

IN THE NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT INDUSTRY (“NBCRFI”).

Case reference number: D112 / PE / 0000 / 07
Arbitrator : Martin Le Roux Koorts

In the matter between

MTWU obo T. Madlalisa

and

SBV

HELD IN PORT ELIZABETH ON 7 DECEMBER 2007

CASE REFERENCE: D112 / PE / 0000 / 07
DETAILS OF HEARING AND REPRESENTATION

This matter was set down for hearing on 7 December 2007 at the offices of National Bargaining Council for the Road Freight Industry (“NBCRFI”) in Port Elizabeth.

The Applicant, Mr T. Madlalisa was represented by Mr R. Mtileni an official of MTWU.

The employer was represented by Mr J. Pieterse employed as an industrial relations manager in the Respondent business.

It was agreed that heads of arguments will be submitted by not later than 11 December 2007.

ISSUES TO BE DECIDED

Whether or not the dismissal was substantively and procedurally fair.

The Applicant was dismissed for allegedly failing to comply with security and / or protection measures in that on 28 June 2007, he failed to deploy with the LM5 assault rifle in a proper manner and in so doing a successful robbery of the vehicle occurred, resulting in more than R5 Million being stolen.

Substantive fairness was challenged in that:

- The Applicant was dismissed without there being a substantive reason for his dismissal.

Procedural fairness was challenged in that:

- The Applicant was never provided with the opportunity to present his case.
- He was never provided with the outcome of his disciplinary hearing and as result could no lodge an appeal within the prescribed timeframe.

The Respondent held that if the Applicant had done his job as required the robbery would have been prevented. The Applicant was familiar with the Respondent rules and was also afforded a disciplinary hearing whereby he could exercise all his rights.

BACKGROUND TO THE MATTER

The Applicant was engaged by the Respondent in the capacity of a protection officer. He commenced employment on 31 July 2006 and was dismissed on 31 July 2007. The Applicant was dismissed after an armed robbery had taken place at the Bluewater Bay Engen Garage on 28 June 2007. The robbers escaped with over R5 Million and the Respondent held that the Applicant who was the carrier of the LM5 assault rifle did not execute his duties and did not follow standard procedure.

. It was the Respondent's contention that the decision to dismiss the employee was fair and appropriate under the circumstances.

The matter was referred to the NBCRFI on 1 August 2007 by the MTWU. A conciliation hearing was held on 17 October 2007 but the matter remained unresolved. The matter was referred for arbitration and is now before me.

SURVEY OF EVIDENCE AND ARGUMENT

This is a summary and does not reflect all the evidence and argument heard and considered in deciding this matter.

The parties tabled a bundle of documents as part of the evidence at this hearing which was referred to during the hearing.

Both parties presented opening statements at the onset of the hearing.

Three witnesses testified on behalf of the Respondent.

The first witness to testify was Mr Karel Mostert employed as an internal investigator by the Respondent Company. It was his evidence that there was an armed robbery on 28 June 2007 at the Engen Garage situation in Bluewater Bay. An investigation was conducted and the results showed that the protection officers of this armed vehicle did not comply with the

Respondent Rules. The Applicant was one of the protection officers when the robbery took place. The Applicant was the “long gun man” which means that he was the person who was armed with an automatic assault rifle. The other three employees on the vehicle were the driver, senior member and the bagman. He testified that the cash are kept in bags on the armed vehicle. This specific team was servicing the Nedbank ATM at the Engen Garage. They arrived on site early and proceeded to the loading side of the ATM which is at the back of the Engen garage. There is only one entrance to this courtyard by means of double doors / gates. The door was closed and the Applicant got out of the vehicle and opened the door in order that the armed vehicle enters. According to the Applicant’s statement he stated that he did observe and patrol the area to make sure that that it was clear. The vehicle then reversed with its backside into the area and stopped close to the ATM cubicle door. The senior member also exited the vehicle and observed that there was a diesel spillage on the ground at the exact spot where the vehicle stopped. He also observed that the diesel cap of the armed vehicle was missing. The senior member then called the driver from the vehicle and told him to get out of the vehicle and to assist him to close the diesel funnel / outlet. The Applicant then also went to the back of the armed vehicle and stood with the aforementioned two employees at the back of the vehicle. The Applicant asked the driver to get a rag and cable ties so that they can cover the funnel. By that time the custodian of the Bank also entered the courtyard with his vehicle. The bagman removed the specific bags from the vehicle allocated to this site. The senior accompanied the custodian to the cubicle door which was very close to the back of the vehicle. The custodian entered the cubicle and the bagman brought the money bags from the vehicle to the cubicle and handed same to the custodian. He testified that the custodian and bagman were at the time already both inside the cubicle. The driver, the senior member as well as the Applicant were all standing at the back of the vehicle and attended to the diesel spillage.

It was his evidence that at that exact moment an unknown number of armed people entered the courtyard area and approached the three members standing at the back of the vehicle. They were then held at gunpoint and ordered to lie down on the ground which they complied to. They then ordered the Applicant to assist them with the removal of the bags from the armed vehicle. The suspects also removed the weapons of the members as well as the bags handed to the custodian in the cubicle. The suspects then drove away from the scene, stealing more that R5 Million.

It was his evidence that the Applicant did not comply with the Company rules as a long gun member is supposed to secure and protect the vehicle and

the outside perimeter. The Applicant though placed himself at the back of the vehicle where he had no view of the entrance as well as the surrounding area. The result is that the Applicant did not notice when the armed people entered the courtyard as he stood at the back of the vehicle where his view was blocked. He referred to the various photos as they appear on pages 9 to 13 in the bundle of the site where the robbery took place. He gave evidence with regard to where the armed vehicle and other objects were as well as the place where the Applicant stood at the back of the vehicle showing the various angles and views towards the entrance of the courtyard.

He testified that on pages 14 to 18 are various statements and the Applicant's statement appears on page 14 of the bundle. He testified that the Applicant was at the back of the vehicle and he was not supposed to be there. The Applicant had to place himself in an area where he could protect the vehicle and the other members. He testified where the Applicant was standing when the attack took place he could not protect or see any danger approaching. He testified that the driver was also not supposed to leave the vehicle and the senior member erred in ordering him to leave the vehicle in order to assist with the diesel spillage. It was not a huge spillage and not a big problem which was suspicious. The senior member was also dismissed for his part of wrongdoing. The driver received a final written warning as there were mitigating circumstances in that he acted on an order from the senior member of the crew.

It was his evidence that if the Applicant had placed himself in the correct position he would easily have been able to spot the suspect vehicle and the suspects much earlier. He gave evidence with regard to the places the Applicant could have positioned himself in the courtyard which would have enabled him to have seen the armed people at an early stage and at the same time have a full view of the armed vehicle. He testified that the Applicant drew the sketch as it appears on page 18 of the bundle and showed his position behind the vehicle as marked on the sketch. He testified that the whole team was requested to undergo a polygraph test. The test results of the Applicant and senior member both showed deception. The driver showed no deception.

The Applicant was suspended and a disciplinary hearing was held. The Applicant was represented at the hearing which took place on 25 July 2007. Mr Stander who was from the Company head office chaired the hearing. He testified that the test results of the Applicant showed that he had prior knowledge of the robbery that had taken place on that day. This was though the only evidence and there were as result no further charges introduced against the Applicant.

At the disciplinary hearing the Applicant pleaded not guilty on the charges as per page 46 of the bundle. The procedure followed by the Respondent at the disciplinary hearing appear on page 47 onwards. He testified that the Applicant was found guilty on the charge. Mitigation was considered but the decision made by the presiding officer was that the Applicant is to be dismissed. The Applicant had a right to appeal but never appealed.

It was inter alia his evidence under cross examination that the Applicant is suppose to protect the vehicle and other members as he is also the only member with a long gun. The Applicant had to secure the outside perimeter and observe any unwanted people as it was his duty. He testified that where the Applicant stood behind the vehicle he was not in a position to carry out his duties of protecting the vehicle and the other members. Instead the Applicant chose to go and assist in a minor problem where one or two liters of diesel has spilled from the vehicle. In the process he left the vehicle completely unprotected with more than R5 Million inside the vehicle.

He testified that if the Applicant for example placed himself in front of the coal bags which was a perfect place for him to be, the robbers would at first had to eliminate him and then also the other members at the vehicle. The Applicant made it very easy for the robbers. He testified that it was illogical for three (3) people to attend to a diesel cap that was missing and in the process leaves R5 Million unattended. He gave further evidence where the Applicant could have positioned himself and he could also have moved around.

He confirmed that it was the duty of every member to protect the vehicle and its contents. He gave evidence with regard to what is seen to be the inside and the outside perimeter area. He testified that a polygraph test was only and investigative tool. He confirmed that the Applicant's disciplinary hearing could only have commenced on 26 July 2007. He testified that he cannot comment on the issue of when the outcome of the hearing was communicated to the Applicant. He testified that the Applicant "stated a lot" when he was cross-examined at the disciplinary hearing.

Under re-examination he confirmed that the final written warning issued to the driver appears on page 19 of the bundle.

The next witness to testify was Mr Dunjwa who was the driver of the armed vehicle at the time of the armed robbery.

It was his evidence that he became aware of the diesel spillage problem of the armoured vehicle two (2) days before the robbery took place.

Under cross examination he testified that the diesel cap of the vehicle was missing and it was closed with a piece of plastic bag and he reported the matter.

The next witness to testify on behalf of the Respondent was Mr Barnard employed a training officer in the Respondent Company. It was in essence his evidence that he did provide training to the Applicant as reflected on page 51 of the bundle which is a report of the training that the Applicant received. He gave evidence with regard to the various types / modules of training provided to the Applicant. It was also his evidence that the long gun person is responsible to protect the outside perimeter. The first thing he should do is to scan the outside perimeter and then he must observe anything suspicious and report back. It would not be possible for the Applicant to protect and secure the vehicle from the back of the vehicle where it stood in the court yard where the robbery had taken place as the Applicant was unable to see the entrance to the court yard.

Under cross examination he testified that each person must look at the environment and would then normally go and stand around 15 meters away from the vehicle in order to be able to observe the vehicle.

He confirmed that the Applicant must move around but must observe each situation and check where the exit and entrance points are.

If the scene of the robbery is considered it is clear that there were at least three (3) places where the Applicant could have stood but he chose to stand at the wrong place.

The last witness to testify on behalf of the Respondent was Mr van Niekerk employed as a chief protection officer in the Respondent Company. He testified that on page 53 to page 55 in the bundle appears a memorandum received from head office which outlines the procedure for deployment. He testified that he made the Applicant aware of the content of this document and he also signed for this document as recorded on page 56 of the bundle. He gave evidence with regard to point 3 (“Role of the support weapon”) on page 54 of the bundle. It was his evidence that in the court yard where the robbery took place the Applicant could not protect the outside perimeter from the back of the armoured vehicle as his view was restricted. He was unable to monitor the access point. The Applicant is not allowed to fiddle

with the armoured vehicle and he distracted. He testified that he also discussed the procedures with the employees at general staff meetings.

Under cross examination he testified that the Applicant's view was restrictive of the main access point from where he stood. The vehicle was in the way and there are also building corners on the site. He testified that it was the Applicant's duty to monitor the access point on the day of the incident. He confirmed that all the team members must be observant.

The Applicant testified at this hearing. It was his evidence that he was able to defend himself at his disciplinary hearing that took place on 26 July 2007. It was his evidence that he had done his job on the day of the robbery. The team leader stated that he must open the gate. He went inside and he observed the whole yard and called the driver to enter with the vehicle. The driver parked next to the ATM. He went around and in the front of the vehicle. The senior came out of the vehicle and around two minutes later the custodian of the Bank arrived. The senior called the bag man who went to the ATM. The senior called the driver over the radio and told him to come and see the diesel spillage. The driver came out of the vehicle and checked the diesel spillage. He testified that while he went around to the back side of the vehicle he told the driver to stop the diesel spillage and he must get a rag. As the driver turned to go the robbers arrived.

He testified that there was nothing that he should have done which he did not do as his job is to observe all over. It was his evidence that the best cover is the vehicle as it is armoured.

He testified that what he is saying is that he did go around and then went closer to the vehicle so he could get the best cover. It was his evidence that when they were trained they were told not to stand in one position for more than five (5) minutes. They have to move around and not stay in one point too long. It was his evidence that one is allowed to stand in any place. His hearing was held on 26 April 2007 and the following week he was told verbally that he was dismissed and they will provide the result to the Union. It was his evidence that the Union only received the result of his disciplinary hearing in October 2007.

Under cross examination he testified that he believes the position of "long gun" according to the training that he received was to give cover to the team. He must be the first person to observe. He confirmed that his job was to provide cover and to observe.

It was put to the Applicant as to how could he give cover to the other members if he stands with them at the back of the vehicle. The Applicant did not provide an answer to the question. The question was repeated and he again failed to answer it. He testified that he was observing when he was at the back of the vehicle.

He was referred to page 15 of the bundle which was part of his statement and it was put to the Applicant that he stated in his statement that he asked the driver to bring a lappie so they can close the leak.

The Applicant insisted that he was observing when he was at the back of the vehicle.

He then testified that he was going to help the driver to close the diesel funnel.

It was put to the Applicant that in order to assist the driver he had to put the long gun down somewhere in order to assist the driver. The Applicant did not answer the question. The question was repeated and he then conceded that he was going to hand the rifle to the driver.

The Applicant confirmed that he was taken by surprise by the robbers. It was put to the Applicant that the reason for this was because his attention was at the diesel funnel and he was not observing the outside perimeter.

The Applicant then testified that he was not the only team member that was supposed to observe, everyone had to observe.

Under re-examination he confirmed that there was team work amongst their crew. They help other crew members and the driver can use the rifle.

Heads of arguments were received in writing from both parties as agreed for consideration.

ANALYSIS OF EVIDENCE AND ARGUMENT

It is my view that the evidence before me has established on a balance of probabilities that the employee was guilty of the alleged misconduct, if inter alia the following is considered:

That the following facts / issues were not disputed / conceded by the Applicant:

- That a robbery took place at the Nedbank ATM site at the Engen Garage in Bluewater Bay on 28 June 2007 and more than R5 million was stolen during this robbery. The Applicant was part of the team

- who was robbed and was the carrier of the LM5 assault rifle on this day.
- Mr Barnard confirmed in his evidence that he trained the Applicant in the Respondent's tactical deployment requirements with the LM5 rifle. Mr van Niekerk testified that he reconfirmed the Respondent's tactical deployment requirements on a number of occasions with the Applicant and other staff members. The Applicant did not dispute the aforementioned evidence
 - The Applicant conceded that his duty as the carrier of the LM5 rifle ("long gun man") was to protect the other team members by providing cover and to observe for any suspicious actions / threats.
 - The Applicant admitted that he was caught totally by surprise by the robbers, which substantiate the Respondent version that he was totally occupied with the fuel cap / spillage.
 - The Applicant conceded that he would have had to use his hands in order to assist in fixing the diesel spillage problem and was going to hand his assault rifle to the driver of the vehicle.

I am furthermore satisfied that the evidence established that:

- The evidence has shown that the Applicant did not protect the outside perimeter of the ATM site as was required of him.
- The evidence established that the Applicant was familiar with the tactical deployment procedures as the carrier of the long gun.
- I found the evidence of the Respondent witnesses consistent in all material issues. All these witnesses (except for Dunjwa to whom this question was not posed) also confirmed that the Applicant did not comply with the Respondent's tactical deployment procedures with the LM5 rifle. It was inter alia their corroborated evidence that the Applicant could not perform his functions if he was busy with something else (like attending to a fuel leak at the back of the vehicle like in this instance).
- The evidence established that the diesel leak was of minor concern and there was certainly no justification to leave R5 plus million unattended whilst attending to this diesel leak / spillage.
- The Applicant could not observe any threats from the back of the vehicle as he could not see the entrance to the court yard from that position.
- There was no evidence to show that any of these witnesses stood to gain in any way by implicating the Applicant in serious misconduct.

- Just based on the concession made by the Applicant whilst he was cross examined it is evident that the Applicant's defence is not sustainable in that he was complying with the Respondent's tactical deployment procedures by being positioned at the back of the armoured vehicle.

Considering inter alia the above I must conclude that the Applicant did not comply with the Respondent tactical deployment procedures on the day of the robbery as his full attention was with the diesel cap / spillage problem and was stationed in the inside perimeter, where he should not have been. In being in the wrong position the Applicant was not able to do his duty by observing for threats and protecting the outside perimeter of the team.

The evidence also shows had he been in the correct position in the outside perimeter as trained and instructed the robbery could have been prevented.

If I consider the Applicant's actions as well as the nature of the Respondent business and the Applicant's duties I must conclude that the misconduct is serious and have cause the trust relationship irreparable damage.

In the premises I cannot interfere with the penalty of dismissal imposed.

Though inconsistent application of disciplinary measures by the Respondent was not challenged as such there were some evidence led with regard to the manner in which the driver of the vehicle was treated compared to the Applicant. The evidence has shown that disciplinary measures were also taken against the driver, Mr Dunjwa as he was issued with a final written warning. It is evident from the evidence that the circumstances of the misconduct of Dunjwa were not similar to that of the Applicant. In addition it is also my view that if the mitigating circumstances are considered in the Dunjwa matter the penalty imposed (final written warning) was appropriate.

The dismissal of the Applicant was substantively fair.

Procedural fairness was challenged on a twofold basis.

It was in the first instance held that the Applicant did not have an opportunity to present his case and in the second instance that he as not provided with the outcome of his hearing.

The Applicant testified in his evidence in chief that he was able to defend himself at the disciplinary hearing. He also conceded when he was cross examined that he presented his version of events at the disciplinary hearing.

The Applicant conceded that he was advised of his dismissal a few days after he was dismissed. There is no requirement in the LRA that compel employers to notify employees in writing of the outcome of their disciplinary hearings. I also fail to understand or accept that this prevented the employee from lodging an appeal. He conceded that he was verbally advised and he should then have lodged an appeal if he wanted to.

It is therefore my conclusion that there was no substance in the challenges with regard to procedural fairness.

The dismissal was accordingly also procedurally fair.

AWARD

The dismissal of the Applicant was procedurally and substantively fair and is confirmed.



M. Le R Koorts
Arbitrator