



ARBITRATION AWARD

Case Number: PERFBC 24876

Commissioner: Theresa Malgas

Date of Award: 20 May 2013

In the **ARBITRATION** between

Siyabulela Miyana

(Union/Applicant)

And

Prime Serve

(Respondent)

Union/Applicant's representative: Siyabulela Miyana

Union/Applicant's address: 66 Nciniba Street

NU 3

Motherwell

Port Elizabeth

Telephone: 073 890 3800

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Respondent's representative: Prime serve

Respondent's address: 173 Cape Road

Milpark

Port Elizabeth

6000

Telephone: 041 373 0094

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DETAILS OF HEARING

1. The arbitration was held at the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) offices in Port Elizabeth on the 17 May 2013. The Applicant, Siyabulela Miyana appeared in person and the Respondent, Prime serve, was represented by Ms.Verna Taylor.

2. The Applicant called one witness, Mr.Nceba Noqobo a fellow employee. The Respondent's witnesses were Mr Clayton Kleinhans, the Acting Operations controller and Mr. Gregory Hannaford there Operations Manager. The parties relied upon a bundle of documents paged 1 to 29.

ISSUES TO BE DECIDED

3. I was required to determine whether the dismissal of the Applicant was substantively fair or not.

BACKGROUND INFORMATION.

4. The Respondent is Primeserve whose main business is an outsourcing company that provides labour to UTI.

5. The Applicant has been in the service of the Respondent since 3 August 2011. At the time of dismissal he was a General Worker whose duties varied from driving to material handler and earned

a weekly salary of R920, 00 [nine hundred and twenty rand].The disciplinary hearing was held on 28 February 2013 and the Applicant was found guilty and dismissed on 4 March 2013.

The charges against the Applicant were:-

Count 1.

“On the 22nd of February Siyabulela Mtyana left his working area and left the site without authorization from either his team leader or his Controller Clayton. Siya asked Clayton earlier in the day if he could leave at 14:30 and their agreement was only if his work is completed he could leave, however at 14:30 he did not complete his work for the day and left his working area and left the site without informing his team leader Nobubele or Clayton his Controller.”

Count 2.

“On the 22nd February Siyabulela left work without signing out on his timesheet. He left work without authorization and on his return to work only after his Controller phoned him and instructed him to return to work did him eventually return. However when he left he did not sign out as mentioned before and when he left after the shift at 16:30 he again made no comment or time on his timesheet for the time period he was off site which was between 30- 45 minutes, thereby contravening the DISHONESTY and FRAUD policy.”

SURVEY OF EVIDENCE

Respondent’s evidence and submissions.

7. Mr Kleinhans testified that on 22 February 2013 he was working as the acting operations controller. He testified that the Applicant approached him requesting to leave work between 14:00 and 14:30 and that he agreed that the Applicant could leave if his work will be done by then.

8. The Applicant approached Mr.Kleinhans round 14:15 asking whether he could leave, but whilst they were discussing they were disturbed by a fellow employee who needed an urgent part. The Applicant informed Mr.Kleinhans that he knew where the part was and went to look and fetch the part.

9. Mr.Kleinhans testified that after some time he went to look for the Applicant and could not find him. He went to check the timesheets and noticed that the Applicant did not clock out. He

subsequently went to look for his cell phone number called him and told him to come back as he did not give him permission to leave.

10. On the return of the Applicant the manager enquired from him where he was coming from and who gave him permission to leave, The Applicant did not answer at first but on being asked again he replied that Mr.Kleinhans gave him permission. The Manager informed him that the Applicant will be dealt with but must go back to work.

11. Mr.Kleinhans submitted that there is a procedure in place that if an employee wants to leave early he must obtain permission from the team leader or operations manager and if approved clock out when you leave the premises. The Respondent has two clocking systems in place, an electronic and manual signing by employees. The reason for these two systems are if the one system fails the other is there for back up.

12. During cross examination the Applicant stated that he requested permission from Mr.Kleinhans the previous day to leave work early on 22 February and Mr.Kleinhans agreed. This was done in the presence of Nceba a fellow employee .Mr.Kleinhans disagreed and stated that if he agreed he would have made arrangements He also stated that the Applicant never mentioned this in the disciplinary hearing. Mr.Kleinhans maintained during cross examination that he told the Applicant that he can leave after his work was done.

13. Also during cross examination the Applicant stated that to prove that he had an agreement with Mr.Kleinhans to leave early he was given extra work to move heavy parts which is a lot of work in order for the Applicant to leave early. Mr.Kleinhans conceded to this during cross examination.

14. Mr Gregory Hannaford, the Operations Manager, testified that Prime serve is an outsourcing company providing labour to UTI. He stated that they supply 450 employees to UTI and should employees leave there positions without permission it could cause line stoppage and severe financial loss.

15. Mr Hannaford further testified that UTI is currently cutting down from 24 outsourcing companies to 12 outsourcing companies and that is causing Primeserve to supply to the best of their ability. He further stated that the Applicant had 4 Warnings on his file.

16. During cross examination the Applicant stated that he always asks for permission to leave and that the team leader was not speaking the truth.

Applicant's evidence and submissions.

17. In the arbitration the Applicant pleaded not guilty to Count 1 and Count 2. This was tendered by the Applicant in the process of narrowing the issues. He testified that he spoke with Mr.Kleinhans the morning of the 22nd of February reminding him that he will leave early on the day in question.

18. He denied that he had left his workplace without permission and that Mr.Kleinhans agreed the day before that he could leave early. He submitted that his team knew he was leaving early at 14:00 as agreed with Mr.Kleinhans.He went to Mr.Kleinhans at 14:00 to state that he was leaving. Whilst Mr.Kleinhans was still deciding which employee to put in the Applicant's place at work, a fellow employee arrived who needed an urgent part and the Applicant went to look for the part. After that the Applicant looked for Mr.Kleinhans to inform him that he was leaving. The time was 14:25 and the Applicant left as he was running late and forgot to clock out.

19. He testified that after he left he was called by Mr.Kleinhans to get back otherwise he would be in trouble. He stated that within 15minutes he was back at work and was told by Mario to get back to work.

20. Under cross examination the Applicant stated that Mr. Kleinhans agreed that he could leave early and there was no condition attached to him leaving early. The Applicant conceded that he did not clock out when he left or clocked in when he returned. He stated that he was confused and forgot to clock when he was called to get back to work.

21. He conceded that he knows that it is an offence not to clock in or out.

22. The Applicant called Mr.Nceba Noqobo as a witness. He testified that he was present when the Applicant requested Mr.Kleinhans to leave work early on 22 February 2013.This request was made the previous day to Mr.Kleinhans and Mr.Kleinhans agreed that the Applicant could leave early.

23. Mr.Noqobo testified that the agreement was that the Applicant could leave at 14:00 o'clock. He testified that all heavy boxes were unpacked and done and when the time came for the Applicant to leave Mr.Noqobo and the team was busy with the light boxes. He stated that as a team they report to each other when one of the team needs to go somewhere and on the day the team did not have a problem with the Applicant leaving at 14:00 as they were aware that the Applicant obtained permission from Mr. Kleinhans to leave early.

24. Under cross examination Mr.Noqobo stated that he worked for the Respondent for two years and six months and that he has a good working relationship with the Applicant and with everyone that works with him. He conceded that he does not have the right to allow any employee to leave work, but stated that it has been practice ever since he started to work for the Respondent that the team he works with report to each other when they leave there workstations.

ANALYSIS OF EVIDENCE

25. Section 192(2) of the Labour Relations Act 66 of 1995 as amended places the onus on the Respondent to prove that the dismissal was fair. In the case **Marapula & Others vs Conteen (Pty) Ltd [1999] 8 BLLR 829 (LC)** at 837 C it was held that the onus is discharged if the employer can show by credible evidence that its version is the more probable and acceptable version.

26. It has been clearly shown in evidence of both parties that the Applicant left his workstation and was subsequently called on his cell phone to return back to work.

There was a rule of the Respondent that states that an employee must report to a team leader or controller if permission is seeked to leave work early and an employee needs to clock out when leaving the premises of the Respondent. I find that the Applicant failed to clock out when he left the premises of the Respondent and subsequently failed to clock in when he was called to return to work on 22 February 2013.

27. The Applicant's own testimony in the arbitration to the effect that he forgot to clock in and out is a clear violation of the Respondent's rules. This is a clear admission that the Applicant knew that he violated an existing rule.

28. The Applicant denied that he left the premises of the Respondent without permission. The question is what the agreement between Mr.Kleinhans and the Applicant was. I accept the version of the Applicant that he requested permission from Mr.Kleinhans the day before the 22 February to leave at 14:00 o clock. This is clearly shown in the testimony of both the Applicant and Mr.Kleinhans that the two discussed on more than one occasion the request of the Applicant to leave at 14:00 o clock on 22 February 2013.

29.The Respondent submitted that the Applicant had 4 Warnings in his file .The first warning that was issued on 2 March 2012 has expired, the second warning is a counseling session for

Unauthorized absence and did not serve as a warning, but a counseling session dated 4 April 2013. The third warning as referred to by the Respondent is a Final Written warning issued on 18 April 2012 and has expired as it was valid for 12 months. The Applicant had a Final Written Warning issued on 20 August 2012 that is not related to any of the charges the Applicant faced at the time of this case.

I find on a balance of probabilities that the Applicant's version is the more probable version to what transpired on 22 February 2013.

30. I find however that the Applicant violated the Respondent's rule to sign and clock in and out when entering and leaving the premises of the Respondent.

I find the version of the Applicant more probable than that of the Respondent as far as Count 1 is concerned. The Applicant on his own admission accepted that he violated the rule by forgetting to clock in and out on the day in question. The question is whether the misconduct on its own or cumulatively renders the continued employment relationship intolerable.

I find that the sanction of dismissal however was too hard a sanction posed on the Applicant. In **Edcon Ltd vs Pillemer NO (Reddy)** emphasized that an employer must put forward evidence to sustain the allegation that dismissal was in fact an appropriate sanction. This would require evidence, for example that the trust relationship between the employer and employee had broken down. The Respondent did not lead any evidence that the trust relationship between the Applicant and Respondent has broken down and that dismissal was an appropriate sanction.

AWARD

31. Based on the above analysis, I find the dismissal of the Applicant Siyabulela Miyana to be substantively unfair.

32. The Respondent, Primeserve is ordered to re-instate the Applicant, Mr.Siyabulela Miyana in its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal.

33. The re-instatement in paragraph 32 is to operate with retrospective effect from 4 March 2013.

34. As at the date of the award the remuneration due to Mr.Miyana as a result of the retrospective operation of the reinstatement amounted to R 10 120,00 (ten thousand one hundred and twenty rand) [R920 per week x 11 weeks] minus such deductions as the employer is in terms of the law entitled or obliged to make.

35. The amount of R 10 120, 00 is to be paid to Mr.Miyana within fourteen days of the Respondent being notified of this award.

36. The Applicant is to tender his services to the employer within 48 hours of becoming aware of the award.

Signature:

Commissioner: Theresa Malgas

Sector:
