



# ARBITRATION AWARD

Arbitrator: P C Hauch Fenger  
Case Reference No.: KZNRFBFC 6192  
Date of award: 1 February 2010

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In the arbitration between:

ISHWAR MAHARAJ Union/Employee  
party

and

MANLINE (PTY) LTD Employer party

Union/Employee's representative: Mr. E. Mbina \_\_\_\_\_

Union/Employee's address: 79 Emam Road \_\_\_\_\_  
Raisethorpe \_\_\_\_\_  
Pietermaritzburg \_\_\_\_\_  
Telephone: 033 391 5110 \_\_\_ fax: 033 342 6173 \_\_\_

Employer's representative: Mr. J. de Goede \_\_\_\_\_

Employer's address: P O Box 100015 \_\_\_\_\_  
Scottsville \_\_\_\_\_  
3209 \_\_\_\_\_  
Telephone: 033 386 5948 \_\_\_ fax: 033 386 5968 \_\_\_

## **DETAILS OF HEARING AND REPRESENTATION:**

The applicant in this matter contended that the respondent has terminated his service in an unfair manner and referred a dispute in this regard to the Council for conciliation. The dispute remained unresolved, and the applicant requested that the dispute be referred to arbitration. The arbitration took place on 20 January 2010. The parties requested that they be allowed to submit written closing statements. They were advised that they had until the close of business on the 27<sup>th</sup> of January 2010 to submit same.

## **ISSUE IN DISPUTE:**

The issue to be decided is whether the applicant was in fact dismissed and if so whether the respondent unfairly terminated the services of the applicant and if so, what relief would be appropriate.

## **BACKGROUND OF THE DISPUTE:**

See below.

## **SURVEY OF ARGUMENTS & EVIDENCE:**

The evidence of the applicant, Ishwar Maharaj, was that he had read and signed the fixed term contract, which appears at page 3 of bundle A. He never signed another similar document after that contract had expired at the end of January 2008. He signed the contract in the presence of JC and another driver. He expected to sign another contract on expiry of this contract. He made enquiries in this regard with JC and he told him that there was no need to worry about "it", he did not need a contract as he was permanent. He received council benefits from the expiry of his contract in 2008 until his contract was terminated.

He had written the letter that appears at page 1 of bundle B as he had grievances with management. There were four grievances yet he only attended a hearing for one of his grievances and it remained unresolved. He gave the grievance letter to the Branch

Manager, Craig Warr. He reached 200 000 kms on his vehicle on 25 November 2008 according to page 2 of bundle A. It was never discussed with him the fact that he had reached the 200 000 kms. He was given a copy of this letter only at the time of his dismissal. He was never given a notice to attend a disciplinary enquiry.

The evidence of the applicant's witness, Godfry Khubeka, was that he is a Driver and a shop steward. He was called by HR, Imelda who told him that she had an issue with the applicant. When he got there, she showed him two letters from MAN and said that she must terminate the applicant's contract as instructed by the Operations Manager, Craig Warr. He asked her if the applicant was aware of this and she said, she had called the applicant and he would be present at 9h00 that day; he did not know this at this time.

He is aware of the contract between the respondent and MAN. Vehicles come for testing up to a certain mileage. MAN then send other trucks and the drivers will wait till other trucks arrive for testing. There were two other drivers who came at the same time as the applicant. One driver's service was terminated for misconduct whilst the other driver remains in the company's employ. Drivers contracts are not terminated when their vehicle reaches the maximum mileage, the drivers wait for the next vehicle to arrive from MAN. This is what happened with the applicant. A truck did come so he went to HR and said that they had terminated his services as the company had claimed that there were no more trucks; he asked why the company had not brought the applicant back to work and Imelda said they had not done so due to his attitude; there was nothing she could do.

The evidence of the respondent's first witness, Imelda Paltu was that she is the HR Manager. The applicant was employed on a fixed term contract, which is linked to a contract between the company and MAN Truck & Bus. The company does the testing of vehicles for MAN up to 200 000 kms. They employ drivers on a fixed term contract, this is linked to the vehicles assigned to them. There are various vehicles. During the period of employment of the applicant the company was issued with 6 vehicles, four ultra heavy vehicles and two medium vehicles. The applicant drove a medium vehicle as he had said he was not comfortable driving an ultra heavy vehicle.

Page 1 of bundle A is the letter she wrote to the applicant informing him that his Fixed Term contract had come to an end as the company had received notification that his vehicle had reached 200 000 kms. Page 2 of bundle A is the letter from MAN dated the 9<sup>th</sup> of February 2009. It took the Operations department a while to send the letters to the HR department. JC is unknown to her but she knows Jayce Naidoo who is the Cross border Fleet Manager. She does not know whether he was involved in test vehicles. Mr. Martin was in charge of test drivers. The applicant was never advised that he would be permanently employed. The applicant was definitely not dismissed because he had filed grievances.

The applicant suffered from an alcohol and drug abuse problem and the company assisted him via the EAP program. The company paid for his rehabilitation, which lasted 12 weeks and during his rehabilitation he was not allowed to drive. The company had not terminated his contract at the time for failing to disclose this abuse problem, as the union representative had approached her and asked that the company assist him rather than terminate his services.

Reinstatement is not possible as there is no truck for the applicant to test drive. He was paid 4 weeks notice pay. If a person is in a company's employ then the employer is obliged to pay the levies prescribed by Council, irrespective of whether an employee is on a fixed term contract or is permanently employed. The applicant's contract was terminated in terms of paragraph 17 on page 7 of bundle A, namely paragraph 17.1 as the vehicle he was testing had reached the 200 000 km limit. The contracts are confined to the vehicle the driver drove. Drivers for test vehicles are still employed on exactly the same basis as the applicant had been employed.

The evidence of the respondent's second witness, Jacque Martin was that his current position is that of Illovu Fleet Manager. He has been involved in test truck vehicles. MAN will advise the company that they have developed a new vehicle in Germany and they would like to export the vehicle to SA and for the purpose of testing the vehicles, the company supplies the drivers to drive these test vehicles. The testing is normally about 200 000 kms on each vehicle. The company would offer a driver employment on the basis of driving a vehicle until it reaches 200 000 kms.

He knows the applicant because he was asked to take over that contract in January 2009. He was the applicant's manager and at that time he was driving one of the smaller MAN trucks. The applicant's vehicle had reached 200 000 kms and his vehicle had been taken from the company. There was one big vehicle, a TGX running at the time, for which a code 14 was required. The applicant was not given this vehicle as, he had been told by HR that the applicant was not happy to drive a bigger vehicle; he wanted to drive small vehicles and there were no small vehicles available at that time. It is possible for a driver to drive another vehicle if another driver is not there as the employees are paid per km. This is borne out by clause 3 of the applicant's fixed term contract. It is not possible that the applicant was assigned one vehicle and then another vehicle on his contract. The applicant's vehicle was returned immediately and was not replaced immediately. Only one vehicle came in after the 5<sup>th</sup> of March 2009, it was a TGM, a small vehicle; it came in, in about August 2009.

When a driver reaches 200 000 kms in his assigned vehicle the company normally finds other work for them and if there is nothing then their contracts are terminated; he has terminated contracts in the same fashion for two other vehicles. He is familiar with the Fixed Term contract in bundle A as it is used when the company employs test truck drivers. The company only gets paid from the time the vehicle starts with the company until it reaches 200 000 kms after that the company does not get paid. It is the end of the employee's contract when the vehicle reaches 200 000 kms. He explained this to the drivers.

In essence the applicant argued that the dismissal was procedurally unfair in that the respondent had failed to conduct an investigation as required by item 4 of the Code of Good Conduct in the LRA, 66 of 1995. It was substantively unfair as the applicant's termination of service was "not related to his services ". The respondent failed to prove that the applicant's fixed term contract would expire at 200 000 kms. This evidence of the respondent's witnesses is hearsay evidence as it is not contained in the contract. The fact that the applicant continued to work for the respondent after his vehicle had reached the maximum 200 000 kms is proof that the applicant had been employed permanently. The applicant's service was terminated as a result of the grievances he had lodged. The applicant seeks retrospective reinstatement.

In essence the respondent argued that the applicant's claims with regard to renewal of his contract and that he was permanently employed as well as that he had driven another vehicle was hearsay evidence in the absence of corroborating evidence. The applicant contradicted himself and the evidence from the respondent's witnesses proved the applicant's version to be improbable. The applicant admitted that he was aware of the 200000 km stipulation and he never denied that he was without a vehicle for a considerable period of time. For him to have been gainfully employed, a vehicle would have to have been available. There is no evidence to show that the applicant could reasonably have expected further employment once his vehicle had been withdrawn. Clause 1 of the contract obliterates any expectation of employment for an indefinite period. The applicant in any event does not claim in his referral that his dismissal is one in terms of section 186(1)(b). The contract implied that that it would endure until the vehicle assigned to the applicant reached 200 000 kms. The issue of the applicant's grievances was irrelevant to the decision to terminate his contract of employment. The respondent requests that the Commissioner find that there was no dismissal and if she finds that there was a dismissal that it was substantively and procedurally fair.

### **ANALYSIS OF ARGUMENTS & EVIDENCE:**

There seems to be no dispute that the applicant was employed on the vehicle testing project in terms of a contract between the respondent and MAN Truck & Bus. MAN in Germany contracts with the respondent to test drive the vehicles up to a maximum mileage of 200 000 kms. These vehicles are tested for the South African market. It was the evidence of both the respondent's witnesses that drivers are employed on a fixed term contract for the purpose of test driving the specific vehicles which are sent out at any one time. It was the evidence of Martin that a driver will not be assigned to more than one vehicle per project. The applicant claimed that he had been assigned two vehicles for testing but provided no evidence to prove that this was the case. He said that the drivers are employed and assigned to a specific vehicle and that he explained to all drivers that they are paid only whilst they drive the vehicle assigned to them. The company only gets paid for the vehicle testing from the time the vehicle is received till it reaches 200 000 km. The drivers are paid per km whilst they

drive these vehicles. It could happen that if a driver was off then another driver may drive that driver's vehicle.

Martin stated that if there were other test vehicles which arrived after the driver had reached 200 000 kms on the vehicle he had been assigned, then it would make sense to use the driver to drive another vehicle in the next batch of vehicles sent to the company provided of course that the driver had the requisite licence etc. He also stated that the company would try and find alternative work for a fixed term contract driver within the company. Under cross-examination he stated that he had done just this for the applicant but the applicant had refused the alternative work offered to him. This was not disputed by the applicant.

The applicant's evidence that he was offered permanent employment by JC is not substantiated. He did not call JC to testify at this arbitration to corroborate his version despite my advising him and his representative that this would assist his case. It is the applicant's mere say so. It was the evidence of both the respondent's witnesses that the applicant had never been made permanent or promised that he would be permanently employed. The mere fact that the employee enjoyed Council benefits does not mean he was permanently employed. The employee stated that his expectation was that his fixed term contract would be renewed at the end of January 2008 when the contract he had signed had expired. He did not sign an extension of contract yet he remained doing the job he was employed to do in terms of his fixed term contract of employment. The company's failure to get him to sign an extension to his fixed term contract cannot then change the nature of the basis of his employment. If he had been permanently employed, it would stand to reason that the applicant would have been signed on accordingly. The fixed term contract states that the contract will come to an end on the expiry date or until the completion of "Manline's agreement with MAN Truck & Bus... whichever occurs first". It is common cause that the vehicle assigned to him had reached the 200 000 km mileage in November 2008 even though the company was inefficient in not advising the respondent timeously. The respondent's Operations department was equally inefficient in not advising the HR department timeously. This is the only area in which the respondent can be criticized in this matter. Fixed Term contracts must be managed efficiently by both HR and the Operations department, one cannot slip up as this could well create

unintended consequences. It would also be advisable for the respondent to record with the signature of the employee the test vehicle that has been assigned to a particular driver. Furthermore, this maximum mileage of 200 000 kms should also be noted in the contract.

I note that the applicant's fixed term contract states that he is employed as an Ultra Heavy Duty Vehicle Driver yet he did not drive such vehicles. He had advised HR that he was not comfortable driving these heavy vehicles. So he was allowed to drive light vehicles. This was not disputed by the applicant. This limited his employment to lighter vehicles; it was the evidence of Martin that there was a heavy duty vehicle available at the time but he could not assign it to the applicant as he did not want to drive heavy vehicles. Furthermore it was also the evidence of Martin that it was only in about August 2009 that another vehicle arrived from MAN, which would have been suitable for the applicant to drive. His service had already been terminated after the applicant had refused alternative work, which had been offered to him. Had he accepted the alternative work he may well have been offered this vehicle in August 2009 when it arrived. As Martin said it would make sense to use drivers that have done the work and are known to the respondent.

The applicant has failed to show that he was dismissed. His service was terminated in terms of the Fixed Term contract, which he signed at the commencement of his employment with the respondent.

**AWARD:**

I make the following award.

- 1.The applicant was not dismissed.
2. The matter is dismissed.



**Signed and dated at Durban on 1 February 2010.**

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**NBCRFI Arbitrator:PC Hauch Fenger**