

**South African Chemical Workers' Union obo Mathebula / Rocbolt Technologies  
[2020] 12 BALR 1263 (NBCCI)**

**Division:** National Bargaining Council for the Chemical Industry  
**Date:** 28/07/2020  
**Case No:** CHEM291-19/20  
**Before:** F Mooi, Arbitrator

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**Referral in terms of [section 191\(5\)\(a\)\(i\)](#) of the LRA**

*Dismissal - Procedural fairness - Charges - Employee claiming that she should have been charged with poor work performance rather than gross negligence, but employer having prerogative to choose charge.*

*Dismissal - Substantive fairness - Gross negligence - Quality manager releasing sub-standard safety equipment - Dismissal fair.*

**Editor's Summary**

After one of the respondent's clients complained that it had received safety equipment which did not comply with specifications, the applicant employee, a quality controller, was dismissed for gross negligence and bringing the respondent's name into disrepute. The employee claimed that she had not received sufficient training, that dismissal was too harsh because this was her first offence and that her case should have been dealt with as one of poor work performance, rather than gross negligence.

The Commissioner held that the respondent was entitled to frame charges as it wished. Just as in criminal law, different charges may arise from the same set of facts. Employees may not decide on the offences for which they may be charged. Once the employer has chosen the charge, it must prove that the employee was guilty of that charge. In this case, the employer had chosen to press a charge of gross negligence, for which the disciplinary code provided for dismissal for the first offence. The charge was justified because the sub-standard equipment that had been approved by the employee could have led to fatalities. The employee had been in her job for eight years and had been properly trained and the respondent's relationship with its client had been jeopardised. The seriousness of the offence over-rode the employee's otherwise clean disciplinary record.

The application was dismissed.

**Award**

**[1] Details of hearing and representation**

*[Numbering style as per award - Ed.]*

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- [2] This matter was heard at the Bargaining Council offices in Johannesburg on 28 July 2020. The applicant was represented by Mr Molema. The respondent was represented by Mr Madalane.

**[3] Issue in dispute**

- [4] This was an unfair dismissal dispute in which procedural and substantive fairness was challenged.

**[5] Jabulile Manana**

- [6] The respondent's first witness testified and made the following points.
- [7] She is a quality manager. The applicant was a quality controller who reported to her. On 18 July 2019 the product was manufactured. On 28 November 2019, the sales and marketing manager called her about a complaint from the mine to say that they supplied a product which was short in length.
- [8] She pulled out more samples from other shifts and the samples were within the specification. The applicant could not explain why she got it right in the past but not on that shift. The applicant was with the company for eight years.
- [9] She trained the applicant herself when she joined the company and she was comfortable that the applicant did her work right. She brought in two samples from other shifts which are correct and the sample from the shift that was problematic.
- [10] Their product is a critical safety product. Before the client starts mining, they must ensure that there is no rock fall. As the product was short for the hole there would not be enough support. If the product is short it will not fill the hole and there will not be sufficient support and there can be a rock fall and a fatality.
- [11] The applicant said that no one died so it was not a big deal. Someone could have died if the mine did not pick up the issue. Instead of the applicant saying she made a mistake she pushed the blame elsewhere. She was not taking responsibility which is a problem in the quality department. The sanction was appropriate. She cannot trust the applicant to be a quality controller and she cannot double check the work of someone with eight years' experience.
- [12] Page 86 is their disciplinary policy. Page 87 - under "Offences relating to Productivity" point 10 recommends dismissal for a first offence of gross negligence. The applicant was charged for gross negligence and putting

the imagine [image - Ed] of the company into disrepute, page 21. There is no recommended sanction for bringing the company's name into disrepute.

- [13] The applicant does not have any previous written warnings for these offences. The chairman's findings are on pages 1-12. I inquired if the applicant had been guilty of poor-quality control in her eight years of service. She replied that she was coached but she was never charged.

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- [14] I inquired why the applicant could not be rehabilitated given her clean record of eight years and given the fact that she appears to know her job. She replied that a week after the hearing she refused to follow procedure and when she was asked why not she said that she was directed by the forklift driver. She was not charged for this.
- [15] I inquired if the client indicated that the respondent would lose their contract or in any other way be penalised. She replied that from what the sales director said the client was not happy and it would be difficult to get the contract renewed as three companies are tendering for the contract. Training is reviewed every six months. She also does spot checks to see if everything is done correctly. They both sign the training records, page 29.
- [16] Cross-examination will be referred to in my analysis where necessary.

**[17] Linah Mathebula**

- [18] The applicant testified and made the following points.
- [19] She commenced employment in 2011; was dismissed on 11 March 2020; earned R22 280 per month; is unemployed and wanted compensation.
- [20] She was dismissed for gross negligence as the product was out of specification. This was her first offence. She was never charged with misconduct before. She felt disappointed when she was advised that the product was out of specification. It was made on night shift.
- [21] The sanction of dismissal was unfair as it was her first offence. She has a good relationship with her supervisor. She intended to work until retirement. She supports three children from age seven to eleven. She is married. If needed, she will return to work.
- [22] Regarding the contention that the sanction was fair as people could have been killed as the product was out of specification, she replied that this was her first offence. Furthermore, she was taught a specific way at her previous company and she was not given training at the respondent.
- [23] Regarding the contention that she brought the company's name into disrepute as the client discovered the problem and may not renew their contract as other companies are tendering, she replied the mistake was not in the media.
- [24] Cross-examination will be referred to in my analysis where necessary.

**[25] Substantive fairness**

- [26] The applicant was charged with: (1) Gross negligence in that the applicant approved a product that was not correctly measured; (2) Putting the name of the company into disrepute. It is common cause that the applicant approved a product which was not within specification and that this was discovered by the client. The applicant argued that the applicant was not properly trained and argued that the sanction of dismissal was too severe.
- [27] Part of the applicant's defence was that the applicant was guilty of, and should have been charged, for poor quality of work, paragraph 15, of the disciplinary code. The respondent argued that this was a case of gross

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negligence of duties. The applicant's argument that the applicant fell under poor work performance is not cogent.

- [28] The same set of facts can result in different charges. For example, in criminal law, an accident can result in charges of reckless or negligent driving; drunken driving or culpable homicide. The employer enjoys the prerogative of determining what to charge an employee with, the same way that a prosecutor does. Once that is done the employer bears the onus of proving the charge.
- [29] The employee cannot determine what they should be charged with. As the respondent decided not to charge the applicant with poor quality of work, poor performance is not an issue a commissioner can determine as it is not up to a commissioner to determine what an employee should be charged with but only has to decide if the actual charge has been proved on a balance of probabilities. As the main charge was gross negligence, the only issue is whether the applicant was grossly negligent and whether dismissal was an appropriate sanction for that offence.
- [30] The sanction of dismissal was fair for a number of reasons. Firstly, the respondent's code recommends dismissal for a first offence of gross negligence.
- [31] Secondly, I am satisfied that the applicant was guilty of gross as opposed to "ordinary" negligence as the distinction was not challenged and as the fact that the applicant incorrectly measured mining equipment which could have resulted in underground deaths or injuries makes the offence gross, which warrants dismissal for a first offence.

- [32] Thirdly, the applicant's argument that she was not properly trained is without merit as she did the same job for eight years without being charged for any offence relating to her not being able to do her job properly. I am satisfied that she was properly trained and that she was regularly tested as competent, as can be seen from her training schedule. Her alleged lack of training is thus not a mitigating factor.
- [33] Fourthly, although the mine did not write a letter indicating that they were dissatisfied with the respondent's service, the fact that they picked up the error would inevitably have tarnished the respondent's image, which may affect them keeping their contract given that other companies are tendering for the job.
- [34] Fifthly, I take into account that the applicant's eight years of service and her clean disciplinary record is a strong mitigating factor. However, this is outweighed by the seriousness of the offence which could have resulted in a loss of life as well as the recommendation of the disciplinary code that dismissal be imposed for a first offence of gross negligence.

**[35] Award**

- [36] The applicant's dismissal was substantively fair. I dismiss the applicant's case.

*No cases were referred to in the above award.*