

National
Bargaining Council
for the
Road Freight Industry



NBCRFI

ARBITRATION AWARD

CASE NO: GPRFBC9281

In the matter between:

JOSEPH TEBOHO SEPHETO

EMPLOYEE

AND

GRINDROD LOGISTICS

EMPLOYER

Arbitrator:

E. TLHOTLHALEMAJE

Employee's representative:

MR. D. GOBILE (KLO OFFICIAL)

Employee's postal address:

P.O BOX 2230, VEREENIGING.
1930

Telephone:

083 868 2368

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086 537 9320

Employer's Representative:

MR. A. MBELE (HRM)

Employer's postal address:

P.O BOX 257. KLIPRIVER. 1871

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086 743 0104

DETAILS OF HEARING AND REPRESENTATION:

[1] These arbitration proceedings were held at the premises of the NBCRFI in Braamfontein on 31 August 2010, and were finalized on 04 November 2010. The Employee was represented by Mr. D. Gobile from KLO, and the Respondent by its Human Resources Manager, Mr. A. Mbele. The proceedings were digitally recorded.

ISSUE IN DISPUTE:

[2] The Employee had challenged the substantive and procedural fairness of his dismissal. The issue to be determined is whether the dismissal of the Employee was procedurally and substantively fair. The Employee seeks retrospective reinstatement in the event that it is found that the dismissal was indeed unfair.

BACKGROUND TO THE DISPUTE:

[3] The Employee was employed with effect from 07 January 2008 as a Driver. It was common cause that he was dismissed on 28 September 2009 following upon a disciplinary enquiry into allegations of misconduct pertaining to gross dishonesty, divulging of company information, deliberately supplying incorrect and falsified information and, theft of company property. The allegations emanated from an alleged hijacking incident that took place on 10 June 2009. Following his dismissal, the Employee had then referred a dispute to the Council on 02 October 2009. A certificate of outcome was issued on 03 November 2009, and the dispute was referred for arbitration on 04 November 2009.

SURVEY OF THE EVIDENCE AND ARGUMENTS:

[4] The Employer's main contention was that on 10 June 2009, the Employee was on his way to Durban to deliver a load of chrome. Whilst on the trip, the Employee had reported that the truck he was driving was hijacked. SAPS were informed of the incident and the Employee had made a statement with the police. Further investigations were done, including the retrieving of a tracker report. The Employer's own investigations had revealed that there appeared to be inconsistencies between the statement that the Employee made and the tracker report. In the light of the inconsistencies, the Employer had then engaged the services of a private investigating firm, Truth Verification Company to further investigate the matter. Based on the conclusions reached by this company that the Employee had falsified information, charges were then preferred against him as outlined above. It was contended that the Employee was only issued with a notice to appear at the disciplinary enquiry on 18 September 2009 due to the lengthy investigations that were conducted.

[5] The Employer had only called one witness on its behalf. Mikael Badenhorst is employed by a company known as PSE Truth Detection, which specialises in investigative and forensic work. He is a Psychological Stress Evaluator/Analyst/Investigating Officer, and has qualifications in Clinical Psychology. He is internationally trained, accredited and a certified Psychological Analyst. He has vast experience in PSE investigations.

[6] Badenhorst was called in by the Employer on 17 June 2009 to investigate the alleged hijacking as reported by the Employee. The first phase of his investigations entailed subjecting the Employee to a Psychological Stress Evaluation/Examination through the use of what is known as the PSE 5128 instrument. The instrument was used to assess and identify stressful guilt responses from the Employee who at that stage was not viewed as a suspect. Badenhorst had contended that this instrument is an investigative tool that indicated where the investigator must focus and whether any information, truthful or otherwise is disclosed by a subject. He further contended that it was not in any way similar to a polygraph test as it was more reliable and could not be manipulated as it recorded and determined stressful responses and focussed on psychological responses of a subject. The instrument is such that it eliminated fear, anxiety or conflict and only guilt stress were indicated. A session was held with the Employee which entailed explaining the procedure to him, the purpose of the examination, asking him pertinent questions in regard to language, representation and obtaining his consent. The main purpose of the examination was to get information on the alleged hijacking incident that could lead to the capture, where possible of the culprits involved. The Employee was asked questions relating to the statement he had already made. The second phase entailed repeating same questions as asked in the first phase. Based on the examination, stressful guilt responses were identified and analysed. Having identified these responses, further (field) investigations were then conducted with SAPS.

[7] The Employer had received a report from SAPS in Musina that the hijacked truck was recovered in that area at the Beit Bridge near the border with Zimbabwe on 12 June 2009. A further report was that a person who was driving the truck when it was recovered was apprehended and locked up in jail. Badenhorst and Otto van Griethuysen the then Employer's Operations Manager had then travelled to Musina where they interviewed this suspect. The suspect when interviewed had made allegations that the Employee was part of the stage-managed hijack. Further damning allegations were made against the Employee by the suspect in regard to the Employee's involvement. Badenhorst had then had a second session with the Employee based on these allegations. Following from the second session, the Employee's responses, his statement and the tracker report, inconsistencies were picked up and then detailed in a report as contained on pp1 to 10 of the Employer's bundle. The examination had revealed guilt responses from the Employee.

[8] Under cross-examination, Badenhorst had reiterated that the Employee had voluntarily subjected himself to the examination, was not treated as a suspect at the time, and was never threatened with arrest if he did not cooperate. He further testified that the Employee was never asked questions that insinuated that he was guilty or implicated, and only those questions that could assist with the investigations were asked. He conceded that at some stage during the examination the Employee was emotional and upset about the whole hijacking incident. Even at that stage, Badenhorst had however informed the Employee that the session could be postponed. The Employee had however said the session should continue. Badenhorst denied that the Employee had asked for a shop steward to be present during the sessions.

[9] After Badenhorst's evidence was disposed of, the Employer had sought to hand in an affidavit deposed to by Griethuysen who had since left its employ. Mr. Gobile had on behalf of the Employee objected to the admissibility of the affidavit. Mr. Mbele had submitted that Griethuysen had made himself available on previous occasions that the matter was set-down but was unavailable for the purposes of these proceedings. It was further contended that there were 50/50 chances of this witness ever being available, and further that his testimony was merely to corroborate Badenhorst's to the extent that he would confirm the field investigations conducted in Musina. In the light of these submissions and further having had regard to the provisions of s3 of the Law of Evidence Amendment Act, a ruling was made to exclude Griethuysen's affidavit.

[10] The Employee's evidence was the following; on a date he could not recall, he drove a two-trailer truck loaded with chrome from Rustenburg had loaded chrome in Rustenburg to Durban. On his way from Rustenburg he had decided to go via the premises of the Employer in Klipriver to drop off loading documents for previous deliveries. From the Employer's premises he then took the R59 road towards Durban. He had stopped at an Engen service station to fill diesel and proceeded on the R59. He took the Rieden off-ramp towards Duncanville, had stopped at a 4 way junction and was about to drive off when he realised that the truck had stalled and would not move. At the time he thought that there could be something wrong with the air-pump and he got out of the truck to inspect what the problem might be. As he got out of the vehicle, two unknown persons approached him, pointed fire-arms at him, took him back into the truck and made him to lie in the bed area of the truck where one of the hijackers sat on top of him. The hijackers drove off with him towards Villiers and stopped at Three Rivers where another unknown person was picked up. The truck proceeded towards Vaal Marine Road where a fourth person was picked up. At that stage the hijackers had then blind-folded him. The truck had proceeded towards Villiers and the Employee had heard the hijackers talking about cutting off the tracker system.

[11] At some stage the truck had made a u-turn and the next thing that the Employee realised was that he was dumped off somewhere near Grasmere. The hijackers had then removed the blind-fold and then tied his hands with a rope. He had also realised that at the spot where he was dumped, there were two other drivers he did not know who also appeared to have been hijacked. The three of them were left at the spot where they were dumped and they stayed there until into the night and they managed to untie themselves. They walked to a nearby factory where they sought help and called the Klipriver police. When the police came they were then taken to Klipriver police station where they were asked to give their company details. As the Employee did not have Griethuysen's details he had then requested the police to take him to the company premises which were close-by. After he was taken to the company premises he then got Griethuysen's contact number from security and then called him and informed him of the incident. Griethuysen had then informed him to go to a police station to report the matter. He then went back to Klipriver police station and was told to go to Vereeniging police station as the incident took place in that area. From the Vereeniging police station after he had made a statement he was then picked up by a company driver and taken back to the premises where he was subjected to a test by Badenhorst. The Employee contended that he was emotional at the time the tests were done and he was aggrieved due to the reason that Griethuysen had declined to arrange counselling for him before the test. He denied that he was given any choice when the examination was conducted.

[12] Under cross-examination, the Employee contended that he could not recall the date nor the time that the hijacking took place as it happened a year ago. He further could not recall whether he had mentioned in his statements or the internal hearing that he had gone via the premises from Rustenburg to Durban. He could not further point out which was the quickest route between Rustenburg and Durban nor could he recall how many times he had driven between these two areas. When it was put to him that the shortest and quickest route to Durban was through the N3, his response was that Griethuysen had told him and other drivers to drive through alternative routes in order to avoid weighbridges in Villiers. He had further reiterated that he had stopped at a four-way junction when the hijacking took place as the truck had air pump problems. He further contended that at the stop there was another truck behind him and that he did not mention this to the police in his statement. After he was pointed at with fire-arms, the hijackers had driven off with him and he did not know where they came from. His contention was that the hijackers had disabled the brakes from the trailers behind the truck and were able to drive away after enabling brakes. When it was pointed out to him that he had initially suspected that the truck could not move because of air pumps, his contention was that he could not recall whether this had been the problem that caused the truck to stall. He in the same token denied having said that there was a problem with the air pump. He conceded that whenever a driver experienced problems with a truck he had to call the depot. He however did not call the depot when the truck did not move as he had to first check to determine what the problem was before he could call.

ANALYSIS OF EVIDENCE AND ARGUMENTS:

Procedural fairness:

[13] The Employee's main contention in this regard was that he was not afforded an opportunity of representation at the enquiry. He had further contended that the chairperson was biased and had relied on hearsay evidence to conclude that the Employee was dishonest.

[14] The chairperson of the enquiry was not called upon to testify. On the Employee's own version, he was issued with a notice to appear at the enquiry by Griethuysen without the charges being read or explained to him. According to him, the chairperson did not believe that his truck was hijacked. In regard to representation, he was not represented at the enquiry in that his chosen representation who was a shop steward was in hospital at the time. He conceded under cross-examination that he did not request a postponement and further that he did not appeal against his dismissal. It was further put to him that there were two other shop stewards he could have approached to represent him in the enquiry. He further conceded that when Griethuysen handed him the notice, it was explained to him what the charge was all about.

[15] An allegation that a chairperson was biased against an employee in a hearing cannot be sustainable in the absence of substantiation. The fact that a chairperson does not believe an employee's version of events does not indicate biasness. More than a mere allegation of bias is required.

[16] The Employee at the hearing was aware that his chosen representative was in hospital. He could not proffer an explanation as to the reason he did not approach any of the other two shop stewards to represent him nor could he explain the reason he had not requested a postponement. The duty rested on him to either request a postponement or alternatively to seek alternative representation. His contention that he only knew one shop steward is improbable.

[17] It was further alleged that the chairperson had relied on hearsay evidence in dismissing the Employee. This pertained to statements obtained from the culprit who was apprehended by the police in Musina, and the Badenhorst's report. From the minutes of the enquiry as appears on pp1 to 6 of the Employer's bundle, it can be deduced that the chairperson had taken into account the evidence of Griethuysen and Badenhorst insofar as it pertained to what the apprehended culprit had said to them. However, as to what the chairperson did with this evidence is unclear in that from the findings, more reliance seem to have been placed on the tracker report,

and the findings made by Badenhorst that the Employee's responses had indicated deception, and further that there were inconsistencies. Since this was the case, and further since this was the main evidence that was placed before these proceedings, it is found that the allegation that the chairperson had relied on hearsay evidence in dismissing the Employee is without merit.

Substantive fairness:

[18] As Mr. Gobile had on behalf of the Employee pointed out, the Employer had split the charges against the Employee in making a case against him. In my view, there is no merit in the charges pertaining to theft and divulging of company information as there was no evidence led in that regard by the Employer. The testimony led in regard to what the apprehended culprit had alleged insofar as the involvement of the Employee was in the whole incident is hearsay, which is inadmissible.

[19] This leaves the two main charges, via, gross dishonesty and deliberately supplying false and incorrect information to be dealt with. These two charges are interrelated insofar as they pertain to the role of the Employee in the alleged hijacking incident and whether in the course of the investigations he had supplied incorrect and false information to the Employer.

[20] In regard to the examination conducted by Badenhorst, it is important to point out that the instrument used was he had conceded, merely an investigative tool. For the purposes of these arbitration proceedings, the responses emanating from that examination needs to be looked at in conjunction with other factors. In the absence of evidence to indicate that the results of the test are unreliable, they need to be accepted, but however in conjunction with other related factors to determine whether on a balance of probabilities, the Employee was guilty of any wrong doing. It needs to be stated at the onset that I had found that the testimony of the Employee to be riddled with inconsistencies and improbabilities as shall be detailed below.

[21] The first issue is that it is improbable that having been hijacked in the manner that he was, the Employee would forget the time and date of the incident. Strangely enough, he was able to recall all other events in detail and clearly he displayed selective memory to suit his case. Secondly, there was no reason for the Employee to drive via through the offices of the Employer from Rustenburg to Durban to drop off loading documents. I did not understand that there was any urgency to drop off the documents. Whatever can be deduced from his actions in this regard is a matter of conjecture. Secondly, it was illogical and completely incomprehensible for the Employee to travel to Durban on the R59 route. The N3 is the quickest and most convenient route to take to Durban, and any experienced driver who has travelled to Durban would know this

fact. The Employee's contention that he did not know which was the quickest route, and further that he was told by Griethuysen to take the alternative route in order to avoid weighbridges in Villiers is rejected. Any fee to be paid at the weighbridges or any toll fees were to be at the expense of the Employer and it is inconceivable that the Employer would take risks with precious cargo and insist that drivers use alternative routes instead of national roads in order to avoid payment of a small fee at weighbridges or on toll roads.

[22] Thirdly, the Employee's version in regards to how the alleged hijacking took place is remarkable for its lack of credibility. On the Employee's version, the truck had stalled at a four-way stop. The Employee knew what procedures to follow in the event of a break-down but instead suspected that there could be a problem with air pumps. In his wisdom he had decided to get out of the truck to inspect what the problem could be and was then confronted by two hijackers. Miraculously, the hijackers drove off without any problem and the employee could not explain how the problems with the air pump were fixed. Equally remarkable is that despite being dumped in the bed area of the truck with one of the hijackers sitting on top of him, he could know before he was blindfolded, that the hijacker drove towards Villiers, then to Three Rivers and then stopped at Marine Road to pick up another person. The Employee despite lying on the bed with one of the hijackers sitting on top of him was aware of all these events taking place.

[23] On the Employee's own version, he was dumped by the hijackers at a spot where there were already two other victims. Despite spending time with these other two people, and managing to get help from a nearby factory, the Employee never bothered to get their details. Given the seriousness of the incident, it would have been incumbent on the Employee to keep details of the other two persons in order to corroborate his story at a later stage whenever required. Other than this oddity, the Employer had further relied on a tracker report which Mr. Gobile had vehemently objected to. I had allowed cross-examination of the Employee on the tracker report in view of the fact that it was submitted as part of the bundle and as such was deemed to purport to be what it was. From the report, the truck never stopped at any time other than on R59 where the alleged hijacking took place. From thereon, the truck had travelled at varying speeds of over 40kms until at 19h09 somewhere at Villiers where the tracker was dismantled. Based on the report, it makes the Employee's version that the truck had stopped twice to pick two other people improbable.

[24] Based on the above inconsistencies and improbabilities, it should thus be concluded that the Employee was indeed dishonest insofar as giving an account of what transpired on 10 June 2009. Furthermore, to the extent that these inconsistencies and improbabilities have been pointed out, it should be concluded that he had indeed deliberately supplied the Employer with incorrect and falsified information pertaining to the alleged hijacking of the truck.

[25] In the light of the above conclusions, the only other issue to be determined is whether a sanction of dismissal was fair. The misconduct in question obviously destroys any trust relationship between the parties. The fact that the "hijacked" truck was recovered is immaterial and what is paramount is the net effect of the misconduct in question on the employment relationship. There is nothing in fairness or reasonableness that should convince one that a lesser penalty would have sufficed in these circumstances. Accordingly, the following award is made:

AWARD:

- I. The dismissal of the Employee was procedurally and substantively fair.
- II. His referral is dismissed.
- III. There is no order as to costs

Signed and dated at Johannesburg on the 19th day of November 2010

A handwritten signature in black ink, appearing to read 'E. Tlhotlhamaje', written in a cursive style.

E. Tlhotlhamaje

NBCRFI Panellist: