In the National Bargaining Council for the Road Freight Industry

Held at Johannesburg

In the arbitration between:

SATAWU obo B. Ludidi — Applicant

and

Fedex Express — Respondent

ARBITRATION AWARD

Case Number: D516/JHB/1207/07A

Date/s of arbitration: 5 September 2007

Date of award: 19 September 2007

Arbitrator: K. Gunase

Interpreter: Ms. K. Siziba

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Details of Hearing and Representation

This matter was scheduled for hearing on 5 September 2007. The proceedings were mechanically recorded and the audiotapes used for this purpose were handed in to the Council at the conclusion of the process. Mr. Ludidi ('the applicant') attended in person together with a union official, Mr. V. Skaal. Mr. J. De Beer, an attorney, represented the respondent.

The parties held a pre-arbitration meeting and the signed minutes were filed on 5 July 2007. In terms hereof (par.2) the following was common cause:

- That the applicant was employed as a freight processor on the 1st of April 2003.
- That the applicant earned a monthly salary of R3401,13.

The respondent also prepared a bundle of documents that was referred to in the course of the hearing. Further, it was recorded at the commencement of the proceedings that only the substantive fairness of the dismissal was in dispute. Thus the merits of the dispute as well as argument were finalised on the aforesaid date.

Issue to be decided

Whether the applicant's dismissal on 2 April 2007 is substantively fair. Three charges were levelled against the applicant:

1. Carrying unauthorized passengers.
2. Unauthorised private use of a company vehicle.
3. Any other reason recognised in law as being sufficient grounds for dismissal. In the instance this related to the applicant having taken money from the people he allegedly transported.

Summary of Evidence

Mr. C. Steyn (Steyn), a senior operations freight and in-house manager in the respondent's employ, identified the documents contained in the bundle. He also testified that the applicant was first charged with two transgressions and that the third was later added. The applicant did however have time to prepare for same as the disciplinary enquiry was postponed. Regarding the merits of the matter, Steyn stated that he received information that the applicant had been 'playing taxi' with the respondent's vehicles and receiving money for this. Thus on 5 February 2007 Mr. T. Maritz, the night shift manager, advised him when the applicant left the respondent's premises so that he could follow him. As a result Steyn saw the applicant driving with two other employees i.e. Thabo Mabala (Thabo) and Lloyd Sithole (Lloyd) who were passengers in the front of the vehicle. They went to the airport and then to a Shell garage where the respondent's vehicles re-fuel. Hereafter they drove in the direction of Croydon. The applicant then stopped at a taxi rank and opened the rear door of the vehicle so that three men could get in. Steyn did not know the people and noted that they were not the respondent's employees. The applicant then drove off towards Tembisa and Steyn followed the vehicle for a while before going his own way in order to avoid suspicion. The following

day he obtained a trip log printout. He also spoke to Thabo and Lloyd regarding what had happened. Thus it emerged that the applicant had picked up the people and had been paid R10,00 per passenger. Steyn noted that the applicant' conduct contravened the respondent's policies and procedures (pp. 28; 31 & 32 of the Bundle). The applicant was also aware that what he had done was not allowed. In this regard Steyn added that the applicant had received a copy of the disciplinary code. Moreover he had received a final written warning on a previous occasion when charged with carrying unauthorised passengers and the unauthorised use of a company vehicle (p. 34). Regarding casual employees, Steyn knew who these were because he was responsible for engaging them. Moreover if they needed a lift this would have been arranged at the respondent's premises and not where the applicant had stopped.

Under cross-examination Steyn stated that the respondent would give the requisite permission if the applicant were to transport people as occurred with Lloyd. Thus employees were not permitted to transport people without the requisite authorization. Further, one could give a colleague a lift if he was *en route* to work, in uniform and provided he sat in the front of the vehicle. Steyn confirmed that the respondent employed casual employees and that they could be given a lift. As regards them having uniforms he noted that some do have dustcoats. Questioned on the people that the applicant gave a lift, Steyn maintained that he knew who the casuals were because he was responsible for signing them on. He also maintained that he did not know the people in question and thus disputed that they were casuals. In the instance the applicant had authorization to drop off Lloyd and he also had Thabo with him. Both of the employees resided in Tembisa. Thus the applicant had permission to go to this area. However whilst it was not in dispute that the applicant had returned to the respondent hereafter, he did make more than two stops in Tembisa.

Mr. L. Sithole (Lloyd), a freight processor in the respondent's employ, testified that he worked with the applicant. On the night in question the applicant, Thabo and himself left the respondent's premises for the airport at about 22h00, which was after his shift. Hereafter they went to a Shell garage where he made a purchase. They later stopped at another garage where the applicant picked up three men. In this regard he confirmed that the applicant alighted from the vehicle at the time and that the three men sat at the back. Lloyd stated further that he did not know these individuals and that he had not seen them before. Whilst he was a permanent employee at the time he knew who the casuals were; thus he knew Thabo. They drove to Tembisa whereupon two of the people were dropped off prior to himself. Lloyd did not see whether any of the men gave the applicant money. He also stated that he never sits at the back of the vehicle when transported.

Under cross-examination Lloyd confirmed that Thabo was the only casual he knew and thus the one he had seen that night when given a lift from the warehouse. He noted further that Steyn usually signed on the casuals and therefore he could not say how many had been engaged on the day. Lloyd reiterated that he had never seen the three men before. He noted further that the respondent does occasionally employ

people off the street. Questioned as to the distance from the respondent's premises to where the three men were picked up, Lloyd noted that one would need transport to traverse it.

Mr. T. A. Mabala (Thabo), a loader in the respondent's employ, testified that he was a casual at the time of the incident in question and that Steyn had appointed him. He was also the only casual at road freight. On 5 February 2007 his shift ended at about 9 or 10 p.m. and he got a lift to Tembisa with the applicant. Lloyd was also in the vehicle at the time. Thabo confirmed that they first went to the airport and then to a garage to re-fuel. Hereafter they drove towards Croydon where there were people hiking. The applicant stopped and loaded them into the back of the vehicle. Whilst he could not recall exactly how many there were, he did note that he did not know or recognise any of them. The people were all wearing civilian clothes at the time. As to why the people got into the vehicle Thabo noted that when people do not find taxis they hike and would then pay when they get out of the vehicle that transported them, which was a bakkie in this case. Thabo recalled that one of the people had paid the applicant R10,00, which he put into his pocket. Thabo did not pay for the ride. He added that when it was time for the people to alight from the vehicle the applicant would open the door and they would get out and pay.

Under cross-examination Thabo confirmed that the applicant had stopped the vehicle for hikers and that they spoke to him. He could not tell what had been said because the applicant had gone to them and he then saw them getting into the vehicle. The applicant had opened the rear door for them at the time. Questioned as to what transpired when the people were offloaded, Thabo testified that after giving them a lift the applicant asked where they were going. When it was time for them to alight the applicant got out of the vehicle in order to open the door.

The applicant stated that he worked the 4-12 p.m. shift on 5 February 2007. In the course hereof he had to go to the airport to make certain deliveries. Lloyd and Thabo were in the front of the vehicle with him because he had to drop them off. Three people, who said that they were casuals and needed a lift to Tembisa, were at the respondent's gate. He told them that he was not allowed to pick them up because of the parcels he was transporting and that he would return. After leaving the airport he refuelled the vehicle at a Shell garage. He then proceeded to Tembisa and *en route* he stopped at another garage because he saw the men he had seen at the gate. This was about 2km from the respondent's premises. One of them had a yellow lumber jacket that he recognised from his earlier encounter. The men said they were going to Tembisa and he, in turn, said that they could go with him. Thus he opened the door and gave them a lift. The applicant noted further that he had not returned to the respondent's premises after re-fuelling to check on the people because he did not want to give people lifts. One of the people took out money and the applicant indicated that he was not taking it because they had said they were casuals. He also told them not to pay him because he was not a taxi. The three men alighted from the vehicle in Tembisa. The applicant confirmed that this was the first time he had seen the three people and that he did not know them. He later

returned to the respondent's premises and parked the vehicle. He was suspended, with pay, the following day and later dismissed. The applicant believed that his dismissal was unfair because he was never told not to give casuals a lift. As to whether he worked with the three people on 5 February 2007, the applicant stated that he did not work with road freight.

Under cross-examination the applicant testified that he was aware of the rules that an employee was not allowed to transport unauthorised passengers and, that the respondent's vehicle was not to be used for private purposes. The applicant further agreed that this stemmed from an incident in 2005. He also conceded that it was dishonest to take money from passengers, as this was not allowed. Regarding the incident in question the applicant stated that he worked with the drivers and not road freight. As to there being more than one casual in road freight, the applicant noted that he had met the three people at the gate inside the premises and that they had said they were casuals. The applicant confirmed that Lloyd and Thabo were with him when he left the premises and that he had also spoken to the three people at the time although he did not get out of the vehicle. Notwithstanding this he could not comment on why this occurrence was not mentioned by either of his two passengers. As to his version not being put to the respondent's witnesses, one of whom had stated that the three people were hiking, the applicant stated that he believed the three people walked from the company to Croydon and that they had recognised the respondent's vehicle. The applicant also maintained that the people were casuals because of where they had stood looking for transport. In this regard the applicant conceded however that if this were the case, Thabo and Steyn would have known them. He also conceded that if Steyn had said that they did not work for the respondent this was the case. The applicant testified further that he did not ask the people for their work ID's when he first saw them, or when he stopped at Croydon. In this regard he noted that he recognised the individual wearing a yellow jacket.

The applicant also stated that when called in the following day his manager said that he had given people, who did not work for the respondent, a lift. As to why he did not state that they were casuals, the applicant indicated that he said nothing at the time because he was scared. Also, he did not try to locate the persons because he did not know where they lived. In addition he did not ask Steyn for a list of the casuals who had worked on the day in question, which he agreed was a logical thing to do, because it did not occur to him to do so. The applicant was also aware that the respondent has CCTV at its gate but did not seek to view the footage in order to corroborate his version because he had not thought of it. The applicant disputed that he had taken R10,00 as Thabo had testified. He also indicated that he knew Thabo from work and that there were no issues between them. As to why Thabo would lie about what had transpired, the applicant stated that he believed someone had bribed him because he (the applicant) was not wanted at the respondent. The applicant also noted that there was a conspiracy against him. However regarding his relationship with Steyn and Mr. Maritz, the applicant testified that there was no bad blood between them.

Analysis of Evidence and Argument

In terms of section 192(2) of the Labour Relations Act 66 of 1995, as amended ('the Act'), the onus rests on the employer to prove the dismissal fair. This entails proving, on a balance of probabilities, that the reason for dismissal is a fair reason and that the dismissal was effected in accordance with a fair procedure (s188(1)). See also: *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC). Further in considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure regard must be had to Schedule 8 of the Act, which is the Code of Good Practice on dismissals ('the Code') [s188(2)]. I add that it is trite that this is a hearing *de novo* on the merits of the case. See: *Gibb v Nedcor Limited* [1997] 12 BLLR 1580 (LC).

In the instance only the substantive fairness of the dismissal stands to be determined. As noted elsewhere, three charges were levelled against the applicant. Thus I note, firstly, that it was not in dispute that the applicable rules/standards existed, that they were valid or reasonable, that the applicant was aware of them, or that the respondent applied them consistently. Accordingly, on the evidence before me I have to determine:

1. Whether the applicant committed the offences alleged, and
2. Whether the sanction of dismissal was appropriate in the instance.

The respondent called three witnesses in support of its case. Having had regard to their evidence in conjunction with the applicant's it is apparent that there are significant disputes of fact. On this score I note that the following dictum of Wessels JA in *National Employers' Mutual General Insurance Association v Gany* 1931 AD 187, is instructive:

> "Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false" (at 199).

This has been confirmed more recently in *Masilela v Leonard Dingler (Pty) Ltd* [2004] 4 BLLR 381 (LC) where Francis J stated the following:

> "This Court is faced with two mutually destructive versions only one of which is correct. In deciding which version to accept and which one to reject I am obliged to consider *inter alia* the issue on a balance of probabilities. The onus is on the respondent to prove on a balance of probabilities that its version is the truth. The onus is discharged if the respondent can show by credible evidence that its version is the more probable and an acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the respondent's version, an investigation where questions of demeanour and impression are measured against the contents of a witness's evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts that cannot be disputed

and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety. In this regard see *Mabona & another v Minister of Law & Order & others* 1988 (2) SA 654 (SE)" (at 390G-391A).

Steyn, Lloyd and Thabo were all satisfactory witnesses whose credibility was not impeached under cross-examination. Steyn was the applicant's superior and his involvement in the instance was based on a tip-off. Further, his presence during the applicant's journey on the night in question went undetected. More significantly however is the following: the respondent's two further witnesses, neither of whom was aware of his presence, corroborated his version as to what occurred during the journey on material aspects. Steyn's testimony is noteworthy for another reason: it questions the veracity of the applicant's version that the people he transported were casual employees. This is so because it was not in dispute that Steyn engaged the casuals and that he therefore had knowledge of who these individuals were. It was also not disputed that he had an opportunity to see the three people on the night in question and that he did not recognise them. Moreover he stated categorically that if a casual sought a lift, this would have been arranged at the respondent's premises and not in the manner in which the people were transported. Lloyd and Thabo were present in the vehicle in the course of the journey from the respondent's premises to Tembisa. Consequently it was not in dispute that they were present when the applicant stopped the vehicle in order to pick up people some distance from the respondent's premises. Like Steyn, they both consistently stated that they did not know these individuals. In this regard it must be noted that Thabo was himself a casual at the time and had been working on the night in question. It therefore stands to reason that he would have known the persons had they in fact been casuals, or at the very least recognised them were this the case. What is also pertinent on Thabo and Lloyd's version is that neither one of them made any mention of the people at the respondent's premises. This is indeed salient given the applicant's case that he stopped and spoke to them at the time. I add that there is nothing to reflect that the respondent's witnesses were dishonest about what transpired. Given the evidence before me there was also nothing to suggest that they had reason to lie. This is significant in light of the applicant's own concession that there was no animosity between him and any of the respondent's three witnesses.

The applicant on the other hand provided no satisfactory answer to the respondent's case. I am further of the view that he was not candid and that his version is improbable for the following reasons:

- The applicant stated that he was not amenable to giving people lifts. However the following must question his veracity: he was not prepared to return to the respondent's premises where he allegedly told these individuals to wait and where he could verify their status, but appears to have had no issue with picking them up on the road some distance away from the company.
- The applicant could not explain why neither Lloyd nor Thabo mentioned that the three people picked up were at the respondent's premises when they left for the airport, or that the applicant had

spoken to them. This must, on the probabilities, question the applicant's version. In this regard it is noteworthy that the applicant could also not explain why his account was not put to the aforesaid witnesses.

- The applicant could provide no rational explanation as to why he made no effort to locate any of the three people concerned. This is significant in light of his avowed belief that they were casual employees. I add that his failure to do so is, in my view, indicative of his version being an afterthought.
- The applicant contended that the respondent's witnesses were untruthful. However in the same breath he also testified that there was no enmity between them. In this regard I add that his allegations that Thabo had been bribed and that there was a conspiracy against him was not only unsubstantiated but also improbable in light of the proven facts before me. To my mind this finding is a further indication that the applicant's version of events is an afterthought.
- Whilst the applicant detailed, in the course of his evidence, why he refused to accept any money it must be noted that neither the fact that he did do so, nor his version was put to Thabo under cross-examination. I have commented on Thabo's credibility elsewhere. Thus in light of the aforementioned I am drawn to the conclusion that the applicant's testimony on this score was a tailored reply to the respondent's case.

Accordingly I am satisfied that the charges levelled against the applicant were well founded.

I turn now to the appropriateness of the sanction. In *County Fair Foods (Pty) Ltd v CCMA & others* [1999] 11 BLLR 1117 (LAC) it was held that employers are entitled to set the standard of conduct for employees and to determine the sanction for non-compliance. Interference would only be justified if the employer's decision were unfair. As stated by Ngcobo AJP at par.28:

> "There must be a measure of deference to the sanction imposed by the employer subject to the requirement that the sanction imposed by the employer must be fair. The rationale for this is that it is primarily the function of the employer to decide upon the proper sanction".

See also: *De Beers Consolidated Mines Ltd v CCMA & Others* [2000] 9 BLLR 995 (LAC).

Further in the more recent decision of *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021 (SCA), Cameron JA confirmed that commissioners may interfere with the sanction of dismissal only if the decision is unfair. Thus the Learned Judge of Appeal stated the following:

> "[A] CCMA commissioner is not vested with a discretion to impose a sanction in the case of workplace incapacity or misconduct. That discretion belongs in the first instance to the employer. The commissioner enjoys no discretion in relation to sanction, but bears the duty of determining whether the employer's sanction is fair" (at 1037D-E).

I note further that after a comprehensive evaluation of the law the issue was summarised as follows:

"...(d) Commissioners must exercise caution when determining whether a workplace sanction imposed by an employer is fair. There must be a measure of deference to the employer's sanction, because under the LRA it is primarily the function of the employer to decide on the proper sanction.
(e) In determining whether a dismissal is fair, a commissioner need not be persuaded that dismissal is the only fair sanction. The statute requires only that the employer establish that it is a fair sanction. The fact that the commissioner may think that a different sanction would also be fair does not justify setting aside the employer's sanction" (at 1040H-1041B).

Given the facts and evidence before me there can be little doubt that the respondent entrusts its employees with the safekeeping of its vehicles as well as any cargo. Also, in light of the fact that a vehicle is on the road and thus outside of the respondent's premises it is not possible for the respondent to monitor every step of an employee's conduct. This scenario therefore demonstrates the level of trust placed in an employee who is given charge of a vehicle. In the instance the applicant decided to pick up passengers for reward because he had the requisite permission to travel to Tembisa in order to drop off two colleagues. In so doing he displayed scant regard for the respondent's rules in this regard as well as the adverse implications that his conduct could have for the respondent. It was not in dispute that the applicant had been disciplined before and that two of the charges at the time mirrored that in the instance. The applicant was thus given the benefit of progressive discipline, which it would appear he did not heed. Hence for these reasons I accept that the applicant's actions were serious and wilful thereby justifying dismissal.

Accordingly with due regard to my findings in the instance, the Code of Good Practice as well as the aforementioned *dicta* I am persuaded that dismissal was a fair sanction in the instance. I therefore find the applicant's dismissal substantively fair.

Award

1. The dismissal is substantively fair and the application is accordingly dismissed.
2. There is no order as to costs.

Thus signed at Johannesburg on this 19th day of September 2007

K. Gunase
Arbitrator