IN THE NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY

BETWEEN:

Coin Security Group **(the employer)**

and

Thobelani Sasa **(the employee)**

ARBITRATION AWARD

Case Number:	TOKISO / N7 /211
NBCRFI Ref No:	D1549 / JHB / 0525 / 06A
Date of arbitration:	18 September 2007
Date of award:	2 October 2007
Head-note:	Polygraph examination result alone - insufficient evidence of dishonesty. Unfair dismissal. Further charge of insubordination does not by itself justify dismissal.

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1 DETAILS OF HEARING AND REPRESENTATION

This is an arbitration award in the arbitration between the Coin Security Group (hereinafter referred to as "the Company") and Mr Thobelani Sasa (hereinafter referred to as "the Employee"). The arbitration took place at the offices of the National Bargaining Council for the Road Freight Industry (hereinafter referred to as "the BC") Parow, Cape Town, on 18 September 2007. The Company was represented by Mr D Buitenbach. The Employee was not represented.

2 THE ISSUE TO BE DECIDED

The Employee was dismissed following a disciplinary enquiry on 2 October 2006. He was found guilty of the following allegations:

- *Breach of trust for the negligent loss on 08/08/2006.*
- *Refusing to carry out a direct instruction from management on the 02/09/2006*
- *Insubordination*

The dispute is limited to the substantial fairness of the dismissal.

3 PRELIMINARY ISSUES

The Company representative raised a point *in limine* that the Employee had been late referring the dispute to the BC and he had not applied to the BC for condonation. The background is that the Employee referred the dispute to the CCMA. The Company did not attend the conciliation meeting and the matter was referred to arbitration. The Company then wrote to the CCMA indicating that it was part of the BC and the matter was hence handed over to the BC. An arbitration set for June 2007 had been postponed to allow the Company to find certain witnesses, co-workers of the Employee who had been with the Employee on 8 August 2006, but who had since left the Company. My decision was to continue as the Employee had not been out of time in referring the matter to the CCMA and an applicant need not re-apply if a matter is subsequently transferred to a bargaining council.

4 SUMMARY OF EVIDENCE

The Company submitted a bundle of documents and oral evidence was led.

Mr C Grobler testified that he was the Senior Operations Manager and the Employee's direct manager. The Employee had been employed as a vehicle guard in 2006 earning about R4 500 to R5 000 per month. Referring to the second and third allegation, Mr Grobler confirmed that a written statement in the bundle of documents was his. It states:

On the day of the incident Mr Sasa was standing in the reception. We were also in the reception when Mr Richter gave the Employee an instruction to go and sit in the training room. He was very arrogant towards Mr Richter and asked why should go and sit in the training room. He then ignored Mr Richter's instruction and walked into the garage. After this incident I found Mr Sasa in the garage and asked whether he don't want to listen to instructions given by Management. I told him that Mr Richter clearly gave him an instruction to go to the training room after he reports for duty. He again just asked why and turned around and walked away, refusing to follow the instruction. Mr Sasa has got no respect for authority and he does not want to listen to Management. He came to work on his own time and want to do what he pleases.

Mr Grobler noted that Mr Richter is the General Manager of the Company in the Western Cape. He had subsequently resigned and was now in Nigeria. Mr Grobler testified that the Employee had asked to speak to Mr Richter but Mr Richter had asked the Employee to wait in the Training Centre because he was busy. He noted that there was a rule that no one was allowed in the garage after the trucks had left, but he did not know why this rule existed.

Mr Grobler confirmed the documentary evidence relating to 2 prior incidents when disciplinary action had been taken against the Employee. A client had complained to the Company about the Employee's misuse of his firearm, and on 20 April 2005 the Employee was given a Final Written Warning for contravening part of the Arms and Ammunition Act No. 75 of 1969 as amended, and for bringing the Company name into disrepute. The Employee had been given a second Final Written Warning on 23 June 2005 for refusing to carry out an authorized, reasonable instruction. Both warnings were valid for 12 months

On 8 August 2006 there was a loss of R94 806. Mr Grobler referred to and confirmed the investigation report, dated 11 September 2006, in the bundle of documents. There were 3 Company personnel on the vehicle that had collected 15 containers from a client, but only 14 containers were delivered to the bank. These personnel were Mr Nqcobo, the driver, Mr Vellen, the Crewman and the Employee, the third man or vehicle guard. Mr Vellem was responsible for signing for containers and taking these into the bank, and he had signed for 15 containers that day. None of the employees were suspended but all 3 were subjected to a polygraph examination - Mr Vellem on 21 August, Mr Nqcobo on 25 August and the Employee on 8 September 2007. Mr Vellem and Mr Nqcobo were found to be truthful in answering questions put to them. The report in respect of the Employee is in the bundle. The following questions were put to the Employee:

1) *On 8 August did you plan with anyone to steal that missing box of Giant?*
2) *On 8 August did you steal that missing box of Giant?*
3) *On 8 August did you benefit in any way from the theft of that missing box of Giant?*
4) *Can you take me to that missing box of Giant now?*

The Employee answered "No" to all of the above. The findings were given as follows:
"Mr Sasa's polygrams did contain significant physiological responses during the above relevant questions. The examinee was co-operative and all phases of the examination were completed. It is therefore the opinion of Polygraph & Truth Verification Services that Mr Sasa was not truthful when he answered the relevant questions."

The Employee's Task description (in the bundle) states, at paragraph 1.1.1, that his responsibility is primarily *"to guard and protect the vehicle with all assets at all times"*. Paragraph 7.4 states:
Bulk Cash Centres
The Vehicle guard is to assist the Crewman and Driver in off loading and loading containers at bulk cash centres. Your primary task is to ensure that no third party have any access to the containers. You are under no circumstances allowed to sign any documentation with regard to receiving or delivering any containers.

With reference to paragraph 10.4 which states "Be alert, be careful, be proactive" Mr Grobler was of the opinion that if the employee had been alert and careful he would have checked the number of boxes; and if he had been proactive he would have alerted the Company of the missing box.

The Task Description document also has a paragraph on Company Policy (10.1) in which it is stated that the Vehicle Guard can be asked to undergo a polygraph test to assist with investigations of incidents. *"Results of such a test can, however not be used as stand-alone evidence to determine the guilt of the Vehicle Guard. Although the vehicle guard cannot be forced to undergo a polygraph test refusal to undergo the test may result in a negative inference being drawn by the company that the Vehicle Guard either has knowledge of or colluded in the commitment of a specific offence. Such refusal also has the potential of harming the trust relationship that exists between the company and the Vehicle Guard and this may form the basis of dismissal of such a Vehicle Guard in the event he is found guilty, of Breach of Trust."*

Mr Grobler said the Company dismissed the Employee for Breach of Trust. The Company had a zero tolerance policy if there was a breach of trust.

In response to my question as to why the investigation had taken so long and Mr Grobler testified that the investigator is supposed to speak to the client and follow paper trails and make sure the money is not in any other accounts.

The Employee did not elect to cross examine the witness.

Mr A Fordred, National Retail Support Manager, testified on Company disciplinary procedure. He was familiar with the standard form used in disciplinary hearings and although he was not present at the Employee's hearing, he commented on the documentary evidence of that hearing.

Given the Company representative's argument on late referral of the dispute to the BC, I asked about paragraph 30 of this form which states:
"Chairperson advises the accused of his right to appeal against the sanction as well as his right to refer the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA)...."
Mr Fordred responded that agreement to become part of the BC had been signed in November 2006.

The Employee did not elect to cross examine the witness.

The Employee testified that he and his 2 colleagues picked up the money on 8 August 2006 and the Crewman counted the boxes with the client who both agreed there were 15 boxes. The Company personnel then went to the bank. Mr Villem met with Linda, the bank marshal inside the bank, also an employee of the Company. They both counted 15 boxes. The Employee noted that the Bank had a camera and that this should have been reviewed. The boxes were big and they went in one at a time. He said that Mr Villem and Linda should also be at the arbitration to give evidence.

Referring to the polygraph test, he testified that it was conducted in English but he understood the questions. He was told he would be informed of the results the next day but they did not tell him for 5 days. During this period the crewman and the driver continued to work but he was told to wait. He was left sitting at the base and he was bored. He was treated like a baby in that he was not even allowed to get his own lunch. No one came to tell him that he had failed the polygraph. He wanted to ask Mr Richter what had happened and why he was not working. He said that "those guys" knew what happened but that he was the only one not working. So on the sixth day he approached Mr Richter but he was referred to Mr Grobler. Mr Grobbler got angry and started to shout. Mr Richter pushed him behind his neck. He admitted that Mr Richter had told him to go to the training room. He did not remember any rule concerning the garage.

Under cross examination it was pointed out to the Employee that the polygraph examination had been on 8 September and the notice to appear before a disciplinary enquiry was given to him on 11 September, but the employee responded that it did not matter whether to period was 3 or 5 days – the incident was in October last year.

It was put to the employee that the second and third allegation referred to an incident on 2 September 2006, before the polygraph examination, to which the Employee responded that he did not know how to twist a statement into a weapon. He was told to wait for the results and he did not want to talk further about management's treatment of him after the polygraph. He said he was not at the arbitration because of that incident but because of the incident on 8 August 2006. He reiterated many times that the others involved in this incident needed to

be at the arbitration and that that was why a previous arbitrator had postponed the hearing - to allow the Company to find them.

5 SUMMARY OF ARGUMENT

The Company representative argued that the Employee had violated 11 counts of the Company Code of conduct. At my request, he identified these in the Company Disciplinary Code and revised the number to 8 - Negligent loss; Grossly offensive behaviour; Dereliction of duty; Negligence or gross negligence; Dishonesty; Inciting of other members to or of oneself disobeying a lawful and reasonable instructions of the company regulations/policy procedures; Intentionally creating an ill motivated disturbance at or in the workplace; and Deviation from procedures for asset in transit. The guideline sanction for all of the above is dismissal. Finally the 8th one is similar to one above being "refusal to carry out an authorized, reasonable instruction in respect of normal work practice not involving abnormal physical risk, and also not in conflict with any other instruction received". For this the guideline is a final written warning in the first instance followed by dismissal.

It was argued that it was not the loss of the money, but the breach of trust that had lead to the dismissal. It was admitted that the Company could not prove the Employee took the money but the Company representative noted that all employees had to be trusted. Considering the task description of the vehicle guard, the Employee was the only crew member found to be "deceptively implicated" by the polygraph examination and the Company concluded that the Employee had broken the rule of honesty by failing the polygraph examination. With reference to various CCMA cases and another BC case, it was noted that a polygraph result could be used to corroborate other acceptable evidence, and that failing a polygraph provided "some support" to a finding or could be considered an aggravating circumstance. He referred to the Company policy (paragraph 10.1 of the Task Description, quoted above). Finally it was argued that the procedure had been fair, that the sanction was consistent with the Company Code of Conduct and a message needed to be sent to other employees. Due to the attitude of the Employee, any further relationship with him would be intolerable.

In closing, the Employee reiterated that "those guys" knew exactly what happened.

6 ANALYSIS OF EVIDENCE AND ARGUMENT

There is no dispute over the fairness of the procedure and I accept the Company's position that a fair procedure was followed. The issue is the substantive fairness of the dismissal.

I will address the allegation of breach of trust first. Mr Grobler testified as to how the Company lost a container of money on 8 August 2006. The month long investigation did not result in conclusive evidence as to how the theft (or the error) happened. The Company did not even put forward a theory as to how the money went missing. The 3 employees then underwent polygraph examinations. The crewman, Mr Vellem, went first on 21 August 2006. He was the person who signed for the money, and therefore he was the one responsible for ensuring he handed over the same number of boxes to the bank. It is logical to suspect him above the others especially if he were working together with someone either from the client or the bank. Mr Grobler's claim that the Employee was not alert, careful, and proactive is unfair given that the Employee's primary task is to ensure third parties have no access to the containers. He is specifically forbidden to sign any documents and therefore it is possible and probable that he may not always count the number of containers – that is someone else's job – he has to keep an eye out for third parties. When Mr Vellem was found to be truthful in the polygraph examination, Mr Nqcobo, the driver, was examined next on 25 August but he was also found to be truthful. It appears the Company accepted the polygraph results to clear these 2 men of any involvement. Yet if these 2 men were with

the money all the time (together with the Employee) and their word was considered truthful, they could have cleared the Employee also; or alternatively at least indicated a time when the Employee was perhaps left alone with the money. But these witnesses were not even called to the disciplinary hearing. I can only conclude they had nothing to say that could have implicated the Employee. So without the polygraph test, I find that there is no evidence at all to link the Employee to the missing money.

It was a full 2 weeks later that the Employee was sent for a polygraph and he was found to be *"not truthful when he answered the relevant questions"* . Mr Grobler said that the dismissal of the Employee was not about the money, but about trust. This logic is flawed. The "relevant questions" put to the Employee in the polygraph examination were all about the loss of money on 8 August 2006. The Company has clearly lost trust in the Employee because of the polygraph result. The Employee's co-workers were likewise cleared because of their results.

The Company did not call upon the polygraph examiner to be a witness and therefore there is no evidence at all as to the reliability of these particular tests and if I were to consider the results as admissible and reliable evidence, the expert opinion of the examiner would be required. But even the Company representative has pointed out that one cannot dismiss on the results of a test alone and this is in the Company policy also. A similar case, one that he did not mention, is Sosibo & Others / CTM (Ceramic Tile Market) [2001] 5 BALR 518 (CCMA) in which Commissioner Rycroft, found
"the sole reliance by the employer on unspecific polygraph results is insufficient to discharge the onus in terms of section 192 of the Labour Relations Act 66 of 1995 to prove that the dismissal was fair. To discharge this onus, the test of a balance of probabilities is used. To only present polygraph evidence is not enough to show that the dismissal was fair because there is no corroborating evidence. For these reasons I find that the employer has not adduced sufficient evidence to persuade me that the dismissal was fair".

The Company representative argued that the polygraph test collaborated other evidence, but as indicated above there is no other evidence.

He similarly argued that the polygraph could be used as an aggravating circumstance. In the case he referred to on this issue (Spur v Hotellica Trade Union 24.11.1997 WE 3799), Commissioner Horwitz accepted that failing a lie detector could be regarded as an aggravating factor especially where there is evidence of misconduct. In coming to his decision however he used the evidence that the dumping of sauces happened when the accused employee was at work and not when she was not. Hence there was some evidence allowing one to make a decision based on 'balance of probability' – the accepted standard of proof in labour arbitrations.

I turn next to consider: If the Employee is not guilty of theft can he be guilty of dishonesty? I accept that in some circumstances this may be true. The Employee might for example know more than he is letting on. But again one must have more than a polygraph examine result.

In *Harmse v Rainbow Farms (Pty) Ltd* WE1728, Commissioner Wilson held that:

> ". . .an employer is entitled to dismiss an employee whom it can no longer trust, provided the employer has reasonable grounds for losing trust in the employee." (my emphasis).

In the case *Kleinhans v Tremac Indutries WE 31432* Commisioner Bhana quoted the above also, and he held that :

> "As for the issue of dishonesty and in view of Commissioner Wilson's finding mentioned above, I am of the opinion that failing a polygraph test does not provide

reasonable grounds for losing trust in the employee. The employee has no defence against the results of an instrument that he has no control over."

In conclusion I find that there is insufficient evidence to find the employee guilty of breach of trust; or dishonesty. I find him not guilty.

Two other allegations were put to the Employee: Refusing to carry out a direct instruction from management on the 02/09/2006; and insubordination. Both charges refer to the same incident. The Employee's version is consistent in many places with that of the Company yet he refers to a time after the polygraph examination (ie after 8 September) , whereas the charge refers to 2 September 2007. I am not sure if there were 2 occasions when the Employee went to the garage instead of the training room, as instructed by the General Manager, but it is more probable that the Employee is recollecting certain dates and facts incorrectly. In any event the Employee admitted he disobeyed the instruction. If however the Employee had already been sitting in the training room for many hours and even days, as the Employee testified, there is good cause to question the reasonableness of the instruction. The Employee's question "Why?" would have been quite justified in such circumstances. The Employee did not put this background detail of the incident to Mr Grobler when he was a witness, but there is a line in Mr Groblers written statement that is consistent with the Employee's testimony, namely *"I told him that Mr Richter clearly gave him an instruction to go to the training room after he reports for duty"*. (my emphasis). This statement suggests a standing order rather than a once off instruction and is sufficient support for me to accept parts of the Employee's version as true, namely that the Employee was confined to the training room for some time. The Employee's version was that this was without any reason being given, and I accept this also because it is clear management considered the Employee's question of "Why?" as nothing more than insolence. By 2 September 2006 the Company had put the 2 co-workers through a polygraph examination and they had been found to be truthful. Hence it is also probable that suspicion at this point in time was focused on the Employee even prior to his polygraph examination. I accept therefore the Employee's testimony that these 2 men were allowed to work while he wasn't. I hence consider it probable that there were some circumstances leading up to the Employee's act of insubordination that provoked and justifiably angered the Employee and that these could be considered mitigating circumstances at the very least.

I have considered the Company Code and I find that the Company representative's argument that the Employee "violated" (his term) 8 counts of the code is an extreme position based on the trust the Company has placed in the polygraph result and the unfounded conclusions they draw from this. I find the Employee guilty of one offence, call it insubordination or defiance or disobeying an instruction from a manager. I note that the Company's Code mentions disobeying lawful and reasonable instructions under the title of "very serious" where dismissal is the guideline, and also under a section headed by the title "serious" where a warning is the guideline.

Schedule 8 to the Labour Relations Act 66 of 1995, the Code of Good Practice: Dismissal, item 3 (4), requires that to justify dismissal the insubordination must be "gross". In his book, *Dismissal, Discrimination and Unfair Labour Practices,* 2005 (at page 254) John Grogan gives the view that this means that the insubordination must be "serious, persistent and deliberate". He goes on to note that *"the gravity of insubordination depends on a number of factors, including the action of the employer prior to the alleged insubordination, ... and the reasonableness or otherwise of the order that was defied"*. (my emphasis)

In conclusion, I find that the single incident of defiance on 2 September 2006, with mitigating circumstances, does not amount to gross subordination. This is consistent with the Company's own precedent when, in June 2005, the Employee was given a Final Written

Warning for failing to carry out an instruction. This warning, being for a period of 12 months, was no longer valid as at September 2006 and therefore it does not follow that dismissal is the next step. I conclude that if the Company had not found the Employee guilty of "Breach of Trust", the insubordination in isolation would not have warranted dismissal even by the Company's standards.

The principle is well established that an arbitrator should only interfere with a sanction where the penalty imposed is unfair and not just because a lesser penalty is preferred. But I am also mindful of the principle that each case must be assessed on its merits and I have found that the misconduct was not gross insubordination, and given the mitigating circumstances an appropriate and fair sanction would not be dismissal. I therefore find the dismissal to be substantively unfair.

The appropriate remedy for an unfair dismissal is re-instatement unless the Company can provide compelling reasons why re-instatement should not be ordered. The Company representative argued that due to the attitude of the Employee, any further relationship with him would be intolerable. From my brief experience of the Employee I can understand that managing him must, at times, be difficult. He appeared at the arbitration to be stubborn and suspicious and unco-operative. But in reviewing what he has been through, as a result of a polygraph result, his attitude may be justified. I am not convinced the attitude of Company management isn't to blame for the breakdown in the relationship.

For example, the notes of the disciplinary hearing illustrate considerable and unjustified hostility towards the Employee. The Employee's refusal to cross examine witnesses is considered to be a lack of co-operation. The Employee has every right not to cross examine witnesses if he so elects. The Employee was also asked to sign every page of the documents relating to the hearing, including the written statement of Mr Grobler . He had every right to refuse.
The Chairperson wrote in a document headed Chairman's sanction:
You were given the opportunity to defend yourself and provide me with facts to counter these charges. You blatantly refused to co-operate for me to reach a conclusion whereby to possibly find you not guilty. .....The lack of co-operation from your side during this enquiry serves as a symbol of your actions since starting work for Coin Security."

I am left asking these questions: is it fair not to re-instate a worker because the Company management finds a man difficult and has unfounded beliefs that he is dishonest; and as a result dislikes and distrusts him? Is it right not to re-instate because the Company could well make the Employee's life very difficult? The Employee is still unemployed as a result of the unfair dismissal. Not to offer re-instatement, in my opinion, in a country of high unemployment is punitive even if compensation is given. The Company must accept it's responsibility to mend the relationship so that it is tolerable for Company and Employee alike.

7 AWARD

I find that the dismissal was substantively unfair.

Accordingly I order that the Employee be reinstated without loss of salary or benefits (ie full back pay from the date of dismissal to the date he resumes duties. He must resume duties on the terms and conditions that prevailed at the time of dismissal.)

This award must be complied with within 14 days of its date.

In the event that the Employee does not present himself for reinstatement, and provided there is no good cause, this award shall be converted into compensation of 12 months gross salary, which must be paid to the Employee within 21 days of the date of this award.

Joy Fish
(Arbitrator)

Signed