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AWARD

CASE NUMBER : GPRFBC 14798

In the **ARBITRATION** between

CEPPAWU obo Ntshingila Union/Employee party

and

DHL Health Care Employer party

Union/Applicant's representative: *John Appolis*

Union/Applicant's address: *P.O. BOX 6804*
Johannesburg
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Respondent's representative: *Mariaan Freislich*

Respondent's address: *P.O BOX 8166*
Elandsfontein
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DETAILS OF HEARING AND REPRESENTATION:

The arbitration was heard at the Braamfontein offices of the NBCRFI on the 31st March 2011, 6th May 2011 and 12 August 2011. The applicant was represented by Mr John Appolis the union official of CEPPAWU. The employer was represented by Ms Mariaan Freislich.

ISSUE FOR DETERMINATION

Whether the dismissal of the applicant was fair.

THE APPLICANT'S CASE

THE EVIDENCE OF SYDNEY NTSHINGILA

1. The applicant has been in the employ of the Respondent for twenty years.
2. At the time of termination he was employed as a Warehouse Operator and he was a Shop steward for nine years.
3. He testified that on the 7 October 2010, his colleague Mr Dlamini asked him to make an announcement about the issue of Labour Brokers regarding a meeting they had with COSATU that during lunch time there will be a picket.
4. On the 24th August 2010 they had agreed with management that a few labour brokers employees will be employed on a permanent basis. It was further agreed with management that those who will be employed permanent should be amongst those who had a long service with the company.
5. He testified that the language he used when he addressed the staff meeting is "Picketing" because there is no Zulu word equivalent to it.
6. He testified that the decision to picket was taken by COSATU at Booyens on the 17 September 2010 and he reported back to the members of the union after the 17 September.
7. The reason Dlamini asked him to announce the issue of picketing is because he is the one who attends COSATU meetings and it is him who supposed to have made the announcement.

Dlamini authorized him to give the report because a lot of workers came to them that they heard on the television, radio and in trains that there was going to be a picket during lunch time.

8. He testified that on the 7 October 2010 no picketing took place at the Respondent because they had reached an agreement with the company particularly on the issue of temps employed by the Labour Brokers.

9. He stated that on the 7 October 2010 he was suspended and told to leave the premises of the Respondent. He asked if the company had informed the union about his suspension and whether it was possible to be suspended without papers. At that point security was called to remove him from the premises.
10. He went to the union's office where a letter was written to the company to which it did not respond. He later phoned the union office to check if the company had responded to the letter and the company had not responded. Another letter was written to the company and it responded by serving him with the charges.
11. He testified that even when he was suspended he was never told but came to know when he asked if he was suspended to which the company agreed. There was neither consultation with himself or the union regarding his suspension.
12. When the company received a notification of a secondary strike from the union at page 31 of the applicant's bundle, shop stewards were called in a meeting and asked if they knew about the secondary strike to which they said they knew nothing. The company asked if they will go on strike to which they, again said they knew nothing. The company gave them a telephone to phone the union's office to verify.
13. They phoned the union's office and established that the secondary strike had been cancelled.
14. He testified that he was never told by the company not to represent labour brokers employees but at COSATU meeting they are told to represent every employee in the meeting. Like when the system is down and announcements about the end of the year function.
15. Referring to the meeting where he was authorised by Mr Dlamini to speak, he stated that as a member of the stake holder if there is a meeting he had a right to speak.
16. On the the allegations by the company that employees are scared of him and that was the reason they did not attend the hearing, he stated that the evidence of his witnesses in this arbitration is that he is approachable and that the reason that the employees were scared of him was because they wanted to come and tell lies in the arbitration.
17. The chairperson of the hearing Mariana refused to recuse herself from the hearing.
18. He disagree with the company that the trust relationship has been damaged. He stated that for the past 20 years he has had no disciplinary record and has never been accused of intimidating any one .
19. He would like to be reinstated.

THE EVIDENCE OF MZWAKHE PATRICK DLAMINI

20. He has been with the Respondent for fifteen years.
21. He arranged the meeting on the 7 October 2010 and he took the applicant with him to the meeting.
22. He chaired the meeting and the purpose of the meeting was to address issues with management.
23. The applicant was the last to speak in the meeting. He said that there is a picket that was suppose to take place and that management was planning to give temporary employees a permanent employment status and that there was no need for a picket to take place.
24. The applicant spoke in Zulu and he used the word picket as is in English and he did not use the word "strike".
25. In response to the question that the company says the applicant required permission to speak in the meeting, he stated that it was unnecessary because the union represent members.
26. The meeting ended up with the understanding that a picket will not take place because the company had agreed to employ temps on a permanent basis.
27. He stated that the applicant speaks with a harsh voice and he did not understand when the company says the reason the employees did not come at the disciplinary hearing was because they were scared of the applicant.

THE EVIDENCE OF KLAAS MALISELA SEYANEGO

28. He has been with the Respondent for twenty two years and he is employed as a checker.
29. He attended the meeting on the 7 October 2010 and the meeting was chaired by Patrick Dlamini.
30. The applicant spoke towards the end of the meeting. The applicant told the meeting that the picket will no longer take place because management had agreed to register the casual workers.
31. The applicant spoke in Zulu and the word he used is "Picket" and he did not use the word "strike" when he addressed the meeting.
32. On the day of the meeting no picket took place.
33. The first time he heard about the picket was at their monthly meeting before the meeting of the 7th October 2010 and it was the applicant who reported about the picketing in that monthly meeting.
34. The labour brokers employees were not present at the meeting.

35. Regarding the applicant's relationship with the employees, he stated that they (employees) call him Mfundisi (priest) or Mkhulu (old man) because everyone who arrives at the company he is the one who welcomes that person.
36. He stated that he does not understand when the company says that witness could not come at the hearing because they feared for their lives, because the applicant is an approachable and a talkative person.

THE EMPLOYER'S CASE

THE EVIDENCE OF GAVIN FITCHER

37. He knows the applicant as a Shop steward and a Packer at the Warehouse.
38. On the 7 October 2010 the SAK System they do their work on had a problem and as a result they could not work.
39. Patrick Dlamini came to him to ask if he could give feed back to staff and he granted him permission to give feed back to staff as he was not sure when the system will come back.
40. He was telephoned by the IT person to check if the system was working. He went to check but the system was still not working.
41. When he went back to his office he saw the applicant speaking to staff but he did not know what he said in their language.
42. He testified that he (Fitcher) stood at a place where he could not be seen and saw the expression on the employees face that they looked worried.
43. He thereafter approached certain of the people to ask them what was being said to them and they said the applicant told them to go on strike during their lunch hour. The persons to whom this was said were labour brokers employees.
44. He became concerned and he went to his manager to report the matter.
45. He stated that not only the applicant but any DHL employee can not represent the Labour Brokers staff.
46. During the forum meetings only general operational issues were raised.
47. Patrick Dlamini had no authority to give the applicant platform to address staff as the permission was only given to him.
48. At the union meetings they get permission to can deal with those issues.
49. Referring to page 40 of the employer's bundle, he stated that those are the minutes Patrick wanted to give feed back on and there is nothing which relates to strike and picket in the minutes and that it was wrong for the applicant to have raised that issue in the meeting.

50. He testified that the applicant's reinstatement will have a negative effect as many people would fear to lose their jobs and if they know they could be victimized would fear for their families as well.
51. Asked how they would be victimized he stated that they said the applicant has influence.
52. The situation after applicant had left is that employees are now willing to work until late which did not happen when there applicant was present.
53. He concluded his testimony by stating that the official language at DHL Health is English.

THE EVIDENCE OF MARLIN BESTER

54. She is a DC Manager.
55. She testified that on the 7 October 2010 Gavin a controller said he allowed stakeholders meeting feedback to be given to employees and he saw others not being happy and approached them and they told him that there was going to be a strike.
56. She stated that she was also not happy and she went to the Director and a decision was made that the applicant should leave.
57. She stated that the applicant addressed temporary employees who were present at the meeting.
58. Stakeholders meeting is meeting with all the staff.
59. The applicant is aware of the rule. The applicant had no authority to address labour brokers employees as they have their own bosses they report to.
60. The applicant was appointed by the DHL Health and DHL pays his salary.
61. She had previously made the applicant aware that he had no representativity of the labour brokers.
62. Referring to the minutes of the meeting at page 40 of the bundle of documents she stated that the applicant had nothing to do with the labour brokers.
63. She stated that it was never said in any meeting that labour brokers staff will be made permanent.
64. She stated that in a meeting of the 28 September 2010 the applicant was told that labour brokers would be brought to explain how they work and that was done.
65. She testified that she was not told that in the meeting on the 7 October 2010 the applicant was going to raise the issue of labour brokers and that

there was going to be a protest by the union and when she heard that she was very shocked.

66. The relationship they had with the union in the past was that the union would tell if they wanted something.
67. The implication that the picket would have on lunch time is that the lunch time is not same for their staff. Their medicine must be delivered on time and some products must be delivered to the theatre without delay.
68. In relation to charge two she stated that the applicant is a Shop steward for the permanent staff and the labour brokers staff are not his members.
69. She is not aware of any authority in the labour Relation that would give the applicant authority to address people.
70. The applicant has huge influence on staff and the staff look upon him and that is why they chose him.
71. She testified that the applicant did not take the company's interest at heart and that if he did he would have spoken to management. A person who worked for the company for 20 years knows procedures.
72. If the applicant was to be reinstated he would influence staff negatively.
73. She testified that the reason why the disciplinary hearing was held in camera is because the witnesses were afraid to talk and that if they talked what was going to happen to them.
74. When the applicant was dismissed someone brought to management's attention that the document at page 66 of the bundle was circulated to them and it was at that point that she realized that some people has the company's interest at heart. The document at page 66 of the bundle is an article dealing with the applicant's dismissal and the reasons for which he was dismissed. In this article her name was mentioned which is the reason she says it was disturbing that the article was distributed.

THE EVIDENCE OF LESIBA MOKOKA

75. She works for the K&A a labour broker.
76. She attended the meeting on the 7 October 2010. The applicant organized a meeting and he talked about the strike that on lunch time they must go on strike. The applicant said this before lunch.
77. Her contract which she signed with the labour broker does not allow strike.
78. The applicant addressed them in Zulu language and the word he used is "toyi toyi" which means strike.
79. There could have been no misunderstanding between Sepedi and Zulu.

80. She did not go on strike and the reason the applicant wanted them to strike was that casuals should be made permanent employees.
81. She is not a union member and they do not have a shop steward and when there is a problem at work they approach Gavin. She did not ask the applicant to help her with anything.
82. She testified that she did not give evidence at the hearing and that it was the first time to make a statement.
83. She stated that she was not comfortable to be at the arbitration because she does not know what will happen to her if any party wins she could lose her job.
84. She had no contact with the applicant.

THE EVIDENCE OF SHANEL MANUEL

85. She is a temp and she works under capacity a labour broker.
86. On the 7 October there was a lot of work and the applicant called a meeting and said that there was going to be a strike.
87. She testified that they were busy doing the house keeping when her colleague called them to say that there is a meeting. At that meeting Patrick and the applicant spoke.
88. Patrick explained what was going to happen about the Christmas party and the applicant spoke about the strike in his language Zulu. She stated that most of the people who understood the applicant said there was going to be a strike and as for her, she did not want to get involved as she could lose her job.
89. She is employed by capacity and the applicant is not a union of capacity.
90. It was the first time that she has had the applicant speak in the meeting and she did not know that he was a shop steward.
91. She stated that the feeling of the people uncomfortable and the reason for the strike was not communicated.
92. The strike was going to take place at lunch time. They do not all go on lunch at the same time.

THE EVIDENCE OF MIRRIAM BONISILE MATHEBULA

93. She works at DHL Healthcare but her employer is K & A a labour broker.
94. She testified that on the 7 October 2010 around 9 A.M. Patrick Dlamini called a meeting for the stakeholders feedback. Patrick gave them feedback and after he had done that the applicant told them that they should go on strike during lunch time. After that they continued with their work.

95. The reason she knew the applicant talked about the strike is because the applicant said the labour broker should register them.
96. She did not strike because her contract does not allow her to strike.
97. The people's reaction were shocked at hearing that they should strike.
98. The words which the applicant specifically used when he addressed them is "strike".
99. She had no dealings with the applicant before and he was not elected by her.
100. They have agreed on what to write on their statements.
101. She gave evidence at the hearing and she was scared because the applicant is permanent and she did not know what he was going to think when he sees her.

ANALYSIS AND EVALUATION OF THE PARTIES EVIDENCE

THE SUBSTANTIVE FAIRNESS OF THE DISMISSAL

102. The following charges were preferred against the applicant:

" Charge 1:

Instigation of Labour Broker staff to embark on an illegal strike at the premises of Elandsfontein, Healthcare Division, with the demand from their side to be made permanent staff at the Healthcare division. This would have affected the business of Hehealthcare in a serious way causing delivery delays and huge financial loss to the company.

And

Charge 2:

Overstepping your authority as employee of DHL Supply Chain and as a shop steward to illegally engage with Labour Broker staff who do not fall under the bargaining unit of CEPPAWU on the Elandsfontein premises.

And

Charge 3:

Disloyalty to DHL Supply Chain as an employee who should have taken the company interests to heart instead of indulging in behaviour that could have had serious repercussions to the company and by embarking on this behaviour broke your contract of employment with the company.

Conduct that has as a result of the above allegations had the effect that the employment relationship has suffered irreparable harm".

The applicant was found guilty and dismissed on the above charges.

103. There is nothing significant which came out of the cross examination of Mr Gavin Fitcher as his evidence is based on what he was told by the other witnesses.
104. Marlin Bester conceded under cross examination that the issue of Labour Brokers employees becoming permanent staff was discussed. In fact some of those employees has been permanently appointed as employees of DHL Healthcare.
105. Marlin could not explain why when the employer contemplated to take disciplinary action against the applicant being a Shop steward, the union was not informed. Her explanation is that she was not involved in the suspension of the applicant.
106. Marlin could also not explain why the statement (of the unknown deponent) contained at page 50 of the Respondent's bundle could not be given to the applicant and his union representative at the disciplinary hearing. All she said was that the witness to the statement will not be called in this arbitration.
107. There is all the reason why the Respondent has not called the witness who deposed to the statement. The statement at page 50 of the Respondent's bundle is very important for the following reasons:

Firstly, The deponent to this statement contradicts all the written statement of the Respondent's witnesses. In the statement the witness stated that the applicant said "He said we must for "picketing" during lunch time in the gate of DHL. I walk away and carry on with my job".

Secondly, The statement appears to be original. It has not been worded the same like those of the witnesses who testified in this arbitration. The statement by the other witnesses has been worded the same in words, something that is not possible even if people think alike.

I therefore hold that the reason by the Respondent not to bring the witness who deposed to the statement at page 50 of the Respondent's bundle was to avoid him / her contradicting other Respondent's witnesses in this arbitration.

108. Lesiba Lekoka stated that the applicant addressed them in Zulu when he told them to "Toyi Toyi at lunch time. Under cross examination the witness stated that "Picket and strike" means the same thing.

Shanel Manuel also stated that Toyi Toyi and strike means the same thing.

109. Mirriam Mathebula also corroborated the two witnesses in so far as her understanding of what toyi toyi and picket means.

110. There has been a contradiction by the Respondent's witnesses in relation to what was specifically said to them by the applicant when he addressed them
111. The apparent contradiction comes out of the statement at Page 50 of the Respondent's bundle where the witness said in the statement that the applicant said they should picket during lunch.
112. On the other hand Shannel insisted that the applicant used the words "strike" and Lesiba stated that the applicant said they should toyi toyi whereas Mirriam said that the applicant used the word strike.

All these witnesses were addressed by the applicant in the same meeting which they all attended. It is therefore strange that they heard the applicant differently on what he exactly said when he addressed them at the meeting.

In some parts of their statements contained at pages 51 & 52 of the Respondent's bundle, the above Respondent's witnesses used exactly the same wording. This is not possible even where it can be said that people think alike. They sought to justify that by stating that they have discussed first what they needed to put in their statement. This was also unnecessary as a witness can only depose to facts which resides in that witness's knowledge and not what the witness has discussed with others.

For the above reasons I have found that the Respondent's witnesses were not credible and their evidence could not be relied upon and I therefore reject their evidence.

113. It is also not a coincidence that after the dismissal of the applicant this witnesses have now been permanently employed by the Respondent.
114. Mr Dlamini conceded under cross examination that he personally had no knowledge about the good news which the applicant had to announce that the employer had undertaken that it will take temporary employees on a permanent basis.

Dlamini stated that it was on the basis of this hearsay that he allowed the applicant to speak in the meeting. Dlamini was not privy to the discussions at which the issue of the Labour Brokers employees being converted into permanent status, hence he relied on the applicant being the one who attended the meeting at which those issues were discussed.

115. Nothing significant came out of the cross examination of Klaas Seyanego save to state that the applicant used the word 'Picket' when he addressed the meeting and that the picket never materialised but was cancelled because the employer had agreed to employ temps on a permanent basis.
116. The applicant testified that the words he used when he addressed the meeting is "Picket". This is corroborated by his witnesses. He further acknowledged that the procedure when there is going to be a Picket is to discuss it with management, however this was not discussed because the issue was resolved with management who agreed to employ some of the labour brokers employees permanent.

117. In my view there is merit in what the applicant said as the evidence of the Respondent's witnesses confirmed that they were subsequently employed by the Respondent on a permanent basis.
118. The evidence of the applicant that he addressed the issue of picket because employees came to him about what they had on the radios and on the trains and buses was not challenged.
119. In my view telling employees about the picket (which in any event did not take place) does not amount to instigating employees to go on strike. In this case the applicant was making an announcement on the event "picketing" which was identified by COSSATU. The event was not observed due the matter being resolved by management in agreeing to employ labour brokers employees permanently.
120. It is my finding that the dismissal of the applicant was substantively unfair.

THE PROCEDURAL FAIRNESS OF THE DISMISSAL

121. The applicant contended that his dismissal was also procedurally unfair.
122. In support of this contention he stated that the Respondent was in breach of schedule 8 which requires the Respondent to consult with the union regarding its intention to discipline its shop steward.
123. In this case no consultation took place.
124. Schedule 8 to the Labour Relations Act 66 of 1995 is headed Fair Procedure.

Subsection 2 provides : "*(2) Discipline against a trade union representative or employee who is an office -bearer or official of a trade union should not be instituted without first informing and consulting the trade union*".

125. The Respondent representative argued that this is a guideline meaning that even if there was no immediate compliance with this there should be no consequences flowing from it.
In support of this view she relied on the case of SALSTAFF on behalf of Janse van Vuuren and Transnet t/a Transwerk [2002] 23 ILJ 2153 (BCA) where it was stated that the requirement in the code is a guideline and if an employer fails to inform the trade union but it soon becomes aware of the charges, there has been no prejudice and there will be no procedural unfairness.

The undisputed evidence is that the union was informed as soon as the company conducted the investigation and the applicant had more than enough time to prepare.

126. I have accepted that the applicant was not prejudiced when the union was not immediately informed as the hearing had not started then.

127. Another reason cited by the applicant in support of the contention of the procedural fairness is that the Chairperson, Mariaan refused to recuse herself. Evidence was not fully canvassed in the applicant's examination in chief to indicate the basis for the Chairperson recusal and in the absence of such evidence I can make no determination in this regard.
128. Based on the above I find that the dismissal of the applicant was procedurally fair.
129. The applicant seeks reinstatement.
130. Reinstatement is a primary remedy if the dismissal was found to have been substantively unfair, unless there is evidence which could prevent the implementation of this remedy.
131. Having listened to the evidence I am of the view that the trust relationship has not been damaged.

AWARD

- (i) The dismissal of Sydney Ntshingila by DHL Healthcare is substantively unfair but procedurally fair.
- (ii) DHL Healthcare must reinstate Sydney Ntshingila retrospectively on the same terms and conditions which applied prior to his dismissal.
- (iii) DHL Healthcare must pay Sydney Ntshingila arrears salary for the period he remained unemployed.
- (iv) Reinstatement shall be effective on the 10th October being the date the applicant must resume his duties and be paid his arrears salary.
- (v) I make no order as to costs.

NBCRFI Panellist :

Stephen Ntombela

THUS DONE AND SIGNED AT JOHANNESBURG ON THIS THE 25th DAY OF SEPTEMBER 2011

(iv) I make no order as to costs.

**THUS DONE AND SIGNED AT JOHANNESBURG ON THIS THE 24th DAY OF
MARCH 2011**

NBCRFI PANELIST :

Stephen Ntombela