

SOUTH AFRICA / JUDGMENT

Astral Operations Ltd v Bestel and Others (JR1502/05) [2007] ZALCJHB 12 (30 November 2007) [2007] ZALCJHB 12

COURT

Labour Court Johannesburg

BEFORE

Pillay D

CASE / FILE NUMBER

JR1502/05

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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR1502/05

DATE: 2007-11-30

In the matter between

ASTRAL OPERATIONS LIMITED Applicant

And

G BESTEL First

Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION Second

Respondent

SEGGIE R (COMMISSIONER) Third

Respondent

J U D G M E N T

PILLAY D, J: In this review the applicant employer, Astral Operations Limited (Astral) had charged the first respondent, employee G. Bestel

as follows:

“A. You acted dishonestly by instructing Mr M Bradford to procure a false report that a sample of the product of D H Brothers (Pty) Limited tested positive for salmonella;

B. In the alternative to the above it is alleged that you acted dishonestly by condoning that Mr Bradford falsely informed D H Brothers

Industries (Pty) Limited that the test report number 57065 issued by The Poultry Specialist (Avimune) tested positive for salmonella,

whereas the result was negative. You knowingly participated in providing D H Brothers (Pty) Limited with the false information.

Further in the alternative you acted grossly negligent by not taking steps to correct the false information submitted by Mr Bradford to D H Brothers Industries (Pty) Limited from 29 October 2004 onwards”.

Astral dismissed Bestel on 14 December 2004. The second respondent commissioner found that the dismissal was substantively unfair and on 19 May 2005 ordered Bestel’s reinstatement. Mr G C Pretorius SC, who appeared for Astral challenged the award on the ground that it was unreasonable because the commissioner did not consider material evidence. As a result, the commissioner misdirected himself in making three findings, he submitted. These findings were:

1. “On the company’s version Bradford had falsified the report on Bestel’s instructions. Yet, on a careful reading of Bradford’s evidence he said that he inferred that from what Bestel had said that he should falsify a result. This was apparently also his evidence before Roberts”.
2. “There is no evidence that Bestel was told in express terms about the falsification before 9 November and there appears to be nothing in his behaviour between 25 October and this date (other than the above snippet of Moosa’s evidence) which points to a consciousness of wrongdoing”.
3. “Finally, there is the fact that when he became aware of the falsification Bestel had suggested that Bradford should be spoken to and that the parties should move on from there. That he did not insist on strong disciplinary action against Bradford may indicate that he was an accomplice to Bradford’s misconduct, on the other hand it is capable of an innocent explanation”.

Mr J A Ploos van Amstel SC for Bestel, resisted the challenge to the award on the ground that this was not an appeal but a review and for as long as the award was reasonable, it should stand.

The relevant extract of Bradley’s cross examination at the arbitration pertaining to the first finding is the following:

“Question: You said he phoned you and that you had been requested to “find” a positive result for salmonella in the oil cake. Were these his words?

Answer: Yes as far as I can recall.

Question: So you had to go and find a positive result?

Answer: I told him we had not had a positive result for a number of months.

Question: You were going to look for a report with a positive result?

Answer: I told him there were none. He said, “find” one. I understood that to mean I must fabricate a positive result.

Question: A false report stating that there was salmonella?

Answer: Yes.

Question: Not understood Bestel to take an old report and change a negative to a positive?

Answer: I took the meaning of our discussion to mean go and fabricate a result”.

The court agrees with Mr Ploos van Amstel for Bestel that Bradley inferred from Bestel’s instruction that he should “find”

a positive result to mean that he should fabricate such a result. The question before the arbitrator then should have been: was such an inference reasonable?

In the opinion of the court, Bradley’s inference was reasonable because on Bradley’s version, Bestel insisted that Bradley

should find a positive report despite there being none. Bestel’s version of this discussion with Bradley was recorded

at the arbitration as follows:

“I spoke to Bradford and said Armstrong was not satisfied. I said there was an outbreak of Newcastle disease. Our feed performed below Epol. I asked him to ensure that the required bio-security is in place. I also asked him to check the lab data to find out if we messed up anything in the process. If he could, he should find anything to explain the drop in the performance of the birds.

I do not think I mentioned salmonella. Salmonella would retard growth and increase mortality but so could other things”.

If Bestel’s instruction was to get Bradley to ascertain the reason for the drop in performance of the birds, how it would assist Bradley to submit a false report was unexplained. If there was not a positive report for the contamination then the explanation for the drop had to be found elsewhere. Giving a false report would not have assisted Astral in explaining the drop in performance of the birds. The probabilities are that the false report had to serve some other purpose.

The evidence in support of the second finding emerges from the following evidence of Moosa who represented the oil supplier in respect of which the false report had been issued:

“On Thursday I contacted Bestel and indicated something was not right with the results he gave me. Bestel was upset and said he gave the documents to me in confidence and I had no reason to discuss it with anyone else”.

And later:

“Bestel says that on Monday 1 November you phoned him and raised the issue that the report had been altered and that in response to that call a copy of the report (on page 34) showing a negative result was sent on 1 November 2004.

Had you indicated to Bestel that it appears the wrong report had been sent on 27 October?

I said that it is strange that a positive has turned to a negative”.

Bestel’s evidence in this regard was as follows:

“Moosa told you the report was altered?”

No he said the report is the wrong one. I must check” and later on, “on page 17, in paragraph 5.11 you wrote about what Moosa told you “it appeared to have been altered”. This is different to your evidence that the report was the wrong one?

Yes I said he never told me it was altered.

Which evidence is correct? The plea which was shortly after the incident?

The plea is correct. He told me it seems to have been altered. Moosa told you the report seemed to have been altered?

Yes”.

This contradiction in Bestel’s evidence should have put the commissioner on his guard. It was a material contradiction because

Bestel conceded that he was aware on 1 November 2005 that the report was altered and not on 9 November 2005 as he had indicated in response to the commissioner’s question. Furthermore, two witnesses, Bradley and Moosa had at the arbitration independently of each other stated that the report had been altered. Despite this corroboration on a material aspect, the commissioner rejected the evidence of both Bradley and Moosa because their evidence “did not have the ring of truth about it”. The commissioner found that there was “no evidence to suggest that Meadowfeeds would have benefited significantly from the cessation of deliveries of a few weeks”.

On the contrary, there was evidence that Meadowfeeds had over stocked with about three months supply when the norm was to retain stocks of about a month’s supply. Here lies the more probable explanation for the false report. If faults could be found with the product, the supply could be staved off. Bestel therefore had a motive to falsify the report.

With regard to the third finding, the commissioner fails to justify why he accepted or preferred an innocent explanation for Bestel not insisting on strong disciplinary action when it was Bestel's own evidence at the arbitration that it was a serious matter.

In the circumstances the award falls to be reviewed and set aside. The order that I grant is therefore in terms of paragraph 1 and 1.1 of the notice of motion, with the first respondent paying the applicant's costs.

PILLAY D, J

DATE OF HEARING: 30 November 2007

DATE OF JUDGMENT: 30 November 2007

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FOR THE APPLICANT: ADV. G. C. Pretorius instructed by Hofmeyr Attorneys.

FOR THE RESPONDENT: ADV. J.A. Ploos van Amstel SC instructed by Tomlinson Mnguni James Attorneys.

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