



**ARBITRATION
AWARD**

Arbitrator: Bejile Mene
Case Reference No.: FSRFBC 6259
Date of award: 22 February 2010

In the arbitration between:

Moahlodi Matthews Litabe Union/Employee party

and

TFD Networks Employer party

**Union/Applicant's representative: Mr. D. Qwelani (attorney from
Qwelani, Theron & Van Niekerk
Attorneys)**

**Union/Applicant's address: Aliwal Street
Bloemfontein
9301**

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**Respondent's representative: Mr. J.A. Kleynhans (Human Resource
Officer)**

**Respondent's address: P.O. Box 27172
Erlich Park
9312**

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DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration took place at the Road Freight Bargaining Council Offices in Bloemfontein on 26 October 2009 and 16 February 2010. The applicant was represented by Mr. D. Qwelani, an attorney from Qwelani, Theron & Van Niekerk Attorneys in Bloemfontein while the respondent was represented by Mr. J.A. Kleynhans, Human Resource Officer of the respondent. The proceedings were mechanically recorded on five tapes.

ISSUE IN DISPUTE:

2. Whether or not to allow the applicant to be represented by a legal practitioner.
3. Whether or not the dismissal of the applicant on 10 February 2009 was procedurally and substantively unfair.

RULING ON LEGAL REPRESENTATION:

Mr. Qwelani argued for legal representation on the following basis:

4. The dispute raised questions of law in that the job that the applicant was accused of not doing did not form part of his job description.
5. The charge of gross negligence was complex and it would be difficult for the applicant to properly refer to the bundle of documents.
6. The way the respondent treated its employees was of public interest.
7. The respondent's representative was conversant with labour issues and that training had been given to him by Labournet. It would therefore be fair and just that legal representation be allowed.

Mr. Kleynhans consented to legal representation.

8. I have considered the consent given by the representative of the respondent and the four factors contained in Rule 27 and my responses to the arguments presented will be briefly as follows:
- (i) I do believe that the question of law raised by the dispute warrants legal representation of the applicant party. The question of law involved is whether the applicant can be dismissed for a job not falling within his job description or whether he was grossly negligent in not carrying out his duties accordingly.
 - (ii) The compilation of the documents is complex and it cannot be expected that the applicant will properly canvass and expose legal points in evidence or argument.
 - (iii) This dispute has an impact on the public interest. There are employees and the public in general who are looking on how the respondent treats its employees.
 - (iv) The applicant cannot be compared with the respondent's representative in that the respondent's representative has been trained in labour issues by Labournet and he has been exposed to legal disputes as the Human Resource Officer. The applicant would be prejudiced pitted against a person who is trained and exposed to labour issues.
9. The conclusion therefore is that it would be unreasonable to expect the applicant to deal with the dispute without legal representation. For the reasons stated above legal representation on behalf of the applicant is allowed.

BACKGROUND OF THE DISPUTE:

10. The applicant was dismissed from his job on 10 February 2009 after he had been found guilty of gross negligence. At the time of his dismissal he was earning R5143.00 per month. Subsequent to the dismissal the applicant referred the matter to the Bargaining Council. When the matter could not be resolved by conciliation it was referred to arbitration. In the arbitration the applicant party handed in a bundle of documents marked as exhibit "A" while the respondent handed in a bundle of documents marked as exhibit "B" and "C" respectively.

SURVEY OF ARGUMENTS & EVIDENCE:

RESPONDENT'S CASE

Jan Kleynhans testified under oath that:

11. He is a Human Resource Officer at the respondent. His job is to deal with disciplinary matters at the respondent but he was not involved in the case against the applicant.
12. He referred to page 1 to 2 of exhibit "B" as the notice of disciplinary hearing and the charge that was served on the applicant to appear at the disciplinary hearing on 6 February 2009. The hearing was postponed to 10 February 2009.
13. He also referred to page 33 of exhibit "B" indicating the aggravating factors and the finding of the chairperson: the applicant was a Pick Controller in the past but was removed for poor work performance; the applicant was the only Pick Controller and had to check the stock; their client Tiger made 60% of the respondent's income and respondent could lose the contract if the respondent did not perform. He further stated that the trust relationship between the respondent and the applicant had broken down.
14. He testified further that there was a rule at the respondent that employees should look after the stock and that training was given to employees. The respondent had to take serious steps against the applicant and that the disciplinary code stated that dismissal was the appropriate sanction. There were people who were dismissed previously for a similar offence as the one committed by the applicant.
15. In cross examination he stated that there was stock that was supposed to have been picked up, checked and handed over for delivery but he could not say what stock it was. He stated further that the Pickers were given invoices on 23 and 24 January 2009 indicating the stock that was to be picked up and delivered at Tiger but could not give or produce the said invoices.

16. He further stated that there was a general job description applicable to the applicant but did not know whether it was given to the applicant. He later confirmed that there was no proof that the job description was given to the applicant.
17. When he was referred to page 4 of exhibit "A" which stated that the person who was responsible for checking the stock was Andre Du Preez, he disagreed and said that Andre was a risk control officer.
18. When he was asked what was it that the applicant did not check, he said he could not say and that he did not have details.

David Kgosi Mang Mfundisi testified under oath that:

19. He was a Warehouse Controller and knew the applicant. He described the tasks of the applicant as control picking, ensure that the stock from Johannesburg was correct and the transfer of stock.
20. The stock of Tiger that was supposed to be picked up on 23, 24 and 26 January 2009 was not picked up and that failure to do so amounted to gross negligence. As a result of the failure to pick up stock the respondent had to hire trucks to deliver the stock. The respondent incurred delivery and overtime costs.
21. In cross examination he stated that the duty of the applicant was to make sure that stock was picked up and that the stock of Tiger was not picked up. However he could not say or give details of which/what stock was not picked up. He indicated that the documents used by the respondent were filed. However the documents regarding the stock were missing.
22. He only became aware on the 24th January 2009 that the stock was not picked up when the transport people told him.
23. He later stated that the truck driver was responsible to check whether the stock to be loaded corresponded with the stock on the invoice. The truck driver loaded the stock and left without checking that all the stock was loaded. He did not know whether the truck driver was charged for failing to perform his duties properly or not.

24. He could not say how much the respondent had suffered as a result of the stock that was not picked up. He was only informed that a truck was hired.
25. He and the previous witness did not testify at the disciplinary hearing. No statement was taken from him and he was the first one to know of the stock that was not picked up.
26. He also conceded that the respondent should specify what the applicant had not done so that the applicant could defend himself. If he were in the position of the applicant he would have refused to attend the disciplinary hearing. He further conceded that no specific detailed charge was given to the applicant.
27. He conceded further that at the time when the applicant was dismissed a lot of employees were dismissed and that only casuals from labour brokers were used. He could not say whether the said casuals were paid overtime or not.
28. When it was put to him that one of the casuals by the name of Thabo who was working with the applicant had refused to work overtime and at one stage Thabo left at five o'clock without finishing his work, he said that it was news to him. When he was confronted with an e-mail (page 1 exhibit "A") sent by applicant to that effect, he confirmed that the said e-mail was sent to him but could not remember discussing the contents of it with the applicant.
29. He confirmed that the person who was responsible for checking the stock was Andre as indicated on page 4 of exhibit "A". He further confirmed that the driver of the truck had to check as well. He could not say why the stock was discovered by the customer and not the team of Andre or the driver.

Stephni Chantal Vos testified under oath that:

30. She's working for Labournet for two years and was the chairperson of the disciplinary hearing. She has an LLB degree and had been chairing disciplinary hearings at all times as a labour consultant.

31. She stated that pages 3-23 of exhibit "B" were the minutes of the disciplinary hearing and that each page had been signed by the applicant. She also referred to page 24-26 of exhibit "B" which was a check list relating to procedure followed at the disciplinary hearing: she allowed each party to give evidence; the applicant did not want to call witnesses; she considered aggravating and mitigating factors and made a finding. Pages 31-35 were the typed judgment after the disciplinary hearing.
32. The applicant was dismissed for gross negligence in that: the applicant was a picking controller; applicant's functions were to monitor picked stock and these duties were on the applicant's job description; the applicant did not make sure that stock was on load to be dispatched; applicant noticed that there were shortages but let the stock to be dispatched. The dismissal of the applicant was the appropriate sanction: she considered the age of the applicant and the fact that he was married; applicant had numerous expired warnings and one warning which was still valid; the fact that the applicant held a responsible position; the fact that the conduct of the applicant could have led to the respondent losing the contract or money.
33. She stated further that the trust relationship between the respondent and the applicant was broken down irreparably. Respondent made 60% profit from Tiger as its customer.
34. She testified further that the offence was serious and that the rule in the company had to be complied with. The applicant was aware of the rule and that progressive discipline had been applied previously to the applicant. She further stated that the rule was consistently applied by the respondent. People had been dismissed previously.
35. In cross examination she testified that she did not have any information about the case against the applicant prior to the disciplinary hearing. She indicated that it was possible that Labournet was giving training to the respondent.
36. She further testified that only one witness, Ms Elize Beneke, was called by the respondent at the disciplinary hearing. She further stated that the applicant confirmed that no stock was picked up to be delivered to Hartswater. She did not know what stock it was but that it was destined for Tiger.

37. She stated further that the respondent incurred a loss of R4500.00 as a result of the stock not being delivered. However there was no documentary proof of the said loss.
38. She stated further that the record in these proceedings was incomplete. She stated that the job description of the applicant was produced at the disciplinary hearing but thought that now it had been lost.
39. When put to her that she was biased at the disciplinary hearing, that she served the interests of the respondent, that the disciplinary was not fair and at some stage she stopped the applicant from presenting his evidence, she said that was not the case and referred to page 10-14 of exhibit "B". She also stated that the applicant was given an opportunity to state his case.
40. (NB the witness was very impatient, became very angry and irritated, she interrupted the applicant's representative when asking questions. She also defended the respondent and testified as if she had first hand information on what transpired at the respondent's place when the alleged incident took place).

APPLICANT'S CASE

Applicant testified under oath that:

41. He was a Picking Controller at the respondent and was earning R5143.00 per month. He worked for the respondent for six years. He started working in Johannesburg for 4 years and was later on transferred to Bloemfontein where he worked for 2 years. He was dismissed from his job for gross insubordination as indicated on page 2 of exhibit "B".
42. The chairperson of the disciplinary hearing was Chantal Vos. He stated that the respondent had a good relationship with Labournet. Labournet was giving training to the respondent on labour issues. At the disciplinary hearing the chairperson did not give him enough chance to state his side of the story. The chairperson disputed his version before even the respondent could do. The chairperson interfered and took sides in the hearing. He felt that he was against the respondent and the chairperson. The facts he relied on did not appear on the

minutes of the disciplinary hearing. Page 3-23 of exhibit "B" was not the true reflection of what happened in the disciplinary hearing. He was not allowed to read the minutes before he signed. The typed version differed considerably to what happened in the disciplinary hearing.

43. On the merits of the case he stated that he was given an instruction by David Mfundisi (his supervisor) to move the stock from the depot to the cages. The stock was packaged for specific customers and he was not supposed to unpack it. David Mfundisi told him not to unpack the stock.
44. He did not play any role in loading the stock. There were people who checked the stock before it was loaded. Mfundisi had a list of stock to be dispatched to customers. He (applicant) was also not part of dispatching. The dispatching team would have an invoice and would know the stock to be taken to customers.
45. He referred to page 2 of exhibit "A" which was an e-mail he sent to Mfundisi and others regarding the instruction that was given to him by Mfundisi but no one replied to the said e-mail. He stated that if Mfundisi had given him the correct instruction the incident could not have happened. The said e-mail was never disputed by Mfundisi.
46. He testified that the stock was not lost but it was still in the cage and therefore no costs were suffered by the respondent.
47. He further stated that if the dispatch people had done their work properly no costs would have been incurred for hiring another truck.
48. He testified further that in 2008 about 80% of staff was dismissed by the respondent. The respondent hired unskilled staff. The respondent paid the unskilled staff R70.00 per day and this was irrespective of whether the said staff was working overtime or not. The staff that was checking the stock was new and did not do their job properly.
49. He also referred to page 2 of exhibit "A" which stated that checking was done by someone else (Andre). He indicated that stock should be checked before leaving respondent's premises. The driver should also check the stock and if not

the driver might be charged. He also stated that the people who were responsible for checking were the people referred to in page 5 of exhibit "A", which was the driver, VR Security and Warehouse Controller. All these people were never charged. He also stated that the stock was only discovered by the customer and the said customer was angry with the driver.

50. In cross examination he testified that he was given an instruction to pick up the load and not Tiger stock. Mfundisi didn't put all the stock into the cage as he (Mfundisi) had a list.
51. He testified that the chairperson told him that the minutes were for her own benefit.

ANALYSIS OF ARGUMENTS & EVIDENCE:

52. In the matter of **County Fair Foods v CCMA (Pty) Ltd and others [1997] 11 BLLR 1117 (LAC)** Ngcobo AJP, as he then was, stated "I agree with Conradie JA that the commissioner should not be held to have not applied his mind to a particular facet of the matter merely because it is not explicitly dealt with in the award. Nor do I quarrel with the proposition that awards are expected to be brief. Section 138 (7) of the LRA says so. Though desirable as it may be, it is not expected of commissioners to write well researched and scholarly awards. Awards must be brief and the proceedings before the commissioners must be dealt with expeditiously." To this extent I assure the parties that I considered the entire evidence that was properly placed before me.

Substantive fairness:

53. The respondent must prove on a balance of probabilities that the dismissal was fair. The Labour Relations Act provides in the Code of Good Practice: Dismissal in Schedule 8, Article 7, that a person considering the fairness of a dismissal for misconduct must consider the following:
 - a. Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
 - b. If a rule or standard was contravened, whether or not-

- i. The rule was a valid or reasonable rule or standard;
- ii. The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- iii. The rule or standard has been consistently applied by the employer; and
- iv. Dismissal was an appropriate sanction for the contravention of the rule or standard.

Did the applicant contravene the rule?

54. The rule that is the subject matter of this dispute is gross negligence in the performance of work (exhibit "C" item 25) in that the applicant did not pick up and check the stock that was supposed to be delivered to the customer of the respondent.
55. The oral and documentary evidence given by the parties showed that the applicant was not given any job description; the people who were responsible for checking and loading the stock were Andre Du Preez (exhibit "A" page 4) and the drivers (evidence of Mfundisi as corroborated by the applicant and exhibit "A" page 5 item 4). Exhibit "A" page 4 clause 2 is an e-mail dated 24 October 2008 which states that 'all checkers have now been put under the direct responsibility of Andre Du Preez (Risk Control). This has been communicated and confirmed to all management and staff on site' (my emphasis). Exhibit "A" page 5 clause 4 states that 'drivers are currently and will continue to check their loads. DA's are issued for any shortages prior to vehicle being loaded. In future, the shortage will be verified by VR security and only the warehouse controller or nightshift controller will be permitted to authorise a DA...' (my emphasis).
56. The person who was responsible for picking was the applicant. However the undisputed evidence is that on the day in question the applicant was working under the instruction of David Mfundisi. David Mfundisi had a list of the stock that was to be picked up and loaded for delivery. The applicant complied with the instruction of David Mfundisi. When the fault was discovered the applicant wrote an e-mail to various people like Elize Beneke, Gerhad Pretorius, David Ras, David Mfundisi and Jan Kleynhans (exhibit "A" page 2). The contents of this e-mail stated that the applicant worked according to the instructions given. No one disputed the contents of the e-mail. Why would the respondent now accuse the applicant of not

picking up the stock when he worked and complied with the instruction given?

57. Even the stock that was loaded into the trucks was not checked and verified by the people who were responsible for doing so as indicated above. Andre Du Preez did not check whether the stock corresponded with the invoice and was not charged; the driver drove without checking whether the stock corresponded with the invoice and was not charged, the VR Security also did not check and verify. The blame cannot therefore be put on the applicant.
58. Having said and considered the above evidence it is my considered view that the applicant did not commit any offence and/or was not grossly negligent in performing his duties. It is therefore not necessary to consider the other factors mentioned above in paragraph 53.

PROCEDURAL FAIRNESS:

59. The evidence that was presented to me by the respondent, especially David Mfundisi, showed that there were procedural flaws in the handling of the disciplinary hearing against the applicant. Mr. David Mfundisi testified that no specific charge was given to the applicant and if he were in the position of the applicant he would have refused to attend the disciplinary hearing.
60. Exhibit "B" page 2 stated as the alternative charge against the applicant that 'gross negligence in that on the above dates you failed without proper cause to perform your duties with the proper care required in that you did not do the picking as required'. The charge does not state what stock the applicant did not pick. Even in these arbitration proceedings the respondent failed dismally to state what stock it was except to say it was Tiger stock.
61. It is also trite that the chairperson of the disciplinary hearing should be impartial. The chairperson has shown by her demeanour in this hearing that she indeed took sides in the disciplinary hearing. As indicated above she gave an impression that she was close to the respondent. She also gave an impression that she was conversant with the merits of the case before she even presided over the case. She

testified as if she had first hand information of what transpired when the incident occurred instead of giving evidence on what was presented before her and thereafter properly applied her mind. She was very impatient, became angry and irritated and interrupted the applicant's representative when asking questions. Her attitude and demeanour shows that it was probable that she did the same in the disciplinary hearing and did not properly allow the applicant to present his case. Having said the above I find that on the balance of probabilities the procedure was also unfair in dismissing the applicant.

62. The applicant had indicated that he wants to be reinstated and be paid back pay. I just wish to state that it is important to bear in mind that security of employment is a core value of the Constitution which has been given effect to by the Labour Relations Act. Having found that the dismissal of the applicant was both procedurally and substantively unfair, I believe that the primary remedy of reinstatement as stated in the Labour Relations Act will be proper in this case. I also believe that the applicant should be paid back pay from the date of his dismissal until the date when he resumes with his duties.

AWARD:

Based on the above I make the following order:

1. The dismissal of the applicant, Moahlodi Matthews Litabe was procedurally and substantively unfair.
2. I order the respondent, TFD Networks, to reinstate the applicant retrospectively to the same position and on the same terms and conditions that governed the employment relationship prior to the dismissal on 10 February 2009.
3. As a result of the reinstatement of the applicant above I order the respondent to pay the applicant back pay in an amount of **R66859.00** (R5143.00 per month x 13 months: the period since the applicant had been out of work until the date of resumption of duties).
4. The above amount must be paid to the applicant on or before **1 April 2010**.
5. The Applicant must report for work on **1 April 2010 at 08:00**.
6. I make no order as to costs.

Signed and dated at BLOEMFONTEIN on 22 February 2010

NBCRFI Panellist: Bejile Mene