



ARBITRATION AWARD

Case Number: GPRFBC25323
Commissioner: Moahloli Nyama
Date of Award: 2nd September 2013

In the **ARBITRATION** between

MTWU obo Nonyane

(Union/Applicant)

and

Star Express cc

(Respondent)

Union/Applicant's representative: Ephraim Maboja (MTWU Official)

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Braamfontein

2017

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Respondent's representative: Mr Stuart Jensen (Branch Manager)

Respondent's address: P.O Box 2678

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DETAILS OF HEARING AND REPRESENTATION

1. This is an arbitration award in the arbitration between MTWU obo Nonyane Sydney, the applicant, and Star Express cc, the respondent. The arbitration was held under the auspices of the NBCRFLI in terms of the Labour Relations Act, 1995 as amended (“the LRA”)
2. The arbitration was conducted at the Braamfontein offices, 29 Dew Korte Street, on the 25th June and 29th July 2013. The applicant was represented by Ephraim Maboja from MTWU and Mr Stuart Jensen represented the respondent.
3. I have to decide whether or not the applicant’s dismissal was procedurally and substantively fair.
4. If I find the dismissal to be unfair to award reinstatement.

BACKGROUND TO THE ISSUE

5. The applicant was appointed as a Driver on the 26th October 2011 and earned R4, 774.00 per month at the time of his dismissal.
6. The applicant was charged with misconduct related to unauthorized use of company vehicle for private use, attended a disciplinary hearing and dismissed on the 26th March 2013.
7. The matter was previously postponed on the 26th June 2013.
8. The respondent called two witnesses and submitted a bundle, herein referred to as “A”. The applicant testified for himself, called one further witness and submitted a bundle, herein referred to a “B”.

SURVEY OF EVIDENCE AND ARGUMENT

Respondent’s 1st witness: Stuart Jensen (“Jensen”)

9. He is the Branch Manager and he conducted the investigations after he received a telephone call from their head office about excessive usage of the vehicle driven by the applicant over weekends. He called a meeting of the operations team to inform them. Jerry Mojela (Mojela) and Damon Crocker confirmed that the vehicle, with registration number CEY 30714, was used by the applicant.
10. They conduct a courier business and the applicant took the vehicle home daily including weekends. The applicant volunteered to transport staff after work and on weekends. He also made deliveries on weekends if the need arose. When he was given the car he promised to keep it safe at his house. The applicant was aware that the tracking system was fitted in the vehicle. The applicant was also in possession of a petrol card that he also used on weekends.
11. He used the tracking system report for the period 12th January to the 10th February 2013. The report showed that every weekend the vehicle was used by the applicant even when he did not work. On the weekends he worked, he still used the vehicle after he had completed his work. On the weekend of the 9th February 2013 he worked until 09H28 but used the vehicle until 19H35
- 12 The report showed that the applicant visited regular places on weekends. The applicant conceded at the disciplinary hearing that on certain weekends he parked the vehicle at his girlfriend’s place and they were unaware if the place was safe. The investigation showed that the regular places visited were pubs, shebeens or taverns in Tembisa. Photos, downloaded from Google, were presented as part of the evidence confirming

that where the applicant had stopped for a period between 15 minutes and an hour was either a shebeen or a tavern. The applicant said one of the shebeens was owned by his brother.

13. In the disciplinary hearing the applicant said he visited car washes, but the investigations showed none except one newly built in the area. They supplied cleaning material for vehicles to be washed at work and there was no need for the applicant to pay for washing the vehicle. In certain instances he visited the shebeen more than one per day and as such it was not possible to wash the vehicle more than once per day.

14. The applicant was represented by a shop steward at the hearing and said that he was not aware that he could not use the vehicle for personal use. The disciplinary schedule of offences is displayed next to the Employment Equity Act summary in the warehouse for all employees to see. The schedule stipulates a dismissal for the applicant's offence.

15 The applicant signed the conditions of employment – code of conduct document on the 8th December 2011 which stipulated that he was in breach of his contract if he broke the law that implicated the company and misappropriates misuses or neglects any assets entrusted in his care.

16 The disciplinary hearing was conducted through Skype, a video call facility on the internet. The chairperson, who was in Cape Town, explained the process and there was no objection. He conceded that the chairperson was his mother and was responsible for finance and human resources. Three other employees were dismissed for the similar offence. The shop steward was aware of the disciplinary schedule of offences and in his closing arguments accepted that there was a problem with use of vehicle for personal use. The applicant conceded in the hearing that it was costly for the business to pay for diesel on weekends and that it was cheaper for him to use the company vehicle.

Cross examination

17 Every new vehicle was fitted with a tracking device. He started with the investigations a week before the disciplinary hearing. The rule of use of the vehicle was explained to the applicant when it was given to him.

18 If the applicant did not understand the code of conduct he should have asked. The applicant did not sign the disciplinary code, but it is in full view for all employees to see. Julius Mojela was intimidated in the disciplinary inquiry and could not remember if the rules were explained to the applicant.

19 He issued Charles with a written warning after he went to SARS for an hour in December 2012 and thereafter called a meeting for all drivers to inform them about the use of company vehicles.

20 He denied that the chairperson represented him. He denied that the chairperson dominated the proceedings rather that he controlled it as a chairperson. There was no need to call the chairperson to testify because the hearing was conducted fairly.

Respondent's 2nd witness: Damon Ray Crocker ("Crocker")

21 He was the operations supervisor. The applicant was supposed to use the vehicle for business purposes. The applicant required permission if he wanted to use the vehicle for personal use.

22 The applicant was given the vehicle because his property was safe and had a closed gate. The disciplinary code is laminated and displayed on the wall where drivers take their trip sheets and vehicle checks documents. Drivers visit the area daily.

Cross examination

23 He was called in as a witness in the disciplinary inquiry. The area where the disciplinary code is placed is used to communicate any changes as well.

APPLICANT'S TESTIMONY

24 When he was given the vehicle by Jensen and Mojela he was told that Mojela's place was no more safe and he should take the vehicle to assist with lodging documents in the afternoon and that he would be called after hours when necessary. He was not informed on conditions of usage.

25. It was his first time to know that a vehicle was an asset and as such the code did not mention the use of vehicles specifically. He does not deny that he did the trips on the weekends because he was never told not to use the vehicle. If he was given the instructions he would have not used the vehicle.

26. He drove the vehicle around the precinct so that he could be able to respond when called. He also parked the vehicle where state security employees stayed. His girlfriend's place was safe. He worked abnormal hours and he could not wash the vehicle at work.

27. He only became aware of the disciplinary code at the disciplinary hearing. He was served with a memo informing him that vehicles are not allowed in the townships on the 4th March 2013. It was unfair and inconsistent that Charles was only given a written warning when he went to SARS.

28. He sat in Johannesburg for the hearing and he was told by the chairperson that it was legal to conduct the hearing on Skype. The chairperson was in Cape Town and dominated the proceedings. She asked most of the questions and he or his representative she freaked out. She was also intimidating. The chairperson also instructed them to move away and stand next to the wall

29. The disciplinary code was not clear where it was displayed and it was never explained to him. If the instructions were given to him he would have adhered to them. He was still unemployed.

Cross examination

30. I explained what assets are and the applicant then understood that the vehicle was an asset to the respondent. His representative was a shop steward who was a long distance driver who had time to browse the documents in the warehouse.

31. He conceded that Mojela used the vehicle for lodging documents after hours and opening the warehouse in the morning. In the meeting he was only told about the safe conditions of the vehicle because a battery was stolen at Mojela's house. He drove to all places mentioned as there were no conditions placed on the use of the vehicle.

32. He did object to the disciplinary hearing conducted in the manner it was held.

Applicant's witness Majuda Ben Tsoai "Tsoai"

33. He represented the applicant at the disciplinary hearing. He only became aware of the disciplinary code at the disciplinary hearing when the chairperson asked about it. He had seen it on the wall but was not aware what it was. He was aware of the memo, issued in April 2013, that vehicles must not be driven in the townships.

34. He did not know that a vehicle was an asset. It was unfair for the applicant to be dismissed because Charles used the vehicle to go to SARS but was not dismissed.

35. He asked the chairperson if it was lawful to conduct a hearing on Skype and she said it was. The chairperson instructed what was to be done and even instructed which witnesses must be called. She was biased.

Cross examination

36. They only met with the respondent two weeks before the arbitration to discuss rules and regulations. He never signed warnings issued by Jensen.

ANALYSIS OF EVIDENCE AND ARGUMENT

Substantive fairness

37. It is common cause that the applicant was charged with unauthorized use of company vehicle for private use.

38. It is further common cause that:

- The applicant drove the vehicle on weekends
- Charles was issued with a written warning after he used the vehicle to go to SARS.
- The applicant signed the conditions of employment – code of conduct on the 8th December 2011

39. The conditions of employment - code of conduct document stipulates that an employee breaches the contract if he misappropriates, misuses, or neglects any assets entrusted to his care.

40. The applicant conceded that he used the vehicle and as such was in breach of the stipulation as he did misuse the vehicle. The applicant did not dispute that he representative did say at the disciplinary hearing that it was indeed a problem to use the vehicle for private use.

41. Schedule 8 - The Code of Good Practice: Dismissal (hereinafter referred to as "the Code") item 3 (6) reads as follows: *The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.*"

42. ***In S A Commercial and Allied Workers Union & others v Irvin & Johnson (1999) 20 ILJ 2302 (LAC)*** this court set out the principles of consistent employment discipline...*"the 'parity principle' merely requires that every employee must be measured by the same standards. When comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated and the disciplinary record of the two employees compared. No extraneous matters should be regarded and a comparison has to be made between all the relevant features that normally considered when one employee is disciplined."*

43. No evidence was placed before me if the applicant had any other disciplinary records. Charles and the applicant both used the company vehicle for private use. Charles was issued with a written warning, contrary to the schedule of offences' indicated penalty of dismissal.

44. Where two employees have committed the same wrong and there is nothing else that distinguish them, there is no justifiable reason to treat the differently. They must be treated in the same way.

45. Consistency is an element of fairness. In this case there was no evidence presented to show a justification for differentiation between the applicant and Charles. The reasons for the differentiation must also be fair.

46. The respondent was thus not consistent with the application of discipline. The respondent bears the onus that it acted consistently. The respondent was required to lead evidence to justify the differentiation and that such differentiation was fair. In this regard the respondent's action was unfair on the applicant and such the dismissal was substantively unfair.

Procedural fairness

47. The applicant testified that the chairperson was intimidating, asked most questions and freaked out when they objected. The chairperson also instructed them to stand against a wall. Tsoai testified that the chairperson also instructed which witnesses were to be called and as such she was biased. Jensen testified that the hearing was conducted fairly and conceded that the chairperson was his mother.

48. The relationship between Jensen and his mother could probably have tainted the proceedings.

49. Jensen presented a minute of the disciplinary hearing. The minute does not deal with the issue of Skype at all, but both the applicant and Tsoai raised it as an issue. I would however find that Skype would be acceptable for an inquiry of this nature as it is a video call.

50. Having read the minute, the probability shows that the chairperson was dominant. She asked several questions. The record also showed that when the first witness was called the chairperson said " Lets call our first witness" as if she is representing the employer rather than chairing the hearing.

51. The record further shows that the minute taker, D Lezar, was allowed to ask Tsoai a question. I do not understand why the chairperson allowed that. The record does not show what process was followed because whilst the 1st witness, Thula Majakotja, was testifying the chairperson asked him to leave without Jensen indicating whether he has finished or not or whether cross examination by Tsoai was completed. The chairperson merely called for the next witness and Hosea Morkae was then called.

52. It is also unclear from the minute when did Hosea Morkae complete his evidence for the chairperson to call the next witness, Jerry Majola. The minute also showed that the chairperson actually took over Jensen's role as a representative. The chairperson actually cross-examined the applicant.

53. The probabilities show that the chairperson was dominating, took over Jensen's role and in the process became a involved. Her impartiality became questionable. The probabilities show she was biased and as such conducted the hearing in a procedurally unfair manner.

54. In weighing the evidence in totality, I conclude that the respondent on a balance of probabilities has failed to discharge the onus that the dismissal of the applicant was fair.

55. Under such circumstances I find that the dismissal of the applicant to be procedurally and substantively unfair.

Relief

56. The applicant wished to be reinstated. No evidence was presented that it would be practically unreasonable to reinstate the applicant. The applicant testified that he was still unemployed.

57. I therefore find that reinstatement is appropriate under the circumstances.

58. The respondent is ordered to pay the applicant back pay from the date of dismissal to the date of the award, a period equivalent to five months and equal to R23, 870.00 (R4,774.00 multiply by 5)

AWARD

59. The applicant's dismissal was procedurally and substantively unfair.

60. The applicant must be reinstated to his position at the time of his dismissal on the same conditions that existed at that time and without of any loss of accumulated benefits.

61. The respondent, Star Express cc., is ordered to pay the applicant, Sydney Nonyane, an amount of R23, 870 (Twenty Three Thousand Eight Hundred and Seventy Rands only), less tax deductions as per SARS tax directive.

62. The amount referred in paragraph 61 must be paid by the respondent no later than fourteen days of receipt of the award.

63. The applicant must report for duty on the 9th September 2013.

This is signed at Johannesburg on the 2nd September 2013.

Commissioner Moahloli Nyama