

**NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT INDUSTRY**

In the arbitration between:

D.C. Wright

Applicant

and

TNT Express

Respondent

ARBITRATION AWARD

Case Number: D1204/JHB/4297/2005A

Date/s of arbitration: 30 January 2007

Date of award: 26 March 2007

Head-note: Dismissal for an alleged unfair constructive dismissal. Award in favour of the Respondent. Applicant and his representative are held liable for Respondent's costs.

Johan D. Stapelberg
Arbitrator

1. DETAILS OF HEARING AND REPRESENTATION

The hearing was held on 30 January 2007, at the Bargaining Council's offices in Braamfontein. The Applicant was represented by Advocate P. Gillessen, who was instructed by M.L. Schoeman Attorneys. The Respondent was represented by Attorney, R. Mayer. The hearing was conducted in English and was recorded by the Bargaining Council's computer recording system.

2. BACKGROUND INFORMATION

2.1 Applicant's Opening Statement

The Applicant's case is based on an alleged constructive dismissal. It is common cause that he was employed from 1992. He started as a Branch Sales Manager at Sandton. In January 2005 there was a meeting held by the Applicant and Shaun De Beer as well as Steve Burd. During this meeting the Applicant's performance was discussed and he was told to no longer go to the Sandton Branch but to go to the Central Johannesburg branch. His position would then change from Branch Sales Manager to that of Major Accounts Executive. The evidence will show that this was a demotion. The Applicant realised that his career opportunities became such that he had no other option but to seek alternative employment. He terminated his employment in August 2005 and left the employ of the Respondent. As a result of the demotion, the working circumstances and career opportunities became such that it was a constructive dismissal. The Applicant is the only person who will testify on his behalf. He seeks to be compensated.

2.2 Respondent's Opening Statement

The Respondent's case is three fold. In the first instance it is denied that the Applicant was demoted. Secondly in so far as he may have perceived his status as a demotion, he did not follow the grievance procedures of the company. Secondly he did not refer such alleged demotion to the Bargaining Council. As such he did not discharge the requirement for a constructive dismissal to exist, namely to exhaust all avenues before making such a claim. The correspondence the Applicant exchanged at the time of termination by resignation did not indicate in any way that the cause of resignation related to intolerable circumstances. He said that the Applicant's case has no prospects of success and for that reason it will be argued that an adverse cost order should be made as the Respondent is being dragged to arbitration to defend the matter where it is clear that the Applicant has little prospects of success. He said that he would call two witnesses.

3. PRELIMINARY ISSUES

None.

4. THE ISSUE(S) TO BE DECIDED

Prior to the arbitration the parties had a pre-arbitration meeting and agreed on various issues. I will not mention all of the issues agreed to, only the main issues that are relevant to the arbitration.

4.1 Issues that are in Dispute:

I have to determine whether the Applicant was constructively dismissed and if so whether such dismissal was unfair and what remedy would be appropriate. Tied to the main issue that I need to decide are:

- Whether a demotion took place;
- Whether the Applicant's salary and benefits stayed the same;
- Whether the Applicant's status changed.

4.2 Issues that are Common Cause:

The following is not in dispute:

- The Applicant started with the Respondent on 31 August 1992. His services were terminated on 31 August 2005. He was employed as a Major Accounts Executive at the time of his dismissal. Although the pre-arbitration agreement stated a different amount, it was agreed at the arbitration that the Applicant was earning a basic monthly salary of R19,340.91.

4.3 Documentary and Real Evidence

A single bundle of documents was submitted, the content of which is known to both parties. It was agreed that nothing contained in the bundle is being disputed and that it can be accepted as evidence in to the record without the need for authentication by oral evidence.

5. SUMMARY OF EVIDENCE & ARGUMENT

5.1 Applicant's Version

5.1.1 Duncan Christopher Wright (Duncan), testified under oath:

- He said that prior to being a Branch Sales Manager he was moved up from the Coast. He started as a Sales Executive in Durban and sometime in 2001 he moved to the new branch (Sandton). His duties included revenue generation, motivation of sales staff and to ensure the company's best interests are considered.
- He had 3 employees working under him when he took over the position. He said that there was a National review where each branch was reviewed. Mr Shane De Beer (National Marketing Sales Manager) and Mr Steve Burd (Regional Sales Manager for

Dubai) came around. The sales teams were reviewed. By that stage his branch had gone from 3 internal people to a team of 8 sales people in four different territories. The numbers in the branch had increased significantly.

- In the meeting the highs and lows of the teams were discussed, where they did well and not so well. Opportunities of improvement and reasons why things were not done and how it could be done differently to achieve better results were some of the points of discussion.
- After the review, Mr De Beer sat down with him and they discussed the review. There was no indication to say that there were definite areas for work to be done. There was no indication that there were any matters of urgency. Targets were only discussed the following day when he was called to Johannesburg.
- Shane De Beer and Steve Burd were again present. The Applicant's activities and reasons for it were discussed at Sandton and he was questioned on why he did not do certain other activities to reach a different result. They were not happy with the Sandton office. Based on the review of the respective territories, they did not like the results. They wanted to know what he had been doing over the past 11 months and to justify what he was doing as opposed to what he should have been doing in their view.
- The objective of the regional review is to go into history to see the trends. To see why the branches did not achieve certain targets. They wanted to know what he was doing to assist the sales teams to achieve the targets. According to his calculations the branch reached about 93% of the annual target. In quarter 1 (January to March) no one in the team made the target, it was below 90%. In the second quarter there was a more favourable result. Two of the territories made target. In quarters 3 and 4 the target was missed. The annual target achieved was 93%.
- After these matters were discussed, he received a straight forward impression that decisions had been made. This was confirmed when Shane De Beer said he should not return to Sandton and that his services are not required there. He was to keep a low profile and not discuss the meeting.
- He was not asked to leave straight away but to rather not participate in any active role with the sales people. He was not to get involved in any activities with them. He was told to return on Friday to discuss what TNT had in mind for him. He opted to stay in sales, given a choice of other departments. This meeting was on Thursday and he was to return to speak to them on Friday. Shane De Beer was to investigate alternative positions.
- In the Friday morning meeting was him, Shane De Beer, and Thandiwe Mpokwana (HR Manager at the time). On going into the meeting he asked her (Thandi) if what had happened was within the company's rights. She said it was. In the meeting he was told

the only position available was that of Major Accounts Executive in central Johannesburg and he was informed that if he did not take it there would be no other opportunities for him in TNT. This meeting was held on the Friday morning after the two previous meetings on Wednesday and Thursday.

- He asked for time to make the decision. Shane De Beer gave him the weekend to consider it. He said he could have the Monday as well so that there was no interaction in the Sandton office regarding the process. The meeting was terminated with the understanding that he was to take the opportunity to consider his options and to let them know.
- He contacted Shane de Beer on Sunday that he would take the position. He recalls he started on that same Wednesday.
- He said the reason he decided to take up the position was that his main objective was to stay employed. He could not just get up and leave the company and not know where the next cent came from. He decided that his needs needed be met. He was shocked by the process and it gave him time to find his bearings.
- He was referred to p.39 which was a letter addressed to him regarding the alternative position. He took the position in January 2005 and the letter was only sent to him on 16 March 2005.
- He said he believes his transfer was a demotion because in the Sandton office, they had a JHB and PTA branch and in those branches there were Major Accounts Executives and one of them reported to him. There was a change in the structure and they were moved. He ended up working next door to his colleague who reported to him in Sandton before. These positions may be influential in other parts of the world, but with TNT's change of structure it was just a rearranging of efficiencies.
- He said subjectively he felt it to be a demotion. He did not manage any staff, only himself. All the responsibilities he was used to had fallen away. From a career perspective, he woke up to the fact that he and TNT were not going any further, based on how he was treated. He said that the trust had been violated and it was clear to him that although he was given the position, whether he did well or just maintained, opportunities for growth would not be forthcoming.
- He was referred to p.59 of the bundle. It is a letter from his attorney to the Respondent, dated 31 May 2005. He said that when the process happened he was not thinking as clearly as he should have. He was shocked. He had 10 weeks of counselling from a psychologist. He realised he needed some sort of backup outside the TNT environment. His direct superior was Shane de Beer and he felt that this communication would not be looked after in the manner it should be and he decided to source some sort of vehicle so

that he would be looked after in the process. It took him a while to get himself together before the letter was written.

- P.60 is an e-mail in response to this letter, dated 14 June 2005 from the HR Manager. He said that no possible dismissal for incapacity was discussed as alleged. He was just told that if he doesn't accept the other position that there would be no position for him. He interpreted it that if he did not accept the position offered he would have been forced into a position where there was no position for him.
- He said the reason he did not react immediately is because he was shocked and his immediate line manager was involved in the process and he did not believe it would be properly considered. He said he felt that the process was premeditated and no matter what he did through the channels, the outcome would be premeditated. He felt that the position could change again and this is when he decided to look after his best interests to get outside representation.
- He was referred to p.62 of the bundle, which is another letter from his representative, Ms Schoeman, which was read into the record. He confirmed it was only addressed in June 2005. He said that he was safeguarding his position by not following the prescribed route. After sending this letter, dated 13 June 2005, some questions were asked of him. His issues were not addressed. There were some casual communication between him and his line manager. He felt that his attorneys were dealing with it.
- He confirmed that he then left the employ of the Respondent. He said that although on the surface the environment was fine he had to walk through the offices everyday and hold his head up high. He said that everyone was saying that they could not believe it had happened to him.
- He said it was a career decision as well. He felt that the relationship had spoilt due to what had happened and that nothing positive could come out of the relationship any more. He felt he had to go look elsewhere for his career. From his side there was no other option available but to resign. He confirmed that p.44 is his resignation letter, which was submitted on 15 July 2005.
- He interpreted the situation that the employer employee trust had been broken and that nothing positive could come from the relationship any longer.

During cross-examination, Duncan confirmed that with regard to his performance at the Sandton branch, his figures were not up to standard. He felt though that he had a significant input into the branch and with the staff members. He confirmed that targets were not being achieved. He said however that targets have always been a contentious issue. Targets have been ambitious, which does not help with the morale of staff and it is an uphill battle to keep staff motivated to reach for the targets.

It was put to him that prior to the review he mentioned, there were two other reviews. One was in February 2004 as well as November 2004, which is where he himself was being reviewed. He said these were general reviews. He was asked to confirm that Mr De Beer and Burd had a review with him around November 2004 and at that review he was informed that he was not achieving targets or the number of visits to clients. He confirmed that it was pointed out to him around that time. He said there were reasons for this. It was put to him that he was also asked at that meeting to put a strategy in place. He confirmed that this happened but said that it was only in December 2004. He said the plan was placed on hold when he returned in January 2005 because he had to put in a tender to Sasol, on which he spent about two weeks. This was handed over later. It was put to him that the Respondent's evidence will be that in February 2005 he was asked again what had happened to the plan and it was not in place. He said that this plan had no deadline. It was a working document. He said that early in January 2005 he came back from leave and did what he believed was necessary to put the Sasol presentation together. In that same period they had the branch reviews. The result of these developed into a situation that did not warrant any further activity on the plan.

It was put to him that this plan was urgent and required his attention and it was expected that the plan be in place by the next review and at the very least he was expected to produce a plan. He confirmed that the plan had not been in place by the next review. It was put to him that the Sasol tender was already submitted in September 2004. He confirmed it, but said that after this everyone was to come and present what they would do to win the tender. He said Sasol had not given a response yet and from experience in working with them he knew they could suddenly give them a short deadline and he did not want to be caught off guard. He saw the Sasol tender as taking preference at the time. An analogy was drawn to the Titanic and it was put to him that it was reasonable to expect him to juggle both responsibilities. He repeated that to his knowledge there was no deadline for the plan to be submitted, which is why he chose to focus on the Sasol, because "either way you are going to sink". He said that as far as he was concerned he was managing that. He said that he feels he was attending to what was critical. It was put to him that even though he was employed for a long time he was not performing at the Sandton branch. It was put to him that with the second review he was asked where the plan was. He said this question only came up on the Thursday, after the National Review took place on the Wednesday. He confirmed that by that time he still did not have the plan.

It was put to him that when asked how performance was to be improved he did not have any answers. He said it was passed on as a general question. He confirmed he did not come up with a plan. He was also asked if he agreed he did not have a clear plan on how to improve the performance of the branch. He said that the meeting was not very positive and he went

into the meeting sensing that something was going on and that certain decisions had already been made regardless of what he was going to say. It was put to him that this was not true and that he was being reviewed. He said he was not being reviewed that Thursday. It was put to him that the atmosphere would have been more positive had he complied with the instructions to come up with a plan.

It was put to him that Mr De Beer did not want to confront him in front of his staff and when it became evident that he did not have answers or a plan, they told him it was serious and that he had failed to put together a plan. He said there are different opinions about what he was and was not doing. He said that indoor sales worked in teams of two who generated prospective business for field sales people who would go out and generate the results. He confirmed that things were not going according to plan. It was put to him that because he did not at least put down a written plan that he was told that disciplinary steps may have to be taken. He denied that this was mentioned. It was put to him that he then asked if he had to look for another job and that he was told that this was not necessary but that there was a position for him and that after some discussion the major accounts executives position was chosen. He said he does not recall asking someone if he should look for another job. He said he cannot recall a threat of disciplinary action either. He said he would have been surprised if he was told that they may need to take disciplinary action.

He said the only time he recalls being consulted for another position was with the meeting in Johannesburg on the Thursday. He said he cannot recall having a meeting prior to that. He said that it was at the Thursday meeting that he was told his services were no longer required in Sandton and that he was informed on Friday what was available. He said on the Thursday Mr Burd had to urgently leave on a plane. He said the meeting on Friday was not a consultation. He said it was a proposal put to him which he was open to accept or reject. He said he felt it was one sided though.

He confirmed that he felt it was a demotion. He said that one of the reasons he believed this is that Carla Ferreira who had been reporting to him before, became his colleague. It was put to him that she only reported to him until she became a Major Accounts Executive. He confirmed this and said that this was after the restructuring. He said that she had done the same work before, but he agreed that when she became a Major Accounts Executive she was no longer reporting to him. He said however that it was just a title change. He also conceded that there was a change in the reporting structures. It was put to him that Major Accounts Executive was a D2 position, which is managerial and is now called MA Manager. He said that he believes that at the time he had the position it was just a straightforward accounts position, but he conceded that now it may be Managerial. He said that in its infancy it was not managerial. It was put to him that it was on the international standard and it was still a managerial position, so he was not demoted. He confirmed that he was offered

this position. He said that this position was offered to him on the Friday morning. He said he believes it was in January, though the Respondent believes it was in February. He said that he consulted his attorney about two or three weeks after the event. He confirmed it may only have been around Mid March that he called her (his attorney). He said he spoke to her and painted the picture from his side. She asked if any letters had been submitted by him. He said no and she asked if he wanted her to submit one on his behalf. He told her that he did not want to follow the normal channels due to the issue of the line manager. She then agreed to write a letter on his behalf.

The Applicant was asked if he is aware that the Respondent has a grievance procedure and a code of conduct. He was referred to p.10 and 11 and identified it as being part of his contract of employment. It was pointed out that on p.11 he could dispute disciplinary actions he felt to be unfair in terms of the grievance procedure, of which he was aware. He said he felt his position in the company was under threat. He said if he had to go through this type of procedure with his line manager, he would be under threat. He said that he felt if TNT could do that to him he wondered what else they could have done to him. It was put to him that if they wanted to get rid of him they could have done it in February 2005 instead of offering him an alternative. He said he still felt his position was compromised. It was put to him that it was only in terms of the Branch Manager position and not as an employee. He said this is not what he felt to be the case. It was put to him that the legal principles in constructive dismissal required him to exhaust all internal remedies and that he could not just walk in and say he was resigning. He said he felt that according to what happened he felt there was enough to find that there was a constructive dismissal. He confirmed that after the alleged demotion he did obtain legal advice on the matter. It was put to him if it was true that he was demoted, he was to explore all avenues prior to resigning. He said he did. It was put to him that the Respondent's version will be that after they received the letter on p.59 from his attorney, dated 31 May 2005 that a meeting was held with him, where he said that he wanted the letter to be sent a long time ago, but that at that time he was no longer unhappy. The Applicant said that when he consulted his attorney everything was handed over to her. He said he felt at the time that the situation could not change. It was put to him that this is not true because he could address it as a grievance internally and refer a dispute externally if the grievance was not resolved.

He was referred to p.38, which is a grievance form. He said he is familiar with it. It was put to him that he was supposed to complete it and that neither he nor his attorney did this. He said that the letter was written by his attorney to raise the grievance. It was put to him that the law was not on his side and that he still had to go through the procedures even if he distrusts the result and that he had to go through the process.

The Applicant said that as far as he recalls his attorney did have a copy of the grievance procedure. He was referred to p.36 and 37 and confirmed that he knows the document and knows the steps to be taken according to it. He said that according to this, Tamica Ching would have been his immediate line manager. He said that there were no problems between them. It was put to him that with regard to her his objection was not valid. He was referred to stage two. He said his departmental manager was Shane de Beer. He said that the National Manager would have been Tim Steele, who is above Mr de Beer. It was put to him that his concerns regarding Mr de Beer would have been resolved. He said this is not necessarily true. Stage 4 takes it to the union and stage 5 is the dispute procedure, which means it would have gone to the Bargaining Council. It was put to him that he could also refer an alleged unfair demotion to the Bargaining Council. He said he did not know this before.

He said that according to his info, it did not make a difference whether he used the internal documents or raised the grievance through his attorney, it is the same thing it should get the same respect. He was asked if his attorney escalated it to stage 5. He said that as far as he knows his attorney was in contact with TNT's attorneys. He was asked if he believes the procedure was escalated to level 5, because the Respondent's version is that it was never escalated. It was put to him that if nothing happened, they (the Applicant) had the responsibility to escalate the matter. It was put to him that his attorney had to step into his shoes and act on his behalf. He said he does not know if the matter was escalated. He said it is the Respondent's fault. It was put to him that that the next logical step if it was not resolved internally is that it was to be referred to the Bargaining Council as an alleged unfair demotion. He said it was not and that it was referred as a constructive dismissal instead.

He confirmed he felt he could not hold his head high. He also said that he felt he had no future with the Respondent. It was put to him that his situation was not intolerable either subjectively or objectively. He said that is debatable because no one can speak on behalf of him with regard to the situation he was going through. He said he needed to show a positive front and he took the position to stay employed in order to make good out of a bad situation. He was asked when it became intolerable. He said he was unhappy with the whole change process. He said it became intolerable from the time he moved across to the new position. He was asked if it was intolerable for 6 months. He said it was and that he was uncomfortable and unhappy.

He was asked why in his resignation letter nothing is mentioned of the intolerability. He said he saw no benefit in putting it in the letter. It was put to him that it can be held against him if he fails to mention it, given that it is a natural position. He said he reads it differently. He said he has been with TNT for a while and that what is put on the letter of resignation never gets looked at again so he saw no need to explain the reasons for the resignation.

He was referred to p.46 onwards, which is his exit interview form. He was referred to various responses in the document that were very positive. He was asked if it is not reasonable for him to mention his unhappiness in this exit interview. He said that the exit interview related predominantly to Sandton and not to the Johannesburg position. He said there was never a running water issue. It was put to him that he was being disingenuous as this interview was when he resigned in July and yet there is no mention of intolerability. It was put to him that it is not in there because he acted opportunistically to try and milk the company. He denied it and said he doesn't enjoy the dispute meetings and he is taking it very seriously. He maintained that he had had enough when he resigned. He said it was of no benefit to him as it would just go into his file. It was put to him that it was not on his mind. He denied this.

The Applicant said that he is self employed and has been since 1 March 2006. He said after his resignation he joined another company as a Business Development Manager in September 2005. He said he received confirmation of his new appointment a day or two before he resigned. It was put to him that he seized the opportunity when he received a new job and the reason for his resignation was not due to intolerability but because of the position he was offered by the other company. He said that he was looking after his best interests and he had to choose that position. He confirmed that because of how he felt he took another opportunity as soon as it materialised. He saw it as an opportunity to solve the problem he had at the time.

During re-examination, the Applicant confirmed that the reason he left is because he felt subjectively that there was no future for him, regardless of whether he stayed there for the next ten years and he would not be considered for further development. He confirmed that he felt everything was done when his attorney submitted the grievance letter. He said that the Respondent did meet with him (his line manager met him briefly) but his understanding was that his attorney was handling it. He said everything was done to lodge the grievance.

5.2 Respondent's Version

5.1.1 Vanessa Scheepers (Vanessa), the HR Manager for the past three months, testified under oath:

- She said that at the time the events occurred between February to August 2005 her function was HR Officer. She was a generalist and dealt with recruitment disciplinary matters, grievances and so forth.
- She said that there are four stages to the grievance procedure. The first is to lodge a grievance with the line manager and complete a form such as the one on p.38. She said that there is a section where the line manager signs as well as the aggrieved employee and it is also handed to the HR department. A person has three days to raise the

grievance and the Line manager has two days from there to arrange a meeting to hear the grievance. She confirmed that she received no grievance on that form. She said that at the time of the alleged unfair conduct she should have received the grievance. She said that she believes the grievance would have been the best way to go. The Line Manager would have been objective because she has not been involved in the changes. If he was not happy, it would have gone to Shane de Beer and from there to the CGM, which is the Country General Manager, which is the National Manager in terms of the Grievance.

- She was referred to p.36, which she identified as the actual grievance procedure with its stages. She went through explaining the various stages of the grievance. She said that where it is noted that a grievance is not resolved HR then escalates it to the next level. They could use the same form or have a new form completed. She said that the Applicant and his attorneys did not comply with the grievance procedure. She was referred to p.10 of his contract of employment, where the Applicant is directed to use the grievance procedure for unresolved issues. She said the code of conduct also refers to the grievance procedure. The Applicant was supposed to speak to the Line Manager and indicate to her that he wanted to lodge a grievance and the forms would have been given to him. If the grievance related to her (Line Manager), he would have gone to the next level.
- Vanessa confirmed that she recognised p.59. She said that it came to her National Manager, Thandiwe. Thandiwe indicated that it was unbelievable that it had escalated to attorney level without it being addressed in the grievance process. She said that when a letter like that is received they go to the employee's line manager and discuss the issue that the grievance was not followed. She said that as far as she knows Thandiwe discussed it with the Line Manager and the Manager discussed it with the employee. She said that nothing else came of it.
- She was referred to p.62 and said that she knows nothing of that letter. She said that the next thing that happened after the first letter was that after a couple of months the Applicant resigned.
- She was referred to p.36, paragraph 2.1, which she read into the record. This is where a "Grievance" is defined. She said that that this applied to the Applicant's situation.
- She said that when one looks at the exit interview, the Applicant has a choice, he may refuse to have an exit interview rather than painting a different picture. She said that exit interviews are a standard procedure. She said that when she looked at the exit interview it indicates that the Applicant left for reasons of career development. She said that an exit interview that causes a red light is where the Applicant raises issues. The document is then taken up and they do not want to lose employees because of unhappiness. If

there was an indication of unhappiness, they would have tried to address it with the employee and ask for an opportunity to resolve the problem.

During cross-examination, Vanessa was referred to p.59 which is the letter referred to before. She was asked why there was no reply to the request to provide the relevant grievance form. She said that there was no document requesting this. She said that the letter did not initiate a grievance as the Applicant failed to follow the internal process. She said because it is an internal process, she did not have to respond to the attorney. It was put to her that though that may be true, the Applicant should have been confronted about it. She said that this was done by the Line Manager and Shane de Beer. The Applicant's response was that the letter was put in in May 2005 and that he had been in the position for a number of months. She said that the letter was not disregarded, when asked about it, the employee said "*No this is old. At the time I felt like that, I don't feel like it anymore*". They could not hold a gun to his head if he did not want to talk about what bothered him. She was asked why it was necessary to appoint attorneys to handle the matter if the matter was dealt with internally and why the Applicant's attorneys were not informed that it was resolved. She said that Vanessa Henry is someone they work with on an ongoing basis whenever employees involve attorneys and it was not a special involvement for the Applicant. She said the attorney should not even have sent the letter of p.60 as the Applicant indicated that he was fine. She was asked if the impression from the letter is that there is no solution for the Applicant as there is a denial that there was a problem or a demotion and that he did not have the impression from that that he was in a cul de sac. She said this letter only states the company's side of what had taken place. She said she disagrees that this was like a final verdict on the matter from the company's side.

She was referred to p.62 and asked if she does not agree that the attorney of record should have responded to the letter and inform them that the Applicant was not acting according to procedure. She said she did not receive the letter and she does not deal with attorneys. She said that once the Applicant had been informed of the procedure he was expected to follow the procedures and convey that to his attorneys. She said if she received such a letter she would not deal with it because it had already been explained to the Applicant. She confirmed that Henry attorneys acted on their behalf. She was asked if she should not ask their attorneys to put on record what was required. She said that this was not necessary if the employee was informed himself. It was put to her that any employment agreement is two sided, with rights and duties and that as an HR Department they had a responsibility to perform their duties. She said that they did inform him on what to do and despite this he chose to deal through his attorney and they had no reason to deal with the attorney. It was put to her that the Applicant had no alternative but to claim constructive dismissal because

the internal procedures had been exhausted. She denied this. It was put to her that the Applicant was not aware that the matter had to be taken further through internal processes after the meeting. She said he testified before that he was aware of it. It was put to her that the Applicant thought that after the grievance was lodged it would follow through naturally. She said he did not follow up on it. She said they did follow up up to the point where the employee said that he did not have an issue any longer. She said that the Applicant had to bring the procedure to the attention of his lawyer.

There were no questions in re-examination.

5.2.2 Shane Archie De Beer (Shane), the National Sales and Marketing Manager since 1 October 2004, testified under oath:

- He said that before the review in question started Steve Burd, the Regional Director of Sales and Marketing for India, Middle East and Africa, had done a National review of territory sales performance. In November there was a follow up and he joined him on this.
- At Sandton Branch, the KPI's on which the sales teams and the Branch managers are measured and the trend since the last review was looked at. No change had been forthcoming. Duncan said he had hired new staff. They said they needed an improvement and he (Duncan) was requested to put together a sales and marketing plan on how to address the issues. He was asked to do it in writing and submit it as a matter of urgency. He also admitted that the results were not up to standard and were below the average results for South Africa. They communicated that they were not happy with the results. He was also asked if there was anything they needed to help him with in terms of skills or training, he said "no".
- They agreed that there would be a review in the first quarter. As he recalls this review was held in the second week of February 2005. When they got to the Sandton Branch there was no improvement in the results. The trend was a declining trend. Neither he nor Steve Burd had received the marketing plan. As he recalls Duncan was asked on the Wednesday whether he had submitted it and he said he had not. Shane and Steve were not happy about it. They decided to confront the Applicant in Isando at Head Office, separately and not in front of his staff.
- At Head Office, he was asked for the plan. Shane said he is certain the Applicant was asked at the Thursday meeting. He is not certain if he was asked on the Wednesday as well, but he believes they did ask him. Duncan did not know why the results were declining. He was told that sales is like a motor vehicle. If the accelerator it pushed the vehicle accelerates. Duncan shrugged and hemmed and hawed and he was told that it

was getting really serious and that if he did not give it attention they would have to take disciplinary action. He then asked them if they wanted him to leave the organisation, he was told “no” and that they wanted the results to turn around. Steve asked Duncan if he wanted another job. Duncan asked what is on offer. They said he could be considered for Operations and possibly the Finance department. Duncan’s reply was that he had been in sales for a long time. He was told that there are structural changes taking place in sales and that there is a vacancy. Duncan indicated he would prefer to be in sales. At that stage Shane said he would speak to HR and find out then discuss it on Friday. They reconvened on the Friday and made the offer of Major Accounts Executive in the Major Accounts area. It was explained that this was a new position in TNT SA, but that it had existed globally for some time and South Africa are aligning themselves globally. They told him that in the mean time there would be no change in benefits and salary. Duncan asked for time to think about it. He was allowed Monday off to think about it. The Applicant called him on Sunday and said he is prepared to take the position. He then spoke to Thandiwe and she put it together.

- He was referred to p.39 and said that this was the offer made to him in terms of the change. Shane said it was not a demotion at all and that it was explained to him on Friday to say that they are not certain of the job grade because the role profiles had not been graded. The job’s current grading as compared to what he did is on the same job grade. This is also the impression they received from the global structure and they expected it to be like that as they had no reason to suspect otherwise.
- Shane said that he finds it hard to believe that it was intolerable for the Applicant. He said after the change he saw Duncan regularly at work and chatted some. They both cycle and they would chat about their training for the 94.7 cycle challenge. He said he had no reason to believe he had aggrieved him.
- Shane said that Tamica Ching was the Applicant’s immediate line manager and he was not aware of any issues between them. He (Shane) would have come in at Stage 2 of the grievance procedure. Tim Steel was at the next stage. Tim would not have had any part of the decision to move the Applicant. He would have known about it but had no deciding capacity, so he had no reason to have bad will or malice towards him. He said that stage 4 and 5 would also not have prejudiced him as the union would have been involved there and the grievance is heard correctly. There could be no prejudice in the Applicant’s following the grievance procedure.
- Shane said that there was no comeback on the Applicant’s status after he was redeployed. The first time he became aware of an issue was when Thandiwe from HR brought him the letter from his attorney on p.59 (31 May 2005). She wanted to know if he was aware of a grievance and he said he was not. She asked Tamica as well and she

knew nothing either. Thandiwe was also not aware of anything. The letter did not state the nature of the grievance. A meeting was held with the Applicant where Tamica and Shane were present with Thandiwe. Tamica asked him to complete the grievance procedure if he had a problem. Duncan said he previously had a problem when the change took place and that he did speak to his attorneys but they took their time to address it and that he was presently happy and that he no longer had an issue. Tamica still gave him a copy of the grievance procedure and said that if he is unhappy he could take the form directly to HR and he did not have to take to it them (her or Shane) if he had a grievance against either of them. Shane said that he is not aware if a grievance was referred to anyone after that. He said that he did have contact with the Applicant after that.

- Shane said that Duncan was performing well as a Major Accounts Manager and they were pleased with his results. Shane said he was quite shocked when he resigned. He asked Duncan what the problem was and he said he did not have a problem and that he had just received a better offer and he needed to better himself. He said this when he popped into Shane's office after his resignation. He said he had thought about it long and hard and he preferred to resign. He did not mention any unhappiness about anyone or that he felt aggrieved nor did he say anything about a constructive dismissal.

During cross-examination, Shane said they believe the targets set for the Applicant as Branch Manager was fair and that it is the same for all sales representatives around the country. Sales volumes are set according to the last 13 weeks. Shane said the Sasol tender had been submitted in September and that 90% of the work had been done. If there was any work remaining on that, it would have been prioritising the slides and deciding what to present off what was already prepared. Shane denied that the Applicant was under severe pressure. He said the Sasol tender did not contribute to his pressure. All the work on it had been done. To reduce a presentation of a number of slides to five or six slides was not a lot to be done. Sasol normally gave them a month's notice with regard to when the presentation would be. He said the presentation was only done in November 2005 so it was not a matter of urgency in January 2005.

Shane denied that he and Mr Burd had their minds made up with regard to the Applicant having to be relocated. He said that he disagreed and that the Applicant himself testified that he was given other options. It was put to him that he did not mention his unhappiness because he was scared. Shane said that a offer was made and the Applicant was not forced to do anything. He said he cannot agree that subjectively he could have been burdened with fear of losing his job.

Shane said that Thandiwe Nkukwana instructed Vanessa Henry to respond to the Applicant's attorney. Shane said that no one was aware of any grievance and the grievance on p.59 was not explained. This is why Duncan was asked to complete the grievance form. He was referred to p.62 and it was put to him that here the Applicant addressed his grievances. He said he never saw the letter before the arbitration today. It was put to him that this was received by the attorney.

Shane said the "possible dismissal" was discussed on the Thursday when the Applicant's failure to perform was discussed. He denied that he gave the Applicant the impression that he would either be dismissed or that he should take the position. He denied it and said that the options were that he either improved performance or accept another position. He denied that he was told not to go to Sandton. He denied that he was left with the impression that he had no alternative but the position. He said if that was true they would have pursued the matter on performance.

It was put to Shane that the grievance was submitted late because the Applicant was scared of being unemployed. He indicated that he had no reason to believe this and that he could have gone to HR. He said that Duncan knows the grievance policies and he even trained the staff under him on this. There was no reason for him to believe this.

Shane said that when they spoke to Duncan he indicated he was unhappy with his attorneys as he had raised the matter with them in February and he was considering not paying them because the letter had to be done in February when he spoke to them and not in May.

Shane denied that the Applicant was demoted or that it was a demotion from the point of view of his colleagues. Shane denied that it was a demotion and said that it was new position in the organisation. After the job was graded it was found to be on the same level. Shane said the results for the position came out around the end of July 2005. There are currently six Major Account Managers in the same position, all of whom are on the D2 level.

Shane said the Applicant was not taken into the JHB branch. It was at Head Office, which is on the same location as the JHB branch. Carla reported to the Applicant prior to February 2005 and after the restructuring, she accepted the same level position as the Applicant. He said that Major Accounts Manager was a sales position. He said that there were positions in Operations and Finance as well, all on the same level. It was put to him that the Applicant had the impression that there was no alternative, he either had to take the job or be unemployed according to his subjective interpretation and he had no alternative, but to seek alternative employment because careerwise he was at an end in the company. Shane denied this and repeated that even the Applicant confirmed that he had alternatives. He said it also took the Applicant 4 months, through his attorneys, to bring it under their attention and that when asked about it he said that he is satisfied with what he is doing and he was happy. He said that the Applicant said that his attorneys was supposed to send the letter in

February and now that he did not want to pay, they submitted the letter. At that time the Applicant was also told to hand in a grievance directly to HR if he did not want to speak to them. It was put to Shane that the Applicant was under trauma and received counselling for some time. Shane said that this was never brought to the company's attention.

There were no questions in re-examination.

5.3 Closing Arguments

It was agreed that both parties would submit written closing arguments by fax or e-mail, by or before close of business on Tuesday, 6 February 2007. The parties complied with this instruction.

Costs

The Respondent requested that the matter be dismissed with costs, should I find in its favour.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

5.1 General

Having considered the evidence and arguments presented to me, I find that in general the Respondent's version is more probable than that of the Applicant. The following is an analysis of some of the evidence that brought me to this conclusion.

- Contrary to the Applicant's claim in its opening statement and in his evidence in chief he was unable to show that his change in position was a demotion. First of all the Applicant was given a choice to either stay in the position, with the proviso that he provides a plan and is able to bring about the necessary changes or to face disciplinary or poor performance action, or alternatively that he takes up another position within the organisation. The Applicant chose the latter. Even here there was a number of possibilities mentioned and the Applicant again chose the position that suited him. If the Respondent wanted to be rid of the Applicant and to make life hard for him it would more likely have forced him into an unsuitable position. The unchallenged evidence of the Respondent however is that the Applicant did well in his new position.
- The Applicant did not deny that the change in position meant no change in his salary or benefits. It seems he largely based his claim that it was a demotion on the fact that a former subordinate had become a colleague. This statement proved to be misleading. The person the Applicant referred to was promoted, which is the real reason for her becoming his colleague. He was not demoted to her level, but she was promoted to his level.

- Another argument in support of the claim that he was demoted, was that there was uncertainty at the time about where the new position of Major Accounts Executive fitted in the organisational structure. Uncertainty or a lack of information has never been grounds for claiming something is inferior. The fact that at present there are 6 Major Accounts Executives and that the position has now officially been graded as a D2 position, which is the same level at which the Applicant's former position was graded, further shows that there was no demotion.
- The Applicant said that the reason he decided to take up the position of Major Accounts Executive was that his main objective was to stay employed. He said he could not just get up and leave the company and not know where the next cent came from. He decided that his needs needed be met. It would seem to me that the Applicant was already planning his exit at this stage, as he said he could not just leave without knowing where his next cent came from.
- The Applicant said that from a career perspective, he woke up to the fact that he and TNT were not going any further, based on how he was treated. He said that the trust had been violated and it was clear to him that although he was given the position, whether he did well or just maintained, opportunities for growth would not be forthcoming. The Applicant often made such bold and vague statements, without providing any evidence. It seems his personal, subjective feelings may have caused him to view things in this negative manner.
- The Applicant said the reason he did not react immediately after the change is because he was shocked and his immediate line manager was involved in the process and he did not believe it would be properly considered. He said he felt that the process was premeditated and no matter what he did through the channels, the outcome would be premeditated. He felt that the position could change again and this is when he decided to look after his best interests to get outside representation. Again the Applicant provided no valid reason for making such assumptions. Nothing in the actions of Shane De Beer indicated any intended malice towards the Applicant. Nevertheless even if the Applicant subjectively interpreted it as such, he had no reason to believe that Shane's superiors or TNT as a whole carried the same sentiments. His failure to use the proper grievance procedure is therefore not justified in these circumstances.
- The Applicant said that he was safeguarding his position by not following the prescribed route (i.e. the internal grievance procedure). I reject this argument. It presumes that the

employer would have victimised the Applicant if he made use of his rights, which the Applicant failed to prove.

- The Applicant claimed that the situation became intolerable when the decision was made to redeploy him. I find it unlikely that anyone would grin and bare a truly intolerable situation for 6 months without making any serious effort trying to bring it under the employer's attention. The truth is that the Applicant stayed in the position and performed well, he bided his time looking for another job and when a better offer was made, he resigned and claimed constructive dismissal. He was therefore in my view disingenuous and opportunistic in his approach.
- In cross-examination the Applicant was taken through the various steps of the grievance procedure of the Respondent and apart from his objection of having Shane De Beer look at his grievance, he had to admit that none of the other managerial employees that would have been involved in the grievance procedure had any reason to treat him unfairly. This further demonstrates that the Applicant had no reason not to make use of the grievance procedure.
- It was also put to the Applicant that he could have referred an alleged unfair demotion claim to the Bargaining Council. He said he did not know this before. I find it hard to believe that the Applicant was not aware of this legal option, given that he had been consulting an attorney for some time prior to his decision to resign.
- From all of the responses by the Applicant regarding why he did not raise his issues internally with the Respondent, he would have one believe that he was certain the Respondent would not take any of his written complaints seriously. This is an insupportably negative attitude, which I doubt existed in any event. I do believe however that he was being opportunistic. I believe he chose not to leave the employ of the Respondent on poor terms or in the midst of a dispute in order to first secure alternative employment and he did not truly begin pursuing the issue until after his resignation. Unfortunately in such matters the saying remains true that "one cannot have your cake and eat it". The Applicant was not hard pressed by "intolerable circumstances" to make a decision either way. His actions and decisions were calculated and pre-meditated.
- From the way he describes it, it sounds like the job offer the Applicant received just fell into his lap, whereas it seems rather that he pursued another position in the months he worked in the new position. He never gave the Respondent a proper opportunity to resolve his issues, if one is to believe that he had any legitimate problems at all.
- The Applicant and his representative both placed great emphasis on how the Applicant himself could "subjectively" interpret the things that were taking place and what was said to him in various meetings. I find the argument irrelevant though as a subjective interpretation of events can not be considered a compelling argument either in favour of

or against a claim of injustice or unfairness. This is also borne out by case law on constructive dismissal. An extract from LexisNexis' Current Labour Law 2006 further confirms it as follows on p.25 of the chapter on Individual labour law by Pak Le Roux:

The decisions make it clear that an employee will not easily be found to have been constructively dismissed. Whether continued employment is intolerable is not dependent on the subjective opinion of the employee concerned. This will be determined by the arbitrator or the Labour Court. Generally speaking, the resignation of an employee in response to the intolerable conduct of the employer will have to be the last resort after all reasonable avenues to resolve the problem have been exhausted. (My underlining).

The above clearly demonstrated the point I have made about the argument of the Applicant regarding his subjective feelings and interpretations of events. The second underlined portion brings me to a different topic, namely that of exhausting all avenues before resignation.

- In my view the employee did very little to afford the employer an opportunity to resolve the problem. According to the evidence led, the meetings that led to the change took place between January and February of 2005. From that time and until the end of May / beginning of June 2005, the Applicant had not displayed any dissatisfaction with the change in his position and his transfer to head office, neither did he raise a grievance either verbally or otherwise. There was no sense of urgency in the way the Applicant addressed his alleged unhappiness. He alleged to have received counselling and to be traumatised by the change, but he produced no evidence to that effect. None of the employer's witnesses who worked with the Applicant could pick up anything in their dealings with the Applicant to support the notion that he was either traumatised or unhappy about anything. The Applicant alleged that his colleagues perceived the change in position as a demotion and implied that they empathised with his lot, but no such witnesses were produced and it is contrary to Shaun De Beer's testimony.
- Then out of the blue, the HR Department receives the letter on p.59 from the Applicant's attorneys where it is alleged that the Applicant has a grievance. No details of this are mentioned and both Shaun De Beer and Vanessa Scheepers indicated that it came as a surprise. The Respondent's version was that when this was taken up by the Applicant he made it clear that it was a non-issue, even though it seems there was some correspondence between the attorneys from both sides, the Applicant did nothing to resurrect the matter or take it further after that. Shaun De Beer was also not challenged when he testified that after discussing the grievance issue with the Applicant he had some social interactions with the Applicant after that and could pick up no unhappiness. He was also not challenged when he testified that the Applicant's resignation came as a

shock to him and that when he asked the Applicant about it the Applicant did not mention any unhappiness, but made it clear he was leaving the company because he received a better offer. This sheds more light on the Applicant's motivations for the manner in which he handled the situation as well as his true reasons for leaving.

- Whenever the Applicant was questioned about his reasons for not raising the issue with the grievance procedure, or with his immediate superior, or with the exit interview so that it could be brought to the Respondent's attention in the proper manner, he kept indicating that it would not have made a difference. In so doing the Applicant made a negative assumption about the Respondent's willingness and ability to deal with the issue. I find however that he has produced no basis for this assumption. There were only two people involved in the process to have the Applicant redeployed to Head Office and only one of these people would have been involved in one of the six stages of the grievance procedure. The Applicant was unable to prove that either of these two people had any malice or ill will towards him or that they had it in mind to prevent him from further growth and development within the company. However even if he could prove that they had such negative things in mind for him, he did not show how they would have the power or ability to bring something like that about, given that they are only two people in a much larger reporting structure. The Applicant's alleged apprehension about losing his job and of addressing the issue internally are therefore unfounded.
- Both in terms the Applicant's contract of employment (clause 18) of May 2002 (p.6-12) as well as the second letter of appointment (General clause) to the new position in March 2005 (p.39-40) the Applicant was contractually bound to make use of the employer's grievance procedure. His failure to comply with it is therefore not as trivial as he would argue. Apart from that, I find that it cannot reasonably be established that he did follow any kind of grievance procedure to the end, but that the majority of evidence lead supports the Respondent's version that when the letter on p.59 was received and the employer met with the Applicant regarding it, he made it clear that it had become a non-issue and furthermore that despite clear instruction and encouragement to follow the Respondent's grievance procedure should there still be a problem, the Applicant declined and in fact did no such thing.
- Since the Applicant was contractually bound to make use of the Respondent's grievance procedure and furthermore because it is an internal procedure, there was no need for the Respondent to entertain or respond to the allegations raised by the Applicant's attorneys, nor can it be said to fulfill the requirements of the Respondent's grievance procedure as there are clear stages and an a manner and order in which the grievance is to be raised and only the employer has the discretion to allow the employee to deviate from it, which was not done in this case.

- There are a number of case law decisions regarding constructive dismissal. In some cases it is found that a failure to exhaust a grievance procedure does not affect the outcome, but the majority has found the contrary. It would seem that the reason behind the minority decisions has to do with the circumstances of the case being such that the grievance procedure could not likely affect the situation in which the employee found him or herself. This would be the case where for instance the highest authority in the organisational structure, or the highest authority involved in the grievance procedure, is directly involved in causing the intolerable situation. This is however not true in the present matter and therefore the Applicant's failure to exhaust the internal remedies (as well as external remedies such as referring an unfair labour practice claim) forms a big part of my decision to find that there was no constructive dismissal. The Applicant had other options available and he did not have to resign as is alleged.

5.2 Analysis of Issues in Dispute

The issues placed in dispute at the beginning of the arbitration, as well as my findings on each aspect are as follows:

I have to determine whether the Applicant was constructively dismissed and if so whether such dismissal was unfair and what remedy would be appropriate. Tied to the main issue that I need to decide are:

- Whether a demotion took place;
- Whether the Applicant's salary and benefits stayed the same;
- Whether the Applicant's status changed.

As I have already indicated I find that there was no constructive dismissal. I have also found that no demotion took place. The Respondent was not challenged in its version that the Applicant's salary and benefits stayed the same. Given that there was no demotion and no other supporting evidence was led, I find the claim that there was a status change to be false as well.

5.3 Costs

At the outset of the arbitration as well as in its closing arguments, the Respondent requested that the matter be dismissed with costs, given that the Applicant had no basis for claiming that a constructive dismissal had taken place and because it viewed the referral as frivolous and vexatious. The Applicant has neither responded to this challenge during the arbitration nor in its closing arguments. My own observations that the Applicant acted opportunistically and disingenuously confirm this view. I therefore have no reason to deny the request.

6. AWARD

I find that the Applicant failed to prove that he was constructively dismissed. The matter is therefore dismissed.

The Applicant and his representative are held jointly and severally liable for the payment of the Respondent's costs in defending the matter, on an attorney client scale, subject to taxation by the taxing master.

A handwritten signature in black ink, appearing to read 'J. Stapelberg', is written over a light grey rectangular background.

Johan D. Stapelberg

Arbitrator