



ARBITRATION AWARD

Commissioner: Ms Winnie Everett
Case No.: WECT2636-22
Date of Award: 21 August 2023

In the ARBITRATION between:

Alison Turner
(Union / Applicant)

And

Environ Skincare (Pty) Ltd
(Respondent)

APPROVED

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration took place over numerous days: 5 – 7 December 2022; 7 March 2023 (which was postponed due to medical requirements of the Applicant's representative); 11 – 14 April 2023; 19 – 22 June 2023; and 1 August 2023. The hearings took place initially at the CCMA's Cape Town offices and then by agreement at the offices of Bowmans Attorneys, and finally online on the final day of arbitration on 1 August 2023.
2. Ms Alison Turner was represented by Adv Bart Ford, briefed by Rabia Sayed Attorneys. Environ Skincare (Pty) Ltd was represented by Ms. Melissa Cogger of Bowmans. The employer's Ms Britke Wessels, Turner's former line manager, was also in attendance.
3. Prior to this arbitration, there were two in limine rulings by two CCMA Commissioners. The Applicant applied for legal representation (opposed by the employer) which was granted. The Respondent subsequently applied for the appointment of a Senior Commissioner (opposed by the Applicant) which was also granted.
4. The proceedings were digitally recorded. The arbitration was conducted in a fairly adversarial manner and both parties were given the opportunity to call witnesses, to question the witnesses of the other side, and to present closing arguments.
5. Detailed closing arguments were submitted in writing, for which I am grateful. Final submissions were received on 9 August 2023.

ISSUE TO BE DECIDED

6. I must decide whether the applicant was unfairly dismissed for gross negligence and, if so, to award an appropriate remedy.
7. Costs in the matter were also in dispute.

BACKGROUND

8. Turner was employed on 1 March 2021 as a Brand Manager earning a monthly salary of R59,500.00. She reported to Wessels ("Wessels"), the Brand Marketing Manager of the respondent.
9. On 2 February 2022, the employer notified Turner of a disciplinary hearing on three allegations of misconduct. The hearing was chaired by an external chairperson, one Robinson, and it took place on 4, 7 and 11 February 2023. Turner was found guilty of gross negligence as follows:
 - 9.1 Gross negligence in that you missed critical deadlines on 24 January 2022, resulting in additional hours being worked by the Brand Team to get the project over the line and incomplete delivery of the launch material to distributors.

- 9.2 Gross negligence in that work that was submitted was riddled with mistakes, resulting in work needing to be redone to get the project completed.
- 9.3 Gross negligence in that you were instructed to hand in final and completed work and you had continued to work on it after submission, without informing your manager. [This third allegation was initially couched as insubordination, but the chair identified that it was not insubordination but gross negligence.]
10. Turner was summarily dismissed on 18 February 2022 on all three grounds of gross negligence. She referred an unfair dismissal dispute to the CCMA on the same day. She claims compensation for what she alleges to be a substantively and procedurally unfair dismissal.

SUMMARY OF THE FACTS AND ARGUMENTS

11. The evidence was lengthy and detailed, yet broadly speaking, the sequence of events was not materially in dispute and can be summarised as follows. After the applicant's employment on 1 March 2021, she and a fellow brand manager who was newly appointed, one Makepeace, underwent a thorough period of training and induction. Turner was responsible for the Japan market alongside her fellow brand managers who were responsible for the international market and South African market. Her primary function was to prepare marketing materials for Japanese distributors, which involved translating and customising marketing materials for the Japanese market.
12. In the course of 2021, there were certain deficiencies as far as Turner's performance was concerned and her manager identified these as insufficient skincare knowledge, ineffective time management and prioritising of tasks, and difficulties or failure to meet deadlines. Wessels managed Turner closely and she often provided Turner with detailed feedback. She also required that Turner keep timesheets to assist her to be more effective.
13. It is fair to say that as the year progressed, the relationship between Wessels became strained as evidenced by Wessels issuing Turner a verbal warning (in September 2021) for failing to meet a deadline and then written warning (on 1 December 2021) for failing to provide information for a shoot; Turner filing two grievances against Wessels; and Turner recording a meeting with Wessels, seemingly secretly. At the same time, there is no question that the small marketing department operated under considerable pressure with tight deadlines and numerous products to produce – all working long hours, including after hours and in their leave. In this context, Turner articulated in a meeting in December 2021 that she was “putting her hand up” because she was not coping, and on email in January 2022 that she was overloaded and her mental state was not what it should be because of the strain and long hours.
14. In early December 2021, the employer discussed with Turner that she would be placed on a performance management programme. This was not formally implemented and it is the employer's case that before this was done there was intervening misconduct that resulted in her dismissal.

15. Things came to a head around 24 January 2022 (an important deadline which had been revised from the earlier date on 22 December 2021) when Turner was required to upload a number of launch materials for the Japan market, with the necessary adaptations from the international materials. The employer maintained that Turner delivered only two of the ten assets by the deadline and this resulted in the first allegation against her. One of the assets she was required to deliver was the Japan trade presenter, and this she sent to Wessels late on the evening of 24 January 2022. According to the employer, it was “riddled with mistakes” and this is what informed the second allegation against Turner. The third allegation related to the same trade presenter document because Turner had indicated that she would set up a meeting the following morning to review the document. Whereas Wessels spent considerable time reviewing and correcting the document on the night of 24 January 2022, Turner continued to work on the presentation and she fixed a number of the errors. This resulted in the third allegation of insubordination but the chair of the hearing found that Turner’s conduct was grossly negligent, not insubordinate.
16. It is worth noting that when Wessels discovered on the following morning (25 January 2022) that she had wasted her time correcting a document that Turner continued to work on, she was incensed, and she called an immediate meeting with the Marketing Director, Susan O’Keeffe and Turner. Turner secretly recorded the meeting and the recording was played at arbitration. Turner was almost at the outset audibly upset to the point of what might be described as a panic attack or breakdown, and the two managers had to calm her down. Following the meeting, Turner was off work and booked off sick.
17. As already indicated, the above is a very brief summary of the facts. The detailed evidence is on record and both parties provided a summary of the facts in their closing arguments, albeit from their perspective.¹

Argument

18. The applicant argued that Turner’s dismissal for gross misconduct was unfair as “the issues at the heart of this dispute, relates to performance, and ought to have been dealt with as contemplated in Item 10 of Schedule 8 of the Code of Good Practice”.
19. The employer argued that this argument is ill conceived and misplaced as the Applicant “was in a senior role, and there is no obligation to performance manage an employee in a senior position. In any event, conducting an incapacity enquiry for poor work performance would not have changed the appropriate sanction of dismissal” and the employer had no option but to terminate the Applicant’s employment as she was a risk to the organisation and summary dismissal was the only appropriate sanction.

¹ The absence of a detailed summary of evidence in this award is part of a CCMA pilot to move away from detailed summaries of the evidence and to focus on the issues needing to be decided and the arbitrator’s reasons as required by section 138(7) of the Labour Relations Act 66 of 1995. The Labour Court advised that it is not necessary for Commissioners to provide a separate summary of the evidence and argument that was led in a hearing as it merely duplicates the available recording of the arbitration proceedings.

20. The employer argued further that costs should be awarded against the Applicant for a number of days including 7 March 2022 when the matter was postponed, as well as for transcription of the record of the disciplinary hearing. The Applicant argued that costs were not warranted and should be dismissed.

ANALYSIS

21. It is not necessary to troll through the lengthy and detailed evidence and cross-examination to make findings in respect of Turner's conduct. On the first allegation I find that the applicant did miss her deadline on 24 January 2022. However, it was evident by then that she would miss the deadline and she had been told to inform Japan of this, which she duly did. On the second allegation – that the trade presenter was riddled with mistakes when submitted - this is a fact and plain to see. On the third allegation that she continued to work on the trade presenter after submission, this is not in dispute. It is clear that she wasted her manager's time spent reviewing and correcting a document but it is not evident that this amounted to gross negligence.
22. The key question is whether the applicant's conduct in respect of these allegations amounted to negligence or whether it was due to incapacity resulting from poor performance. Indeed, this question is fundamental to the determination of the fairness of Turner's dismissal: Was the real reason for her dismissal misconduct (due to gross negligence) or poor performance?
23. Both parties referred to several cases on the test for negligence. These are well summarised in the closing arguments. It is, however, not necessary to burden this award with numerous cases and the issues in dispute can be determined on the facts, with reference to the Code of Good Practice: Dismissal.
24. The Code distinguishes between dismissals for misconduct and those for incapacity due to poor performance. There is a reason for this, and that is that incapacity due to poor performance (as the term "incapacity" suggests) is considered less "blameworthy" than misconduct. It comes down to a question of "I can't" rather than "I won't" or "I don't care to".
25. The effect of this distinction on the employee in question is significant and this is evident from the manner in which Turner herself questioned Wessels (at the disciplinary hearing) on the distinction between misconduct and poor performance. She apparently accepted that she was struggling with product knowledge and the pressures of meeting deadlines, and she was mentally fatigued. In the circumstances, she seemed prepared to accept her employer identifying her poor performance and implementing a plan to improve it. What she did not accept was being accused of misconducting herself, and herein lies the rub, so to speak.
26. Turner was working long hours like all the others in the department. She was under pressure to meet deadlines. She had indicated that she was struggling to meet the standards. She was being closely managed using time sheets to measure her performance and time management. The company had identified the need for a formal performance management programme although this had not yet

commenced, due probably to end-of-year leave and the sheer amount of work to be completed on tight deadlines in the department.

27. Turner was a relatively new employee. It is correct that Makepeace commenced work at the same time as Turner and she was coping much better in the job than was Turner. Just because one employee who was given the same training as another, is managing in a comparable position and the other is not, this does not mean that the issue is one of negligence rather than poor performance. Individuals respond differently to a particular working environment and its pressures. It was evident that despite working long hours and obtaining regular feedback from her manager, Turner was not coping in the position.
28. Based on the above, I have no difficulty concluding that the real reason for Turner's dismissal was her poor performance. And I go further: Her poor performance was a strain on the department in a pressured environment; it drained her manager's time and energy; the repeated mistakes on apparently basic things were irritating and frustrating to Wessels, and I can see why. But this does not change the underlying problem that Turner could not meet that standard of performance expected of her. To impute negligence and a lack of care is simply unfair. It is not that she "wouldn't"; there was nothing deliberate or nonchalant about her intentions or conduct. In fact, quite the opposite; she was striving to meet the standard.
29. The distinction between misconduct and incapacity goes to dignity since it is offensive to be accused of misconduct when one is trying by all means to deliver to standard. When an employer fails to take the distinction into account, it almost invariably results in unfairness. Instead of a performance management plan and time and assistance to improve, Turner was summarily dismissed. The impact of summary dismissal for an employee is extreme. There is no opportunity for the employee to secure alternative employment and the impact on financial and psychological wellness can be devastating. I stress this because summary dismissal is generally not an appropriate sanction in cases of poor performance and even for misconduct, it is reserved for the most serious transgressions.
30. For the above reasons I find that Turner was not grossly negligent and her summary dismissal for gross negligence was substantively unfair.
31. The other consequence of casting incapacity as misconduct is that it may result in an unfair procedure because the distinction in the Code of Good Practice: Dismissal directs the employer to follow two entirely different procedures. The employer argued that if a capacity enquiry were held, Turner would have been dismissed in any event. I cannot say for certain that, had more time and genuine assistance been given, Turner would have met the performance standard, but she would at least have had the benefit of structured monitoring, feedback and, importantly, the opportunity and time to improve her performance. In the circumstances, the misconduct route denied her this and her dismissal was procedurally unfair.

Remedy

32. In deciding on the appropriate remedy, I have taken into account that the applicant was in a senior position with relatively short service. There is no question that she was failing to perform to the required standard despite her genuine attempts to do so. Also, she found alternative employment fairly soon after her dismissal albeit initially at a lower salary. In these circumstances, a large sum of compensation is not appropriate and I am satisfied that two months' compensation is just and equitable.

Costs

33. I am not persuaded that costs should be awarded other than that the parties should share the cost of the transcription, since both parties relied on it extensively during the arbitration. Such disbursements actually incurred may be awarded in terms of CCMA Rule 39(2).

34. In this regard, the Applicant must refund the respondent R8,357,625 (R16,715.25 / 2).

AWARD

35. The applicant's dismissal was substantively and procedurally unfair.

36. The employer, Environ Skincare (Pty) Ltd, must pay Ms Alison Turner two months' compensation, amounting to R119,000.00 less applicable taxation, and calculated as follows: R59,500 per month x 2 = R119,000.00.

37. The applicant, Ms Alison Turner must pay Environ Skincare (Pty) Ltd R8,357,625 as half the costs of the transcription of the disciplinary enquiry.

38. The amount ordered in paragraph 34 may be deducted from the net compensation after tax is deducted, and payment must be made on or before 25 September 2023.



Winnie Everett

WINNIE EVERETT

CCMA SENIOR COMMISSIONER