

IN THE BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY

Commissioner: ADVOCATE LC. SHANDU
Case No.: GPRFBC10660
Date of Award: 24 AUGUST 2010

In the ARBITRATION between:

GAVIN MARK LOUW
(Union / Applicant/ Employee)

and

UTI PARMA
(Respondent/ Employee)

Union/Applicant's representative: SOUL WILLIAMS
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DETAILS OF HEARING AND REPRESENTATION

- [1] This was an arbitration process set-down for hearing on 13 August 2010 at the premises of the National Bargaining Council for the Road Freight Industry in Johannesburg at 09h00.
- [2] The employee Gavin Mark Louw was present and was represented by S Williams an attorney. The employer UTI Pharma was represented by D Ross an official from employer organisation CTL Management Forum.
- [3] The proceedings were mechanically recorded and handwritten notes were also taken. The parties agreed to hand in written closing arguments by 20 August 2010.

ISSUE TO BE DECIDED

- [4] I must decide whether the dismissal of the employee was fair or not. If I find that it was unfair I must determine the appropriate relief.

SURVEY OF EVIDENCE AND ARGUMENT

Employer

The employer representative handed into evidence a bundle of documents marked as Annexure "A" and called four witnesses, i.e. Jacques Lansdell, Lawrence Maritz, Josiah Dibakwane and Edwin Letseka to lead evidence in support of the employer's case. The summary of the evidence and argument presented by the employer follows hereunder:

- [5] Two main charges were preferred against the employee. The first charge had to do with the employee's computer containing pornographic material and his distributing of this pornographic material. The employer discovered the pornographic material in the employee's computer on about November 2009 while they were conducting an investigation into charge 2. The employee's computer was so corrupted by this pornographic material such that it bombed out before they could finish the investigation. The employer managed to retrieve a set of pictures contained on pages 34 of 35 of "A". There was another set of pictures which are not part of the bundle of documents and these involved bestiality where a maiden was having sex with a horse. The employer prior to the pornographic material being found on the employee's computer had issued a communication where it reiterated that the viewing and distributing of pornographic material was not allowed. This is also a dismissible offence in terms of the employer's disciplinary policy. The employer has dismissed employees found guilty of this offence before. The employee during his disciplinary hearing agreed that he forwarded the said pornographic material to co-employees.
- [6] The second charge related to the employee selling a banned drug called Kamagra to co-

employees during working hours. This drug is an illegal substance in terms of the Medicine Controls Act (Act 101 of 1965). The said drug is a generic of Viagra which is a scheduled 4 drug. Only a pharmacist is allowed to dispense medicine and the employee is not a pharmacist. Kamagra has serious side effects as per pages 30 – 33 of "A". The employer is in the business of distributing pharmaceuticals and it is required by the MCC to comply with its regulations in terms of the Medicines Control Act. The employer's business could have been shut down as result of the employee's conduct. The employee during his disciplinary hearing agreed that he was the selling the drugs concerned but that he stopped selling long time ago.

Employee

The employee gave evidence in support of his case. The summary of the evidence and argument presented by the employee is as follows:

- [7] Regarding the charge of selling Kamagra the employee testified that he got the drug for his fellow employees after they held discussions about man power or bull strength. It was in 2008 when he mentioned to his co-workers that he was using Kamagra tablets and they requested that he obtain the tablets for them. He got the tablets from his doctor paid for them and gave them to his co-workers the next day and whereupon they will then pay him the amount he spent in buying the tablets. He did not make any profit from these tablets.
- [8] He has worked for the employer for 13 and half years. There was a merger of the distribution and logistics side of the two companies to form the employer. With distribution the employer is not selling the pharmaceuticals but is selling the service for distributing the pharmaceuticals. This is about taking the drugs from point A to point B. No evidence was presented showing that he was found in possession of drugs. He merely bought the drugs for the other employees.
- [9] On 6 November 2009 when he reported to work he found that his computer had been removed. He was then questioned about selling Kamagra by Lawrence Maritz. He told him that he did not sell Kamagra. Maritz instructed him to write a statement. Maritz dictated to him what he should say in the statement and said he (the employee) should write that he was selling Kamagra. He threw the statement he wrote into the rubbish bin. Maritz issued him with a suspension and said it was because he did not want to cooperate and he was then escorted off the premises. Besides buying the Kamagra for his fellow employees he also bought it for the CEO of the employer who has since passed away.
- [10] Regarding the charge of making unauthorised use of the employer's property; he can see that a lot of information/ documentation which was presented at the disciplinary hearing have been removed

from the bundle of documents presented by the employer at this arbitration. It is true that he admitted to certain things. But the manner in which the questions were asked then is different to the context to which they are recorded. As a way of an example the charge relating to pornography was about him sending pornographic material to external recipients during 30 June and 1 July 2009. The charge was not about viewing pornographic material. The employer failed to prove that the pornographic material presented as evidence came from his computer. The employer failed to produce a page showing where the e-mail that had the attachment of pornographic material came from and whether this was sent to external recipients. He saw the pornographic pictures presented by the employer but he cannot say whether they were in his computer. The employer also did not bring the pictures of a horse and a maiden.

- [11] The employee went on to produce fresh evidence of a copy of an e-mail sent on 1 October 2009 which talks about pornographic material sent by employees using the employer's computers in contravention of the employer's security policy. The employee argued that his charge relates to period 30 June and 1 July 2009 before this e-mail was sent.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [12] The Labour Relations Act 66 of 1995 as amended (LRA) under Section 192 read with Section 188 stipulate that for a dismissal to be regarded as fair there must be a fair reason and a fair procedure must be used. The employee has brought a case alleging that he was unfairly dismissed.

- [13] According to the evidence tendered the dismissal of the employee related to misconduct. The LRA Schedule 8 Item 7 Code of Good Practice provides for the guidelines to be used in assessing the fairness of misconduct dismissals.

- [14] According to the oral evidence led there are two main charges that led to the dismissal of the employee. I note that according to the documentary evidence these charges were split to about 7 charges. All these 7 charges are explained with reference to two statements. It is apparent that the 7 charges are a duplication and the employee should have been charged with 2 charges as per the explanation of the charges and the oral evidence presented by the employer.

- [15] The evidence of the employer established that the employee's computer was found to be infested with pornographic material when it was viewed on about November 2009. I also accept the evidence of the employer that the pictures appearing on pages 34 and 35 of the bundle of documents came

from the employee's computer. I note that the employer presented no evidence showing that the pornographic material was sent to external recipients in line with the charge. Nevertheless the charge as explained on page 14 of the bundle of documents does not only talk about sending pornographic material to external recipients only. The explanation of the charge reads further that *"...You were furthermore in breach of company policies and procedures, with specific reference to the Electronic Communication and IT Security Policy"*.

[16] It was the evidence of the employer that the employee's computer was so infested with pornographic material such that they could not finish the investigation because the computer 'bombed out'. The employee's answer to this was to provide a mere denial. Two witnesses of the employer testified about what they saw in the employee's computer. I observed these witnesses while giving evidence and nothing suggested to me that they were not telling the truth. It was also apparent to me that the employee was disputing their evidence for only tactical reasons because besides their saying so they could not present any written confirmation that the pornographic material came from the employee's computer. While the presenting of written confirmation that the pornographic material came from the employee's computer this might have added weight to the case of the employer, the fact that these two witnesses testified that they actually viewed the said pornographic material from the employee's computer and that I find them to be credible is enough to establish their evidence as probable. The employer was accordingly able to prove this charge.

[17] On the charge of selling Kamagra in contravention of the relevant laws; the employer managed to prove that the employee indeed sold this banned drug and that it was during working hours. Further the employer was able to demonstrate that dispensing this drug is only done by a pharmacist and that this drug has serious side effects. The employee was not able to bring any reliable evidence to challenge this evidence of the employer except to provide bald denials. On the other hand the evidence of the employee corroborated by that of the third and further witnesses of the employer showed that the employee last sold this drug on about June 2008. From thereon no evidence was presented showing that around the time the employee was charged he had been selling this drug. It therefore became apparent that the employee was charged for the offence he committed more than a year ago. I find this to be unfair. Further the employer failed to explain to this hearing why it took it so long to charge the employee. It is trite that discipline must take place contemporaneously with the offence. Assuming that the employer only became aware of this offence at about the time it charged the employee it would have been sufficient to give the employee a stern warning about the severe consequences of being found guilty of this offence and a dismissal would definitely have not been an

appropriate sanction due to the lapse of time since the offence took place.

[18] On the appropriate sanction on the charge relating to pornography I note that the employer's evidence was to the effect that prior to the employee committing this offence all employees had been warned that the viewing and/or transmitting of pornographic material was prohibited and that it was an infringement of the employer's security and IT policy. The fact that the employee had this pornographic material in his inbox on about November 2009 meant that he was contravening the employer's policies. The employee knew that it was an offence to view, distribute the pornographic material. If the employee had received this pornographic material he ought to have deleted it immediately as it was against the employer's policy to have it in the employer's computer. It is evident that the employee did not do this. The employee also conceded to forwarding the pornographic material to co-employees. Also the fact that the pornographic material contained on pages 34 – 35 was not the only pornographic material in the employee's computer also serves to exacerbate matters. The case of the employee is further made worse by the fact that his computer, which is the property of the employer, 'bombed out' or crashed as a result of the contamination resulting from the pornographic material.

[19] I then refer to the authoritative judgement of *Sidumo & Aoter v Rustenburg Platinum Mines (PTY) Ltd & Others [2007] 12 BLLR 1097 (CC)* (at paras 75 to 78) where Ngcobo J, elaborated on the elements of the employer's discretion on imposing a sanction and fairness as follows:

"Equally true is that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. It does not follow that all transgressions of a particular rule must attract the same sanction. The employer must apply his or her mind to the facts and determine the appropriate response. It is in this sense that the employer may be said to have discretion.

But recognizing that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. Nor does it mean that the commissioner must start with bias in favour of the employer. What this means is that the commissioner. . . does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss.."

[20] While I take the view that the employee's misconduct could have been remedied by applying progressive discipline taking into account his long years of service and the fact that he appears to have had a clean disciplinary record; I note that the employee was not completely honest with this arbitration. The employee instead of coming clean and admitting that he indeed received, viewed and distributed pornographic material chose to obfuscate issues and to suggest that pornographic material could have been planted in his computer. This evinces a lack of remorse and a failure to appreciate the gravity of his actions. Under the circumstances it is therefore doubtful that progressive discipline will serve the desired purpose of remedying the employee's errant ways. I accordingly see no reason to interfere with the sanction imposed by the employer and accordingly uphold the dismissal of the employee and find it to be fair.

[21] On procedure the employee's representative indicated at the commencement of the proceedings that he was not challenging the procedure but only the substance. I am therefore not required to make a determination regarding the fairness of the procedure.

AWARD

[22] The dismissal of the employee, Gavin Mark Louw, was fair.

[23] The employee is not entitled to any relief.

[24] The case is dismissed.

Thus done and signed at Pretoria on 24 August 2010

Advocate LC Shandu

Panellist