IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no.: **C644/2009**

In the matter between:

TRANSNET FREIGHT RAIL	Applicant
And	
TRANSNET BARGAINING COUNCIL	First Respondent
M DOLLIE N.O.	Second Respondent
SATAWU	Third Respondent
L G LOUW	Fourth Respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

1. This matter concerns the question whether alcohol abuse should be treated as misconduct rather than incapacity in circumstances where the employee is not an alcoholic.

2. The applicant seeks an order that the arbitration award made by the Second Respondent (the arbitrator) under the auspices of First Respondent (the bargaining council)[1] be reviewed, set aside and corrected. Although the arbitration was heard by a Tokiso panelist, it was done under the auspices of the bargaining council. The applicant seeks to review it in terms of s 145 read with s 158(1)(g) of the Labour Relations Act (Act 66 of 1995).

3. The application is not opposed by any other party. Although the third and fourth respondents (SATAWU and its member, Ms LG Louw) had appointed attorneys, those attorneys filed a "notice of non-opposition" indicating that they abide the decision of this court.

4. As the application is not opposed, the applicant did not seek costs.

GROUNDS FOR REVIEW

4. The grounds of review relied upon by Applicant in its review application are set out in its founding affidavit and may be summarized as follows:

1Case number BC.SATAWU/TFR(SD)NCP/10595 (Tokiso case reference no. Tokiso/T9/109) dated 29 July 2009

1. Second Respondent committed a gross irregularity of a material nature in the conduct of the arbitration proceedings by failing to have proper regard, if any, for the common cause facts and relevant legal principles, specifically, by:

    1. Failing to have regard for the principles distinguishing misconduct from incapacity and, more specifically, that the evidence and common cause facts were that Fourth Respondent (the employee) was not an alcoholic and did not suffer from alcoholism. The Second Respondent committed a gross irregularity in extending the requirement to treat alcoholism as a disease (i.e. an incapacity) to employees who are not alcoholics and who do not suffer from alcoholism (or any other medical illness) simply by virtue of the fact that their misconduct involved alcohol;

    2. Failing to properly consider the importance of the rule that Fourth Respondent had breached and the fact that Fourth Respondent was in a safety critical position which necessitated the strict application of that rule. In assessing the rule Second Respondent placed too much emphasis on other less relevant or irrelevant factors;

    3. Failing to apply the relevant legal principles with respect to the relevance of a serious written warning that had been issued to the employee for a similar offence and that was still valid;

4. Making the finding that Fourth Respondent at most acted negligently in the consumption of alcohol the night before she was booked on duty, which finding is wholly unreasonable and not logically sustainable.

2. Second Respondent exceeded his powers by making an award requiring Fourth Respondent to submit to rehabilitation and to comply with the company policy. Such an award is not contemplated in the context of the powers afforded to him in determining a dismissal dispute.

3. In evaluating the evidence in the manner in which he did and concluding as he did, for all of the reasons set out above, Second Respondent's decision was one which a reasonable decision maker could not have made.

MATERIAL EVIDENCE AND CHRONOLOGY OF FACTS

4. The material facts can be summarized as follows:

1. Fourth Respondent was employed by Applicant from 27 May 2002 until her dismissal on 29 May 2009. At the date of her dismissal, Fourth Respondent was employed as a yard official earning a salary of R10 287, 00 per month.

2. The position of yard official, which involves marshalling and coupling of trains, is a safety critical position. Due to the nature of the work performed the offence of being under the influence of alcohol at work constitutes serious misconduct in terms of Transnet's disciplinary code.

3. On 24 May 2009, being the date upon which she committed the misconduct resulting in her dismissal, Fourth Respondent had a valid serious written warning for being under the influence of alcohol at work which had been issued on 28 May 2008 and was valid for twelve months.

4. At the arbitration hearing held on 22 July 2009, Third Respondent (the employee's trade union, SATAWU) disputed both the procedural and substantive fairness of Fourth Respondent's dismissal on the following grounds:

    1. That Applicant had not afforded Fourth Respondent rehabilitation in terms of its Employee Assistance Program ("EAP");

    2. That Applicant had applied the sanction of dismissal inconsistently;

    3. That, in determining the sanction, the chairperson of the enquiry did not consider all mitigating factors;

    4. That the chairperson of the disciplinary enquiry did not apply his mind to the matter and that the sanction of dismissal was predetermined.

5. In the arbitration award Second Respondent found that:

1. There was no evidence to suggest that the sanction was predetermined or that the chairperson failed to apply his mind to the matter;

2. Third Respondent's reliance on inconsistent application of the sanction of dismissal was unsubstantiated and therefore unfounded;

3. The chairperson of the enquiry was well versed with Applicant's EAP and Fourth Respondent's problems and could have recommended counselling as a form of action to address Fourth Respondent's misconduct;

4. The valid serious written warning was four days short of expiry and Fourth Respondent had essentially not been disciplined for 11 months and 26 days, which indicated that she had taken the warning very seriously;

5. Personal circumstances had led to Fourth Respondent consuming alcohol and arriving for work under the influence, including undisputed evidence that Fourth Respondent had been abused the night before the incident;

6. Fourth Respondent had shown remorse for her actions;

7. As Fourth Respondent had not been allowed to work on the day of the incident, neither Applicant nor its passengers were placed in danger;

8. Other options short of dismissal could have been exhausted;

9. Fourth Respondent could have been suspended in terms of Applicant's policy;

10. There was no evidence to suggest that Fourth Respondent could not be trusted or that her work had been affected and thereby caused an irretrievable breakdown in the relationship;

11. There was no evidence that Fourth Respondent was incapable of fulfilling her functions in the position that she had occupied;

12. Fourth Respondent was aware of the safety hazards of being under the influence of alcohol at work;

13. Fourth Respondent had approached the chairperson of the disciplinary enquiry previously regarding personal problems regarding her in-laws and her possible transfer to Queenstown; and

14. Fourth Respondent had not acted with intent as, at best, she negligently consumed alcohol the night before she was booked on duty and accordingly she did not deliberately flout Applicant's rules for some or other personal

gain.

6. Having concluded as he did, Second Respondent made an award:

1. Reinstating Fourth Respondent into her position;

2. Ordering Applicant to pay Fourth Respondent one month's compensation; and

3. Ordering Fourth Respondent to submit to rehabilitation in terms of paragraph 12 of Applicant's substance abuse policy and to comply with such policy.

RELEVANT LEGAL PRINCIPLES

The Standard of Review

4. In **Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 *ILJ* 2405 (CC)** the Constitutional Court held that the test to be used when determining whether an arbitration award would be unreasonable, and therefore reviewable, is whether the decision of the arbitrator is a decision "*that a reasonable decision maker could not reach."* [2]

4. In that case the Constitutional Court found that, for a review to be successful, it must be established by the Applicant that the result of the arbitration award falls outside of a "*range*

2Para [110]

of reasonableness."[3]

Misconduct, Gross Irregularity and Acting in Excess of Powers

4. Matters may be taken on review in terms of Section 145(2)(a) of the LRA on the grounds of the arbitrator committing misconduct, gross irregularity and/or acting in excess of the powers conferred.

4. This court, in the case of **Woolworths (Pty) Ltd v CCMA & others [2010] 5 BLLR 577 (LC)** at paragraphs [19] to [23], in considering the test for review, stated the following:

"*In the unreported case of Relyant Retail Limited t/a Bears Furnishers v Commission for Conciliation, Mediation & Arbitration & others (case number JR2841/06) [reported at [2009] JOL 24327 (LC) – Ed], this Court held that the function of the court in considering whether or not to interfere with the arbitration award on review is limited to those grounds provided for in terms of section 145 of the Labour Relations Act 66 of 1995, as suffused by the constitutional standard of reasonableness. The reasonable standard entails the applicant having to show that the decision reached by the arbitrator under the statutory arbitration system is one which a reasonable decision-maker could not reach (see Bato Star Fishing (Pty) v Minister of Environmental Affairs & Tourism 2004 (7) BCLR 687 (CC); Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC) [also reported at [2007] 12 BLLR 1097 (CC) – Ed]). In order to succeed in relying on the grounds set out*

3Para [119]

in section 145 the applicant must show that the commissioner:

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers.

[20]The court further held in that case that the issue of whether or not the commissioner committed a gross irregularity or failed to apply his or her mind entails a determination as to whether or not the complaining party was accorded a full and fair hearing by the commissioner. A fair and full hearing entails a determination of all the issues which were placed before the arbitrator during the arbitration proceedings. The inquiry in this respect focuses on the method or conduct of the decision-maker and does not concern itself with the correctness of the decision reached by the arbitrator (see Sidumo at 1179A–C and 1180A–C). There is however authority that it is not every irregularity that would constitute gross irregularity.

[21]In the Bears Furnishers case, supra, the court held that the judicial review powers given to the Labour Court is not for the purpose of necessarily weighing evidence which was presented during the arbitration hearing, upon which the commissioner acted upon in arriving at his or her conclusion. The enquiry which the court needs to conduct is whether or not there is the evidentiary basis for the conclusion reached by the commissioner. In other words, the duty of the court in review is to determine whether the conclusion reached by the commissioner has its support in substantial and credible evidence including consideration and appreciation of the issues arising from the dispute and the facts...

[22]In addition… the general rule, as I understand it, is that the function of a reviewing court in dealing with the complaint of gross irregularity is limited to determining whether or

not a commissioner in exercising the powers given to him or her by the Labour Relations Act did so within the appropriate sphere of those powers and whether the conclusions reached in the exercise of those powers are grounded on the relevant principle of law and supported by all the evidence and the material facts which were presented during the arbitration proceedings. I may hasten to also say if there is deviation from the facts or the law it must be of such a material nature, that it would amount to a denial of a fair hearing to the affected party, for that to warrant interference with the award by the court.

[23] The question that arises from the above is whether the conclusion reached by the commissioner falls outside the range of reasonableness so as to attract interference with the award by the court... The question to ask in considering the reasonableness or otherwise of an award is to determine whether the conclusion of the commissioner is one which a reasonable decision-maker could not reach (see Sidumo & another v Rustenburg Platinum Mines Limited & others [2007] 12 BLLR 1097 (CC)).”

4. Ngcobo J[4], in **Sidumo and Another v Rustenburg Platinum Mines Limited and Others**, *supra*, considered the duty of commissioners to consider all the material facts and stated as follows[5]:

“*It is plain … that CCMA arbitration proceedings should be conducted in a fair manner… Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to*

4As he then was

5Paras [267] – [268]

apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason….

It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate…This constitutes a gross irregularity in the conduct of the arbitration proceedings … And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."

4. When considering how to determine whether a commissioner exceeded his or her powers the Constitutional Court in that case set out the relevant legislation as follows:

"*The question whether a commissioner has exceeded his or her powers within the meaning of s 145(2)(a) (iii) must be determined in the light of the powers conferred on the commissioners under the LRA. In terms of s 188(1)(a) a commissioner is required to determine whether the reason for dismissal is a fair reason. In terms of s 188(2), a commissioner is required to take into account the code in considering whether or not the reason for dismissal is a fair reason. Schedule 8 to the LRA contains the code in relation to dismissal. Item 1(3) declares that -*

> *'[t]he key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees'.*

Item 2(1), in turn, provides that '[w]hether or not a dismissal is for a fair reason is

determined by the facts of the case, and the appropriateness of dismissal as a penalty'. Item 7 in turn provides that… [The arbitrator in] determining whether a dismissal for misconduct is unfair should consider the factors set out in item 7(a) and (b).

All these provisions must be understood in the context of the right to fair labour practices in s 23 of the Constitution and the obligation imposed on a commissioner 'to determine the dispute fairly and quickly'. In NEHAWU [the Constitutional Court]… concluded:

'[T]he focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to [the right to fair labour practices], it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.'"[6]

4. The Constitutional Court went on to conclude as follows:[7]

"… *[T]he award which a commissioner ultimately makes, must be fair to both the employer and the employee. The LRA regulates unfair dismissals in express and detailed terms and provides a code that should be taken into account by commissioners. And this defines the*

6Paras [269] – [271]

7Paras [272] – [275]

powers of the commissioner in relation to awards that they may make under the LRA. It follows from this that where a commissioner makes an award which is manifestly unfair either to the employer or the employee, the commissioner exceeds his or her powers under the LRA. Such an award falls to be reviewed and set aside under s 145(2)(a) (iii) of the LRA."

4. The crucial enquiry is whether the conduct of the decision maker complained of prevented a fair trial of issues.

Ellis v Morgan 1909 TS 576

Goldfield Investments Limited and Another v City Council of Johannesburg and Another 1938 TPD 560

Sidumo and Another v Rustenburg Platinum Mines Limited and Others *supra*

Telcordia Technologies Inc v Telkom SA Limited (2007) 3 SA 266 (SCA)

4. Further, Navsa AJ stated the following in **Sidumo and Another v Rustenburg Platinum Mines Limited and Others**, *supra***:**

"*To sum up. in terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."*

4. As set out above, our courts have recognised that a latent gross irregularity in the conduct of the arbitration proceedings may occur to the extent that an arbitrator may mistake or misunderstand the point in issue thereby failing to afford the parties a fair trial by virtue of the arbitrator misconceiving the whole nature of the enquiry or of his duties in connection with that process. From the judgments referred to above, the duties of an arbitrator in respect

of process may be summarised as follows:

1. To apply the law of evidence;

2. To apply the substantive law of dismissal;

3. To apply his or her mind to all materially relevant factors;

4. To disregard materially irrelevant factors; and

5. To weigh up all the materially relevant factors and issues.

4. In addition, the judgments referred to above establish that to the extent that an arbitrator deviates from complying with those duties, such deviation must not be of such a nature that it materially deprives a party of a fair hearing.

Misconduct or Incapacity

4. Section 10 (3) of the Code of Good Practice: Dismissal specifically includes alcoholism as a form of incapacity and suggests that counselling and rehabilitation may be appropriate measures to be undertaken by a company in assisting such employees. In fact, the requirement to assist such employees by providing them with treatment has been widely accepted. However, when an employee, who is not an alcoholic and does not claim to be one, reports for duty under the influence of alcohol, she will be guilty of misconduct. The distinction between incapacity and misconduct is a direct result of the fact that it is now accepted in scientific and medical circles that alcoholism is a disease and that it should be treated as such. This has been accepted by the CCMA and bargaining councils. See, for example:

Jansen and Pressure Concepts (2005) 26 *ILJ* 2064 (BCA)

Naik v Telcom SA (2000) 21 *ILJ* 1266 (CCMA)

National Union Of Metal Workers Of SA on behalf of Williams and Roberson & Caine (Pty) Ltd (2005) 26 *ILJ* 2074 (BCA)

4. In this regard Grogan states the following in *Workplace Law*[8]:

"*Employees may be dismissed if they consume alcohol or narcotic drugs to the point that they are rendered unfit to perform their duties. There may, however, be a thin dividing line between cases in which alcohol or drug abuse may properly be treated as misconduct, and those in which it should be treated as a form of incapacity. The Code of Good Practice: Dismissal specifically singles out alcoholism or drug abuse as a form of incapacity that may require counselling and rehabilitation [Item 10(3)]...*

It is clear, however, that in certain contexts being intoxicated on duty can be treated as a disciplinary offence...

8pp 226 and 266

Special mention is made [in the Code of Good Conduct: Dismissal] of employees addicted to drugs or alcohol, in which cases the employer is enjoined to consider counselling and rehabilitation. The dividing line between addiction and mere drunkenness is sometimes blurred. An employee who reports for duty under the influence of alcohol or drugs may be charged with misconduct. Whether such an employee should be considered for counselling or rehabilitation depends on the facts of each case. These steps are generally considered unnecessary if employees deny that they are addicted to drugs or alcohol, or that they were under the influence at the time. Rehabilitative steps need not be undertaken at the employer's expense, unless provision is made for them in a medical aid scheme."

4. Where an employee is suffering under incapacity as a result of their alcoholism, the employer is under an obligation to counsel and assist the employee in accessing treatment for their disease. The purpose of placing such a duty on an employer is based on the current medical understanding of alcoholism – that it is a diagnosable and treatable disease. This disease results in the incapacity of the employee.

4. In terms of how to deal with the employee, the distinguishing feature in such cases of alcoholism appears to be, as with all instances of incapacity, that the employee is not at fault for her behaviour – the employee cannot be blamed for their disease and its impact on their behaviour and discipline would be inappropriate in the circumstances.

4. I agree with Mr *Cassels*, however, that the category of misconduct for reporting for duty under the influence has not been extinguished by the incapacity classification for employees with alcoholism. An obligation to assist an employee who does not suffer under such incapacity does not rest on the shoulders of an employer. Such an employee is responsible

for their actions and can, and should, be held accountable for any misconduct they commit.

4. It is not necessary for me to consider how one is to determine whether an employee has alcoholism as it is common cause and a fact accepted by the Second Respondent that the Fourth Respondent is not an alcoholic and is not suffering from alcoholism.

Fairness of Dismissal for Misconduct: Under the Influence

4. Once a commissioner finds that an employee is not an alcoholic he/she is required to consider whether a finding of guilt is fair and whether the sanction applied by the employer is reasonable and justified in the circumstances. In order to do this the commissioner is required to continue to apply the law relating to misconduct and not that relating to incapacity.

The relevance of harm caused by or the potential for harm in cases involving alcohol related misconduct

4. Grogan[9], in discussing the case of **Tanker Services (Pty) Ltd v Magudulela [1997] 12 BLLR 1552 (LAC)** in which it was found that the employee, who was found to have been under the influence of alcohol, committed an offence justifying dismissal, notes the following:

"*...[I]n Tanker Services (Pty) Ltd v Magudulela the employee was dismissed for being under the influence of alcohol while driving a 32-ton articulated vehicle belonging to the employer. The court held that an employee is 'under the influence of alcohol' if he is unable to perform the tasks entrusted to him with the skill expected of a sober person. The evidence*

9*Workplace Law* p 224

required to prove that a person has infringed a rule relating to consumption of alcohol or drugs depends on the offence with which the employee is charged. If employees are charged with being 'under the influence', evidence must be led to prove that their faculties were impaired to the extent that they were incapable of working properly. This may be done by administering blood or breathalyser tests...

Whether employees are unable to perform their work depends to some extent on its nature. In Tanker Services, the question was whether Mr Magudelela's faculties had been impaired to the extent that he could no longer perform the 'skilled, technically complex and highly responsible task of driving an extraordinarily heavy vehicle carrying a hazardous substance'. Having found that he could not safely do so in his condition, the court concluded that Magudelela's amounted to an offence sufficiently serious to warrant dismissal."

4. As to whether an employee, being caught before any serious incident occurs, should be treated more favourably than another who was not caught, the arbitrator in **NUMSA obo Davids/Bosal Africa (Pty) Ltd [1999] 10 BALR 1240 (IMSSA)** was of the opinion that the dismissal of a crane driver was justified despite the fact that he had operated the crane without mishap for some time before the level of alcohol in his bloodstream was discovered to be three times the legal limit for driving a vehicle.

4. This finding was confirmed by the Labour Court in **Exactics-Pet (Pty) Ltd v Petalia NO & other (2006) 27 *ILJ* 1126 (LC)** where Revelas J stated the following[10]:

10At 1131

"*In the arbitration of NUMSA obo Davids v Bosal Africa (Pty) Ltd [1999] 10 BALR 1240 (IMSSA), the union argued that, although its member had operated a heavy duty crane with alcohol in his bloodstream on the material date, his physical condition did not prevent him from performing properly since he had managed to operate the crane for approximately three hours before his condition was detected. In response to this strange submission the arbitrator, Dr Grogan, held as follows:*

> *'However the plea that the moral culpability of a person who is drunk in charge of a vehicle or machinery is diminished because he failed to have an accident before being apprehended, is clearly preposterous. Were that defence to be upheld in traffic courts, the offence of driving under the influence of liquor would be rendered unenforceable, except when the accused had had an accident.'*

The arbitrator's finding in the matter before me, is akin to stating that the ability of the fourth respondent to work for two hours without causing an accident, meant that either he was not drunk or that he should not be held liable for his state of intoxication. That is a logically unsustainable argument."

4. Mr *Cassels* submitted that the ruling in **Exactics-Pets** should logically extend to situations where an employee reports for duty and fully intends to perform their job function but is prevented from doing so by a diligent employer. I agree. The fact that the employee was not allowed to work in his or her intoxicated state should not prevent or mitigate the employee's liability for their state of intoxication. This is particularly relevant where, had the employee actually succeeded with their intention to perform their job function, their state would have made their job extremely dangerous, given the nature of their job function.

<u>Progressive discipline and factors to consider when determining whether dismissal is justified</u>

4. With regard to sanction, Section 3 of Schedule 8 of The Code of Good Practice: Dismissal places an expectation on employers to use corrective and progressive discipline in dealing with the misconduct of employees. It is also trite that in certain circumstances dismissal for a first time offence may be appropriate where such offence is of a serious nature.

4. In **Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC)**[11] the Constitutional Court held that in assessing whether an employer's decision to dismiss is fair:

"*A commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.*"

4. There may be other relevant factors to consider when determining whether dismissal is fair.

Edgars Consolidated Ltd (Edcon) v CCMA & others [2009] 1 BLLR 56 (LC) at paragraphs [18] and [19];

Woolworths (Pty) Ltd v CCMA & others [2008] 8 BLLR 812 (LC) at paras 10-15.

11Para [72]

4. I agree with the suggestion made by Mr *Cassels* that in cases involving misconduct for reporting for duty under the influence of alcohol a commissioner should, in determining the fairness of dismissal, consider and weigh against each other (based on the above), among other things:

    1. That the employee knew of the rule and was aware that breaching it could result in dismissal;

    2. That the employee wilfully committed the misconduct;

    3. The nature and responsibilities of the employee's job function;

    4. The basis for the employee's challenge to dismissal;

    5. The importance of the rule breached;

    6. The principles and necessary application of progressive discipline and the importance of consistency;

    7. The employee's disciplinary record, including the presence or lack of any relevant valid warnings of final written warnings that may be in effect;

8. The harm (or potential to bring harm) as a result of the misconduct.

Job function and the importance of the rule breached

4. The job function of the employee is relevant in determining the fairness of dismissal in cases dealing with being under the influence of alcohol. Where the job is highly skilled, responsible or hazardous or the offence is committed by a senior employee who should be beyond reproach, the courts have found that dismissal for a first offence is justified.

[Tanker Services, *supra*.]

4. It seems to me that in instances where the job function of an offending employee is such that misconduct of this nature would be extremely dangerous and could result in death, injury or damage, a strict application of the rule forbidding it must be applied. Strict application of such a rule is of importance to the company, its employees, and public policy. Commissioners, in weighing up the evidence before them, must have due regard for the importance of such a rule and its role in justifying the dismissal of an employee.

4. Schedule 8 of The Code of Good Practice: Dismissal specifically provides for instances where progressive discipline is simply inappropriate and dismissal for a first offence is justifiable. A number of cases have found that in certain circumstances misconduct relating to alcohol justifies dismissal.

[Tanker Services, *supra.*]

4. Clearly, the importance of the rule and the implications of its transgression must be an essential consideration in determining whether dismissal is justified.

4. A further consideration ought to be the implications of being lenient in the application of an important rule and the message such lenience sends to other employees regarding the infringement of such a rule. The need to deter other employees from committing the same misconduct is a response to risk management and is as legitimate a reason for dismissal as a breakdown in trust. In this regard Conradie JA in **De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others (2000) 21 ILJ 1051 (LAC)**[12] stated the following:

"*A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.*"

Application of a Valid Serious Final Written Warning for the Same Type of Misconduct

4. The Labour Appeal Court considered the relevance, application and purpose of final written warnings in **National Union of Mineworkers & Another v Amcoal Colliery t/a Arnot Colliery & Another (2000) 5 LLD 226 (LAC)**. That case involved an instance of collective misconduct. The employees who were party to the misconduct had varying levels of discipline on their file. Those already on final written warnings were dismissed. The other employees received a lesser sanction which was subsequently reduced by one level in terms of the company's progressive disciplinary structure (e.g. an employee with a clean record was initially given a serious written warning with was later reduced to a warning). Those who had been dismissed did not have their sanctions reduced and the Honourable Court found that this was fair. In this regard the court was of the opinion that an argument that the sanction of dismissal should have also been reduced failed to consider the fact that the other

12Para [22]

employees had disciplinary records that allowed for a lesser sanction than that initially imposed. Their records did not constrain the employer to impose a particular punishment and nothing else. The employees already on a final written warning however left the employer with little choice but to dismiss them. If their dismissal had been reduced it would have been to a final written warning and there would have been no progression of discipline at all. The Labour Appeal Court was of the opinion that failure to impose the sanction of dismissal would mean that they were not punished for that offence and that further, the employee's offence was a fairly serious one and did not justify the extension of any final warning.

4. The implication of this finding, as discussed by Grogan[13] is that:

"*...[A]n employee's disciplinary record may be taken into account when considering whether the employee should be dismissed for a particular offence. This follows from the requirement that dismissal should be 'progressive'. An employee on a final warning for the same offence will normally be regarded as irredeemable, and dismissal will be justified if the employee commits a similar offence during the currency of the warning."*

4. In terms of the relevance of valid written warnings the courts have accepted that the period of validity of a final written warning may differ depending on the gravity of the offence. This is consistent with the principles of progressive discipline.

CWIU & another v AECI Paints (Natal) (Pty) Ltd (1989) 10 *ILJ* 311 (IC)

13*Dismissal* pp 100-101

4. Generally, a final written warning valid for 12 months serves as a clear and strong communication to the employee that their conduct in this regard is extremely serious and will not be tolerated by the employer.

4. Usually, the presence of a valid final written warning at the time of the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature. The principles of progressive discipline require such a re-offending employee to usually be considered irredeemable.

4. Even in circumstances where a final written warning or a string of warnings have expired, a sanction of dismissal may still be justified. In this regard Nicholson AJ in **Gcwensha v Commission for Conciliation, Mediation & Others (2006) 27 *ILJ* 927 (LAC)** stated the following:[14]

"*Even in the absence of a valid final written warning an employer is entitled to dismiss an employee in appropriate circumstances. It must also be recalled that there was in existence a written warning dating from March the previous year with a 12-month duration. The appellant has a deplorable employment record and there is a litany of transgressions to which I have alluded. An employer is always entitled to take into account the cumulative effect of these acts of negligence, inefficiency and/or misconduct. To hold otherwise would be to open an employer to the duty to continue employing a worker who regularly commits a series of transgressions at suitable intervals, falling outside the periods of applicability of final written warnings. An employee's duties include the careful execution of his work. An employee who continuously and repeatedly breaches such a duty is not carrying out his obligations in terms of his employment contract and can be dismissed in appropriate circumstances.*

...

I accept that the purpose of a warning is to impress upon the employee the seriousness of his

14At pp 932-933

actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal. That seems to be the purpose of the warning issued in October to the appellant. I am of the view that an employer is always entitled to look at the cumulative effect of the misconduct of the employee."

Negligence, Under the Influence and Misconduct

4. Negligence can be defined as "*a failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person."*[15]

4. As is obvious from that definition, there is sometimes an overlap between poor work performance and negligence. Negligence can be treated as either incapacity or as misconduct, depending on the circumstances. The basis for culpability in negligence cases is the lack of care and/or diligence accompanying the act or omission. The test for negligence is an objective one, namely whether the harm (or potential harm) was foreseeable and whether a reasonable person would have guarded against its occurring.

Grogan, *Workplace Law*, pages 122 - 123

Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck (2007) 28 *ILJ* 307 (SCA)

Kruger v Coetzee 1966 (2) SA 428 (A) at 430E-H

15Grogan, *Worplace Law* p 122

4. Negligence does not extend to acts where an individual, knowing full well the probability of the consequences of their actions and the dangers in their behaviour, deliberately and wilfully chooses to behave in such a manner regardless of the consequences.

APPLICATION OF THE FACTS TO THE RELEVANT LEGAL PRINCIPLES

Ground 1: Disregard of principles distinguishing misconduct from incapacity

4. Second Respondent in his arbitration award found that it was common cause that Fourth Respondent:

    1. Was not an alcoholic;

    2. Had reported for work on 24 May 2009 under the influence of alcohol.

4. It was common cause on the facts that Fourth Respondent was not incapable of performing her functions but that she had made herself guilty of misconduct in presenting herself for duty whilst under the influence of alcohol.

4. In the circumstances, on a proper evaluation of the evidence and on a proper application of the legal principles distinguishing misconduct from incapacity, Second Respondent ought to have determined that Applicant's Employee Assistance Programme (EAP) was not relevant and Applicant was not obligated to offer Fourth Respondent assistance though it.

4. However, Second Respondent made the following finding:

"*The evidence of the Applicant was that she had raised her personal problems with Mr Majola. They were in discussions regarding possible solutions...Mr Majola as the chair of the enquiry also, was best placed to understand the situation the Applicant was in and could have recommended counselling as a form of action to address the issue given the fact that he was aware of her problems."*

4. I agree with Mr *Cassels* that personal problems of employees are not relevant for determining whether or not an employee is an alcoholic and the matter would more properly be treated as one of incapacity. Alcoholism is a disease. It is leads to incapacity. Personal issues may exist that aggravate the disease but an employee who is not suffering from a disease cannot, because of personal circumstances, be treated as though they are.

4. Second Respondent's finding is basically that although Fourth Respondent does not have a disease amounting to incapacity she should be treated as though she does. That approach is not founded in law and places an unfair burden on the employer. Such reasoning would make the distinction between incapacity and misconduct for alcohol related matters meaningless and the extension of such reasoning would result in employers being required to treat all cases involving employees under the influence of alcohol, as suffering from alcoholism, regardless of whether they are actually ill or not.

4. The arbitrator's requirement that Fourth Respondent be afforded counselling in accordance

with the EAP is also inconsistent with the underlying principles that determine the application of the EAP - which is to assist employees suffering from dependency related problems.

4. Without being insensitive to the personal problems of the employee, it would be inconsistent with the purpose of Section 10 (3) for Fourth Respondent, who is not an alcoholic, to be treated for alcoholism just because she was having a difficult time at home. The requirement to assist employees suffering under such a disease is precisely to protect genuinely ill employees from being dismissed for offences which they may commit through no fault of their own as a result of such an illness. The implication is that employees who are not alcoholics are, in all but the most sinister of situations, in control of their consumption of alcohol and are fit to be held accountable for it.

4. Second Respondent's ruling indicates that he did not appreciate the purpose of the EAP and illustrates that he failed to appreciate the important distinction between misconduct and incapacity in evaluating employee conduct.

4. Had the arbitrator applied the relevant legal principles distinguishing between misconduct and incapacity, he would have concluded that Fourth Respondent was guilty of misconduct and that the EAP was not, on the facts, an appropriate avenue for dealing with the matter. Accordingly, there was no obligation or basis for the employer to have referred Fourth Respondent to the EAP or to address the matter by means of counselling.

4. In addressing the factual dispute before him on the incorrect application of the relevant legal principles, Second Respondent committed a gross irregularity of a material nature in the conduct of the arbitration proceedings, thereby resulting in Applicant not being afforded a fair hearing at arbitration. For the same reasons, Second Respondent's arbitration award amounts to a decision that a reasonable decision maker could not make.

4. Second Respondent's award that Fourth Respondent submit to rehabilitation in terms of the company's substance abuse policy and to comply with that policy is inconsistent with the proven facts that Fourth Respondent was guilty of misconduct. In the circumstances teh arbitrator committed a gross irregularity in the conduct of the arbitration proceedings and made a decision that a reasonable decision maker could not make.

Ground 2: Failure to consider the importance of the rule that had been breached

4. As set out above, it was common cause on the facts that Fourth Respondent had made herself guilty of misconduct in presenting herself for duty whilst under the influence of alcohol.

4. It was further common cause that Fourth Respondent was in a safety critical position which at all times would require the strict application of the rule that employees may not be under the influence of alcohol at work.

4. Fourth Respondent had already been disciplined in this regard and had a valid final written warning on file. She had also been counselled and educated on the issue and danger of alcohol in the workplace.

4. The evidence was that Fourth Respondent was responsible for tasks that were highly risky. Had Fourth Respondent performed her job in the state that she was in, there could have been disastrous consequences and it had the potential to result in death, injury, or damage to

company property.

4. Second Respondent failed to have a proper appreciation of the importance of the strict application of that rule in this matter. Condoning such behaviour by Fourth Respondent, especially when she already had a final written warning for the same form of misconduct, could send a message to Applicant's other safety critical employees that the company will tolerate such behaviour. Mr *Cassels* said that this is a risk Applicant simply cannot be expected to take. I do not think that is an unreasonable stance.

4. I agree that, in assessing the breach of the rule, the arbitrator placed too little, if any, emphasis on the importance of the rule that was breached by Fourth Respondent and too much emphasis on other less relevant or otherwise irrelevant factors, namely that:

    1. Fourth Respondent was not allowed to work on the day of the incident and thus did not place Applicant or its passengers in danger. On the evidence before me, it appears that it would have been extremely dangerous for Fourth Respondent, given her position in the company, to have worked in her condition. The fact that Applicant discovered Fourth Respondent's intoxicated state before she made it to her work station places an unfair burden on Applicant and sets a precedent that requires employers, who wish to send the message that they will not tolerate employees who are under the influence of alcohol, to allow employees suspected of such misconduct to report for and perform their duties before intervening. Such a requirement could have disastrous effects and cannot be said to be in the best interests of public policy. The **Exactics–Pets** case does not support the conclusion reached by the Second Respondent in this regard.

    2. Fourth Respondent could have been suspended in terms of the company policy. In this regard it is noted that the court in **Gcwensha v CCMA & others,** *supra*, was of the opinion that where a policy allowed for a certain course of action to be taken for

misconduct it does not follow that such action must be taken before dismissing an employee in certain circumstances. Schedule 8 of The Code of Good Practice: Dismissal specifically acknowledges that circumstances may arise where the misconduct of an employee is simply too serious to justify any action short of dismissal. It seems to me that Fourth Respondent's misconduct in the current case is one such case that justifies dismissal. Further, the dismissal of an employee on a final written warning is consistent with progressive discipline and, given the seriousness of the offence, suspension would amount to a mere slap on the wrist for an offence which on Fourth Respondent's own record attracted a final written warning in the first instance. Any sanction short of dismissal would amount to Fourth Respondent not being disciplined at all.

3. Fourth Respondent's performance had not been affected by her actions. But the issue before the Second Respondent was not one of performance. As discussed above the issue was more properly classified as one of misconduct and her performance is an irrelevant factor. It is pertinent to note that on the day in question Fourth Respondent's performance was indeed affected by her actions – namely, she was unfit to render her services to Applicant and had to be sent home.

4. Fourth Respondent was aware of the dangers and safety hazards of being present at work under the influence of alcohol. How such a factor could be considered to mitigate Fourth Respondent's misconduct is difficult to understand. One of the reasons for which Fourth Respondent's misconduct ought to be considered so serious as to warrant dismissal is precisely that Fourth Respondent knew of the dangers and the risk to the safety of life and property that presenting herself for duty while under the influence of alcohol imported, and yet she proceeded to do so anyway. Clearly

educating her on the dangers of such behaviour did not deter her form committing the misconduct.

5. Applicant had failed to have sufficient regard for the circumstances which led to the offence being committed. While Fourth Respondent's personal situation may be regrettable, she was more than aware when she made the conscious decision to consume alcohol that she was required to report for duty the following day and that, should she drink to excess, she would most likely still be intoxicated at that time. The company had extended assistance to the employee and had counselled her in respect of her family situation and was, at her behest, looking for a transfer. There is no reason why Fourth Respondent could not have sought further assistance from the company. Despite this, Fourth Respondent chose of her own free will and volition to drink to excess and to report for duty under the influence.

4. It is clear that in assessing the matter as he did, Second Respondent disregarded relevant evidence and had regard for irrelevant considerations and thereby made an award that was inappropriate on the facts and which was one that a reasonable decision maker could not make. In doing so, Second Respondent was also guilty of committing a gross irregularity of a material nature in the conduct at the arbitration proceedings which has resulted in Applicant not being afforded a fair hearing.

<u>Ground 3: Failure to apply relevant legal principles in respect of the serious written warning</u>

4. I also find that the arbitrator misdirected himself in concluding that, as Fourth Respondent was four days short of the expiry of a final warning for similar misconduct and that, as Fourth Respondent had not been disciplined for 11 months and 26 days for similar misconduct, she had taken the warning very seriously, which was a positive factor in favour of her receiving a lesser sanction than dismissal. The fact that such a serious warning would

expire in a few days cannot mitigate the employee's repeated misconduct by showing that she adhered to the rules for a period just short of the period of the warning's validity.

4. Such an application of a valid final written warning is inconsistent with the principles of progressive discipline and the decision in **National Union of Mineworkers & Another v Amcoal Colliery t/a Arnot Colliery & Another**, *supra***.** Failing to apply the sanction of dismissal in these circumstances has the result of being no punishment at all and renders progressive discipline meaningless, which is untenable - particularly in a situation involving serious misconduct.

4. I am persuaded that Second Respondent's analysis of both the relevant legal principles and the facts in this regard constitutes a material gross irregularity in the conduct of the proceedings, which has resulted in Second Respondent making a decision that a reasonable decision maker could not make.

4. A reasonable decision maker would have determined that the fact that Fourth Respondent did not transgress the rule for almost 12 months was proof that:

    1. She knew that such misconduct was considered to be extremely serious by Applicant and that she faced dismissal, should she commit such an act again;

    2. She was not an alcoholic and was not suffering under any incapacity (as is common

cause).

4. By failing to evaluate the evidence relating to the valid serious written warning in accordance with generally accepted legal principles, Second Respondent committed a gross irregularity in the conduct of the arbitration proceedings which precluded Applicant from having a fair hearing at arbitration. Furthermore, Second Respondent's flawed evaluation of the evidence pertaining to the serious written warning resulted in Second Respondent making a decision that a reasonable decision maker could not make in the circumstances.

Ground 4: Fourth Respondent at most acted negligently in the consumption of alcohol the night before she booked on duty

4. It is not logically sustainable for Second Respondent to have concluded that Fourth Respondent, in consuming alcohol the night before she booked on duty, at most acted negligently. Fourth Respondent at all relevant times knew that she had to report for duty the next morning and that if she consumed sufficient quantities of alcohol that night she would still be under the influence of alcohol when she was required to report for duty. Furthermore, Fourth Respondent knew when she reported for work on 24 May 2009 that the probability existed that she was still under the influence of alcohol.

4. The common cause facts are not consistent with Second Respondent's finding that Fourth Respondent at most acted negligently. Second Respondent's finding is also inconsistent with general principles of law relating to negligence and culpability.

4. Second Respondent's failure to apply the relevant legal principles properly or at all and to have proper or any regard for the common cause facts amounts to a gross irregularity in the conduct of the arbitration proceedings which has resulted in Applicant being refused a fair hearing. Furthermore, for the same reasons Second Respondent made a decision that a reasonable decision maker could not make.

Ground 5: Second Respondent exceeded his powers

4. Second Respondent directed that Fourth Respondent report to rehabilitation in terms of paragraph 12 of Applicant's Substance Abuse Policy and that Fourth Respondent must comply with such policy. I agree that in making that award, Second Respondent exceeded his powers in that Second Respondent was tasked with determining the unfair dismissal dispute on the basis of whether Fourth Respondent's dismissal by Applicant was procedurally and/or substantively unfair. Although an arbitrator may make any appropriate arbitration award in terms of the LRA, the award made by Second Respondent that Fourth Respondent submit to rehabilitation and comply with the relevant policy is not contemplated in the context of the powers accorded to him in determining a dismissal dispute. In granting the award that he did, Second Respondent descended into the realm of the employment relationship not covered by his terms of reference. Second Respondent was tasked to determine the fairness of the dismissal dispute. Second Respondent has granted an order instructing the parties to participate in a process within an ongoing employment relationship in circumstances where that process has no application on the common cause facts presented to Second Respondent.

4. The award directing that Fourth Respondent subject herself to rehabilitation is wholly

inconsistent with the proven facts that Fourth Respondent committed misconduct.

CONCLUSION

4. For these reasons, the award must be corrected and set aside. It would serve no purpose to refer it back to the bargaining council for an arbitration *de novo*.

4. Given that the respondents abide the decision of the court, the applicant did not pursue its prayer for costs.

4. I order as follows:

    1. The arbitration award made by Second Respondent under the auspices of First Respondent dated 29 July 2009 is reviewed and set aside.

    2. The award is replaced with the following: "The dismissal of the employee (the fourth respondent) was fair."

    3. There is no order as to costs.

STEENKAMP J

Date of hearing: 2 March 2011

Date of judgment: 4 March 2011

For the applicant: G J Cassells (Maserumule Inc)