IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 323/2004**

In the matter between:

NKOSINGIPHILE BHEMBE **Applicant**

and

SWAZILAND BREWERIES **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
MATHOKOZA MTHETHWA	**:**	**MEMBER**
FOR APPLICANT	**:**	**S. KUBHEKA**
FOR RESPONDENT	**:**	**M. SIBANDZE**

J U D G E M E N T – 25/02/2009

1. The Applicant has applied to the Industrial Court for determination of an unresolved dispute arising out of the Respondent's termination of his services on the 28th December 2003. He is claiming payment of statutory terminal benefits and maximum compensation for unfair dismissal.

2. The Applicant was employed by the Respondent on 3rd November 1997 as a shift fitter. His duties included monitoring the carbon dioxide

(Co2) collection plant and attending to any breakdown or faults that occurred. When he was on the night shift, it was also his duty to start up the CSD washer. This is a machine that washes and pasteurizes the empty beer bottles. It has to be started up at about 3.30 a.m. so that the bottles are washed and ready for filling when the next shift clocks in at 5 a.m.

3. The Applicant received training on the performance of these routine duties at the Respondent's training facility in Johannesburg when he was first employed. He performed the duties for six years thereafter, under the supervision of the Maintenance Charge hand/ Supervisor.

4. The Applicant's services were terminated on the 28th December 2003 after he had been found guilty at a disciplinary hearing on a charge of neglect of duty and responsibility.

5. The charge arose from an incident which took place during the 22h00 to 06h00 shift of the 7th December 2003, wherein it was alleged the Applicant negligently allowed water to enter into the Co2 collection plant, and also failed to start the CSD washer.

6. It is common cause that at the date of termination of his services the Applicant was an employee to whom section 35 of the Employment Act 1980 applied. It follows, in terms of section 42 of the Act, that the burden rests upon the Respondent to prove that the services of the Applicant were fairly terminated. In order to discharge such burden, the Respondent must prove:

7. that the reason for the termination was one permitted by section 36

of the Act; and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the Applicant.

8. The Respondent relies upon section 36 (a) of the Act, which states that it shall be fair to terminate the services of an employee "*because the conduct or work performance of the employee has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him."*

9. It is common cause that the Applicant was issued with a final written warning prior to the alleged neglect of duty on the 7th December 2003 for which he was dismissed.

10. This final written warning was issued after the Applicant was found guilty of neglect of duty at a disciplinary hearing. It was found that he failed to properly fasten a compressor in the Respondent's engine room, resulting in damage to the Respondent's machinery. The Applicant's appeal against the finding of guilt was unsuccessful.

11. When he testified in court, the Applicant asserted that he should not have been found guilty of neglect of duty, and he challenged the validity of the final written warning. The court ruled that the Applicant was precluded from challenging the validity of the prior warning because the Applicant admitted the final written warning in his particulars of claim without raising any issue in respect thereof. We did however allow the Applicant's counsel to argue the point that the final written warning was irrelevant and should not have been taken into account because it did not relate to the misconduct for which the Applicant was dismissed.

12. In our view there is no merit in this point. We accept the principle that in imposing a disciplinary sanction for a particular offence an employer cannot take into account prior warnings which are unrelated to that offence – see **CCAWUSA & Another v Wooltru Ltd t/a Woolworths (Randburg) (1989) ID ILJ 311 (IC**). However in the present matter the offence for which Applicant received the warning was the same offence for which he was dismissed, namely neglect of duty. It is irrelevant that the particulars of the negligence alleged in each case are different. The offences are related because they involve similar misconduct i.e. neglect of duty. In our finding the Respondent was entitled to take the prior warning into account.

13. The court conducted an inspection in loco at the Respondent's brewery. The process by which carbon dioxide is collected and stored was observed by the court and noted in our Statement of Observations which forms part of the record. The process was also explained in evidence by the Applicant and the witnesses for the Respondent. It is not necessary for the purpose of this judgement to give more than a brief outline of the process.

14. Carbon dioxide is a by-product of the fermentation of beer. The gas is collected from the fermentation vessels and transported to the engine room where the Co2 collection plant is situated. The gas first passes through water in a foam trap, where any foam solids are removed and flushed to waste. The gas outlet pipe is situated at the top of the foam trap. This pipe takes the Co2 to a large balloon for accumulation. The gas is then put under pressure by a blower so that it passes through a scrubber and a deodorizer for further filtering, and enters the compressor. The compressor, as its name suggests, compresses the gas and sends it under pressure to the driers, where any residual

moisture is removed. The Co2 then enters the condenser, where the gas is rapidly cooled until it becomes a liquid, in which form it is finally stored.

15. The Applicant and the Respondent's witnesses all stressed the critical need for moisture to be filtered out of the gas on its journey to the condenser, because any water reaching the condenser will freeze into ice, block the system, and take two days to defrost and clean out, during which time the Co2 collection system cannot operate.

16. The foam trap is the primary means by which foaming solids and water moisture are separated from the gas. It occasionally happens that excessive foam is generated by a fermentation vessel, and this may result in foam rising in the trap and entering the gas outlet pipe. In this way moisture enters the system with potentially deleterious results. The collection system has three main safeguards to ensure that this problem does not occur, or if it occurs, to detect it before the water reaches the condenser and brings down the system.

17. Firstly, the shift fitter is required to monitor the foam trap on a regular basis. By inspecting through a porthole, he can readily ascertain whether there is excessive foaming. If this is detected, he is required to switch off the system, disconnect the offending fermentation vessel, and clean out any moisture that has already entered the system.

18. The second safeguard is that water in the system normally trips the blower and shuts down the system.

19. The final safeguard is that there is a pressure gauge situate at the driers. If water has reached this far, this can be noted from the

pressure gauge, and a flashing light is also triggered as an alarm. It is however common cause that this alarm was malfunctioning at the material time. It is also common cause that the Respondent had failed to repair the alarm despite repeated reminders by the shift fitters.

20. The shift fitter working on the night shift works alone. It is rather surprising then that one of the Applicant's duties on the night shift was to drive employees from the previous shift to their homes. Obviously this meant that during the hour he was away from the engine room, he could not monitor the foam trap.

21. On the night of the 7th December 2003 at about 02.00 a.m., the Applicant was alerted to a problem by the compressor making a peculiar noise. He noticed water in the sump of the compressor. He immediately closed the valves, switched off the compressor, and isolated the foaming fermentation vessel. He opened the compressor and found about 5 litres of water inside. He cleaned out the water and re-started the compressor. Then he noticed that there was water in the oil of the compressor. He re-opened the compressor and changed the oil. By now it was 3.30 a.m. He went to start the CSD washer, and returned to continue cleaning and drying the compressor and its valves. At about 4 a.m. he tried to telephone his supervisor to report that he was having a problem but his supervisor's cellphone was off. He re-assembled the compressor, opened the valves and switched on the system. Shortly thereafter at 6 a.m. his relief fitter came on duty and he handed over to him after telling him of the problems he had experienced. At that time, according to the Applicant, the compressor was running without any apparent problem.

22. However it transpired that a short time into the next shift the system

broke down. It was discovered that water had entered the condenser and frozen, blocking the pipes. The plant was thereafter unable to operate for about 2 days whilst the problem was attended to.

23. To compound the Respondent's woes it also transpired that the valves of the CSD washer were closed when the Applicant switched it on, so that the washer did not heat up. When the next shift arrived they found that the bottles had not been washed. The Applicant said he was too busy attending to the compressor to monitor the washer after he had switched it on at the control panel. He conceded that he was supposed to check the CSD washer every half hour.

24. Regarding water getting into the compressor, the Applicant said that the system was supposed to have automatically tripped before water entered the compressor. He could not explain why this did not happen. He also complained that he was not timeously alerted to the problem of water in the system because the alarm was malfunctioning. He said even if he had checked the pressure gauge by that time water would have already reached the driers. He said it only took about 5 minutes for water to travel from the foam trap to the driers.

25. In cross-examination the Applicant denied that he failed to regularly monitor the foam trap. He said he never saw any excessive foam in the trap and there was nothing to alert him to the entry of water into the system. He believed water entered the system because the water entry valve in the foam trap never closed properly, not because of excessive foaming.

26. It was also put to the Applicant that he re-started the compressor when there was still water in the system and that this was negligent. He

denied doing so.

27. The Respondent called the Applicant's supervisor William Dlamini to testify. He said that when he came on duty on 8 December he found that the whole Co2 plant was soaked in water, and the water had reached the condenser and frozen. The system was shutdown for two days whilst the condenser was defrosted and drained, and consequently the Respondent lost two days production of Co2. He said this was all due to the negligence of the Applicant, firstly because he failed to monitor the foam trap, and secondly because he continued to run the plant when there was water in the system.

28. William Dlamini denied that it took only five minutes for water to reach the driers. He said it would take about an hour, since it would have to pass through the scrubber and the deodorizer.

29. The Respondent also called Reginald Maya as a witness. Maya is a shift fitter employed by the Respondent. He performed the same duties as the Applicant in the engine room. The Applicant called him as a witness at the disciplinary hearing. The court found him to be an honest and credible witness who gave his evidence in a forthright manner.

30. Maya said that on discovering water in the Co2 collection system, it is necessary to first trace how far the water has traveled in the system, starting from the driers and working backwards. He said if water has reached the driers, it is too risky to re-start the system, and the shift fitter must call his supervisor to attend to the problem. If the water has only reached the compressor, then it is necessary to drain the system from the compressor back to the foam trap. The deodorizer has to be

changed if it has water in it. Water is manually drained by opening the valves in the scrubber and the foam trap. He said this must be done before the system can be re-started.

31. Asked why the system did not trip on the night in question Maya explained that water trips the blower, not foam, so if the water was still trapped in the foam, it could pass into the system without tripping the blower. Maya agreed with Dlamini that it took about an hour for water to reach the condenser. He said it took about half an hour for foam to reach the blower, which is situated half way through the system.

32. Maya said it was by no means the first time that water entered the system. It had happened before on his own shift, and he was aware of other incidents, including an incident when the water had reached the condenser. He said on that occasion the employee responsible was not dismissed, though he had a prior warning.

33. After considering all the evidence before us, we are satisfied that water entered the system due to excessive foaming. Firstly, this is the most probable, if not only, route of entry. Since the blower did not trip, the water must have entered the system in the form of foam. Water in the foam trap cannot reach the Co2 outlet pipe at the top of the trap because the water drainage pipe is situated halfway up the trap, so the Applicant's speculation about a water entry valve being the cause of the problem seems farfetched. Secondly, the only reason why the Applicant would have disconnected the fermentation vessel is because he observed excessive foaming.

34. In our view a considerable amount of foam must have entered the system before the Applicant discovered the problem, considering that

he found 5 litres of water in the compressor. This means that the scrubber and the deodorizer must have been drenched in water.

35. We find that although it was the duty of the Applicant to monitor the foam trap for excessive foaming, there was no laid-down policy as to how frequently this should be done. The Respondent clearly did not at the time regard the risk of excessive foaming as sufficiently high to warrant continuous, frequent monitoring, otherwise it would not have instructed the Applicant to leave the engine room for an hour or more to drive employees home. This is not to say that the Applicant was transporting employees when the foaming occurred, but it indicates that monitoring the foam trap every 15 minutes, as testified by William Dlamini, could not have been the policy of the Respondent. Moreover the Applicant had to attend to other duties outside the engine room. Perhaps because there was a belief that the system would trip before any serious damage was done, the Respondent did not establish a proper early warning system. The attitude seems to have been that provided the fitter on duty checked the foam trap from time to time when he was in the engine room, this was sufficient.

36. At the inspection in loco, the court learned that the Respondent installed an automatic shutdown switch in the foam trap after the incident which gave rise to the Applicant's dismissal. This is an indication that the previous monitoring arrangement was impractical and unreliable, regardless of which shift fitter was on duty at the time. In our view the Respondent has not proved that the Applicant's failure to notice the build-up of foam in the foam trap amounted to a neglect of duty.

37. However we find that the Applicant did not follow the proper

procedures to ascertain the extent to which water had infiltrated the system. Despite a considerable amount of water being found in the compressor, he did not check the driers, nor in our view did he check the pressure gauge. He did not change the deodorizer, and he switched on the system without first draining the water from the system between the foam trap and the compressor. In his report of the incident, the Applicant stated that he continued with the collection of Co2 whilst keeping on manually draining water from the system. At the disciplinary hearing he said he stopped and started the machine whilst clearing water from the system. We find that if water was not already at the driers when Applicant first switched off the system, it traveled there when he continued to operate the compressor without first draining all the water from the system. The Applicant seems to have appreciated the extent of the problem since he tried to telephone his supervisor. It is difficult to understand why he then re-started the system, without even checking the driers. The court is satisfied that water would not have entered the condenser if the Applicant had carried out his duties competently and correctly.

38. There is no evidence that the Applicant ever had to deal with a similar problem during the 6 years he worked in the engine room, nor is there any evidence that he was shown what steps to take in the event of such an emergency. Nevertheless it is reasonably expected that a qualified fitter with 6 years experience and a working knowledge of the Co2 plant and each of its components would have had at least a conceptual understanding of the correct remedial action to take. The Applicant failed to meet the expected standards required by his job as shift fitter. His bad decisions and poor performance in handling the emergency are a patent indication of incompetence and poor work performance.

39. In our opinion the Applicant's poor performance on the night of the 7th December in relation to the Co2 plant does not show a neglect of duty but rather an incapacity to perform his duties in a competent manner. It is not disputed that the Applicant was hard at work from 2 a.m. until about 5 a.m. cleaning the compressor and draining water out of the system. He did not absent himself, or carry out his work in a careless manner. He just did not seem to know what he was doing.

40. It is our view that the Applicant's poor performance should have been dealt with as a matter of incapacity and failure to meet the Respondent's performance standards, rather than a matter of disciplinary misconduct in the form of neglect of duty.

41. **The Code of Good Practice: Termination of Employment** published in terms of section 109 of the Industrial Act 2000 provides, with regard to a dismissal for incapacity, that any person who is determining whether poor work performance justifies dismissal must consider, *inter alia*, whether the employee was afforded a fair opportunity to meet the performance standard demanded by the employer, and whether dismissal is the appropriate sanction for not meeting the performance standard. It is well-established in our law that an employee who is falling short of the standard required by his employer should be given appropriate counseling, guidance and training before he may be dismissed for poor work performance.

Unilong Freight Distributors (Pty) Ltd v Muller 1998 (1) SA 581 (SCA) at 592.

Fikile Nkambule v Transworld Radio (Unreported IC Case No.

128/97)

Harpet Van Seggelen v Swazi Spa Holdings (Pty) Ltd Unreported IC Case No. 390/2004)

The prior warning referred to in section 36(a) of the Employment Act is required in addition to appropriate counseling, guidance and training.

Harpet Van Seggelen op.cit. at para. 101

42. It is common cause that the Applicant had an unblemished record for 6 years until the incident which gave rise to his first and final written warning. This warning was given on the 4th December 2003, and it was only 3 days later that the incident of water in the Co2 plant occurred. Both issues involved poor performance and incapacity rather than misconduct. In our view a reasonable employer would have seen the need to ascertain whether there was some reason for the sudden downturn in the Applicant's work performance, and whether his incapacity could not be rectified by appropriate counseling or training. In our view it was insufficient and not in conformity with good and fair industrial relations practice to merely issue a warning and strike the Applicant out when he manifested incompetence in his job performance for the second time three days later. The Respondent should have consulted with the Applicant so as to counsel him on his shortcomings and establish a remedial action plan in order to give him the opportunity to improve his performance.

43. The Applicant was also charged with neglect of duty in relation to failing to start the CSD washer. The Applicant admits that he neglected

to monitor the CSD washer to ensure that it was heating up, but argues that he was charged with failing to start the CSD washer, not failing to monitor it. This is splitting hairs, in our view. Starting the washer entailed more than just pressing a button. The Applicant should have checked that the valves of the washer were open when he started it. We find that he was guilty of neglect of duty and responsibility in not making sure that the washer was properly operating. This neglect may to a large extent be due to the Applicant having been distracted by the problems he was experiencing in the Co2 collection plant. This is a mitigation factor, and in the view of the court the neglect was not sufficiently serious as to warrant the summary dismissal of the Applicant.

44. In the judgement of the court, the termination of the services of the Applicant was substantively unfair.

45. The Applicant alleged in his evidence that his disciplinary hearing was unfair because he was prevented from questioning Reginald Maya about the start-up procedures for the CSD washer. It does appear from the minutes that when the Applicant asked Maya a question about the CSD washer the chairman disallowed it. He ruled that Maya was called to testify on the foam trap, and the matter of the CSD washer had been finalized.

46. Maya was the Applicant's witness at the disciplinary hearing. He performed the same duties as the Applicant and could have shed light on the start-up procedures for the CSD washer. This was an issue directly relevant to the charges against the Applicant. In our view it was procedurally unfair for the chairman to disallow the Applicant's questioning of Maya on the issue of the CSD washer, and the

Applicant was prejudiced in the presentation of his defence.

47. The Applicant is entitled to payment of his statutory terminal benefits, and compensation for unfair dismissal. In assessing the compensation to be awarded we have considered his personal circumstances and his employment record. No evidence was led about the Applicant's current employment status, but we believe that as a relatively young man with fitter qualifications and experience he should have had little difficulty in finding alternative employment. We also take into account that the Applicant's incompetence caused loss of production to the Respondent.

48. In the exercise of our discretion we award the Applicant 4 months remuneration as compensation.

49. Judgement is entered against the Respondent for payment to the Applicant as follows:

NOTICE PAY		E 3800-00
ADDITIONAL NOTICE		2923-00
SEVERANCE ALLOWANCE	7307-50	
COMPENSATION		15200-00
TOTAL		E29230-50

The Respondent shall pay the costs of the suit.

The members agree.

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PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT