is warranted'.

This judgment does not address the use of a polygraph test *as evidence,* still less sanction it. In the survey of the expert evidence, Basson J makes certain findings about the value of polygraphs; however, these cannot be read as the laying down of principles of evidence which, by extrapolation, other litigants can subsequently invoke as judicial authority in their separate and discrete matters. In the *Coin Security case,* Steenkamp J heard expert evidence which rubbished the conduct of the tests and as a result he disregarded the evidence on that footing.

[28] In the only LAC decision about polygraphs hitherto, *SATAWU and Others v Khulani Fidelity Security Services (Pty) Ltd* (2011) 32 130 (LAC), the employer, who supplied guards over the baggage handling at airports, and its workers, were bound by a collective agreement in terms of which there was to be a quarterly polygraph test and in the event of failing it, the employees

would be at risk, at the instance of the Airports Company, to be removed from the site. The aggrieved workers, who failed the test, were removed and were then retrenched. The propriety of that process under those circumscribed circumstances was held not to violate any rights. In *Sedibeng District Municipality v SA Local Government Bargaining Council and Others* (2013) 34 ILJ 166 (LC) at [41], a polygraph was held to be a legitimate component of a process to determine integrity for the purposes of selecting persons for promotion, provided there was other information that cast a suspicion on an individual.

[29] An example of a polygraph being used in a misconduct case is *Truworths Ltd v CCMA* (2009) 30 ILJ 677 (LC). In a review, the award was set aside for a myriad of irregularities, including a failure to have regard to all the evidence, amongst which was evidence of polygraph tests. (at [38]) Further, in that judgment, relying on the observations of Grogan A in *Sosibo and Others v Ceramic Tile Market* (2001) 22 ILJ 677 (CCMA), it was held at [37] that a polygraph is useless on its own but may be 'taken into account' together with 'other supporting evidence'. The *dictum* goes onto say that a polygraph can serve as corroboration of other evidence.

[30] These considerations beg the question about what a failed polygraph test really produces by way of usable information. Only the *inference to be drawn from the failure of the test* is useful as material to determine probabilities. In the absence of expert evidence to explain what that inference is, either generically, or within the bounds of the specific instance itself, and also to justify the explanation of what that is, there is nothing usable at all that might contribute to the probabilities. In this appeal, DHL's consent form, signed by the two respondents, states that the test would indicate that the worker was either involved or not involved in the stock loss. That premise is questionable, and to belabour the point, required the kind of expert evidence mentioned above to render it worthy of consideration.

[31] In summary, the respectability of polygraph evidence, at best, remains an open question, and any litigant seeking to invoke it for any legitimate purpose,

must, needs be, adduce expert evidence of its conceptual cogency and the accuracy of its application in every given case.

The Order

[32] Owing to the elapse of time since June 2008 when the events occurred and the elapse of time since the award was handed down on 17 June 2010, it is appropriate to adapt the order and address obvious eventualities that might have occurred in the intervening period.

[33] Accordingly, an order is made as follows:

33.1. The appeal is dismissed with costs.

33.2. The award granting reinstatement with effect from 28 August 2008 is confirmed.

33.3. The appellant's liability for payment of all and any sums to the respondents in respect of that period shall be calculated with regard to any sums of income from employment or business activities received by the respondents, which sums, if any, shall be set off against the sum payable.

33.4. The appellant shall make formal written demand to the respondents to report for work on not less than five working days' notice; such notice may be given to the respondents' attorneys of record.

33.5. The respondents must comply with such notice by tendering to resume work in accordance with the notice, and upon compliance, all payments in terms of this order shall be due and payable by not later than five working days after such compliance.

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Sutherland AJA

I agree

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Ndlovu JA

I agree

_____

Molemela AJA

APPEARANCES:

FOR THE APPELLANT: Adv F Venter

Instructed by Johannes de Beer

Ref R Makoele

FOR THE THIRD AND FOURTH

RESPONDENTS: Adv D Crampton

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