



ARBITRATION AWARD

Arbitrator: L Williams-de Beer _____
Case Reference No.: KZNRFCB 5407 _____
Date of award: 31 August 2009 _____

In the arbitration between:

A D MDLETSHE Union/Employee party

and

TANKER SERVICES Employer party

Union/Employee's representative: M Moonsamy / Self _____

Union/Employee's address: E1037 Ntuzuma Township _____
P O Kwamashu _____
4360
Telephone: 072 992 6654 fax: n/a _____

Employer's representative: L Kolobe _____

Employer's address: P O Box 12045 _____
Jacobs _____
4026
Telephone: 011 821 6931 fax: 011 873 9117 _____

DETAILS OF HEARING AND REPRESENTATION:

The arbitration took place at the Council offices at Suite 501 Mutual Building, Smith Street, Durban on the 2nd April 2009 at 9h00. The Applicant was represented by his shop steward, Moses Moonsamy, and the Respondent was represented by Mr Kolobe, the HR Director.

The matter was scheduled to continue on 8 May 2009 but could not proceed because the Applicant did not attend. When he was called, he advised that he was not aware of the set down date, that his representative could not attend and he did not have his witnesses available. The matter was postponed to 27 August 2009 and the Applicant was warned, in Zulu, that no further indulgences would be given. He was told how to apply for a subpoena and what arrangements needed to be made for a representative and/or a witness.

On 27 August the Applicant appeared in person and advised that his representative was ill. He had spoken to Moonsamy two days to prepare him for the hearing and was not aware he was ill. When he called him today, his wife said he was in hospital. The Respondent objected to a second postponement and I concurred. I reminded the Applicant that he had been expressly warned, in Zulu, on 8 May 2009 that no further postponements would be entertained and he acknowledged that. He was not prepared to tender costs of an adjournment and indicated that he would rather proceed. I therefore commenced with the arbitration.

ISSUE IN DISPUTE:

The Applicant claimed he was unfairly dismissed on 30 December 2008 on grounds of misconduct. The issue to be decided is thus whether the dismissal is substantively and procedurally fair.

PRELIMINARY ISSUES:

The Respondent handed up a bundle of documents.

The Applicant queried page 30 and requested the full document, not just the Competency Certificate. The Respondent disputed that there was any other part to the document and noted that they would be calling the trainer to testify so the Applicant would be able to query the document with him. This was accepted and the bundle was admitted into evidence.

BACKGROUND TO THE DISPUTE:

The Applicant was employed on 14 January 2008 as a bulk vehicle operator/driver and earned R1010,58 per week. He was trained by the Respondent and competent to drive all of its trucks. During or about October 2008 he refused to drive an Eagle International truck. He was charged and eventually dismissed on 30 December, after numerous postponements of the hearing. The Applicant had 4 disciplinary infringements in the 9 months he was employed.

The Applicant admitted he refused to drive the truck in question but averred that he did so because he was not competent to drive it. He denied that he was trained to drive the truck. In relation to the procedure, he noted that witnesses he requested for his appeal were not brought to the hearing and documents he needed were not given to him. The Respondent also relied on evidence from a Shell employee who was not called to testify. The Applicant wanted to be reinstated.

SURVEY OF EVIDENCE:

Colin Nadar, the Depot Manager, testified that the Applicant was instructed by their customer (a Shell controller) to hook up an International Truck Tractor during his night shift. The Applicant told the controller he was not prepared to drive the vehicle because he didn't know how to drive it. The controller in turn called the Operations Supervisor to report the problem. The supervisor instructed him to send another driver to drive the truck and the Applicant was allocated to a different vehicle for the remainder of his shift.

The Respondent received an email from the Shell controller at 4h37am on 15 October 2008 (page 29). The Respondent had a contractual relationship with Shell, as they loaded from their gantry and delivered Shell product to their Shell customers. They operated on the site and their employees had to abide by the requests of Shell employees.

After hearing about the incident, Nadar spoke to the Applicant and enquired what had transpired. The Applicant told him he didn't know how to drive the truck and was not prepared to drive it for safety reasons. This was not true and the Applicant was then charged with two offences. The first related to an incident that occurred on 1 October 2008 but they eventually dropped that charge because it was out of time. The hearing was in relation to charge 2 only. It was adjourned numerous times because either the Applicant or Moonsamy were not available. Moonsamy was often sick and the Applicant refused to proceed with any other representative. Nadar accommodated him because he wanted the procedure to be fair.

Ultimately the chairman dismissed the Applicant for refusing the instruction and giving dishonest information.

It was not true that the Applicant was incompetent as a driver and everyone hired by the Respondent had to pass a written test on literacy and numeracy. Once that was completed, the driver did a road test on an International Truck Tractor. He was then assessed and if he was found to be competent, he was interviewed by the depot manager. Only after this entire process could a driver be hired and, even then, he worked for two weeks under a senior driver and did intensive on-the-job training. Once the senior driver “passed them out”, they were allowed to drive on their own. The Applicant underwent that full procedure and it was thus impossible for him to claim he was not competent to drive the truck.

The Respondent had 6 types of trucks in their fleet: DAF, International, Volvo, Scania, Mercedes and Actros. There was an even mix of vehicles but International was the predominant truck. The training school used International as their training vehicle. The Applicant was thus exposed to that type of vehicle and on 9 January 2008, he signed his competency certificate (page 30) after having been trained on that particular truck. The Applicant denied his signature but the Tachogram (page 31) proved he and the other new recruits were taken on the road in an International Truck. The Applicant’s job observation dated 16 May 2008 also proved he had knowledge of the truck.

Aside of this final incident, the Applicant had not been a good employee since he was hired. On 6 May 2008 he was issued (page 38) with a warning for not completing documents at his vehicle and for using a cell phone whilst driving. On 16 July 2008 he received another warning for negligence in that he drove off without disconnecting the pipe from the gantry thereby damaging the pipe. On 17 June 2008 he had a product contamination at a service station and didn’t notify operations and after that he was put on remedial training. Finally, on 14 August he got another warning for delivering load to wrong customer.

Nadar was of the view that they had done their best to train the Applicant but he simply wouldn’t abide by the procedures. He was counselled on numerous occasions but to no avail. As a result of this history and the final incident, both the Respondent and Shell had lost faith in the Applicant. It would be detrimental to their contract with Shell if they took him back.

On cross-examination Nadar confirmed the controller told him it was a 1282 International Truck Tractor that the Applicant refused to drive. He was not sure of the fleet number of the

truck the Applicant was trained on and it didn't appear on the tachograph (page 31). Nadar was not present at the training that day.

The conversation between the controller and the supervisor was confirmed by the content of the email (page 29). The Applicant did refuse to drive the truck and claimed he hadn't been trained on it. Nadar didn't accept that because he had driven the training vehicle and so should be able to drive any other International in the fleet. He was declared (page 30) competent on Fleet 1331 Eagle International. That was a bona fide fleet number and the Respondent had proved at the internal hearing that they had that truck in their fleet at the time.

The Applicant did admit that he was tested on an Eagle International when he completed his evaluation. He was taken out for training on 9 January 2008 but was only hired on 14 January 2008. The evaluation was done prior to employment and that was the reason for the difference in the dates. Only an employee who passed all the testing was considered for employment. The Applicant did his literacy and driving test on the same day.

The Applicant was given minutes of the hearing (page 6) and he collected his copy with the notice for his appeal hearing.

Dick Blessing Kock was the Driver Trainer and had 10 years service. He was required to assess drivers who were employed. The Respondent had a stringent recruitment process because they transported highly flammable substances.

He trained the Applicant and assessed him on an Eagle truck on 9 January 2008 (page 30). Kock completed the Competency Evaluation and signed the document, along with the Applicant. The tachograph from the truck they used to do driver's tests was found at page 31. Kock used one tachograph for all the new recruits and it was simply to prove they had actually gone on the road and been assessed.

At one stage the Applicant claimed that he didn't know how to use a metered truck so Kock went out with him to assess him (page 32). One night shift he assessed the Applicant (page 35) working on a DAF metered truck numbered 1352. The Applicant did everything correctly and was thus wrong to claim he didn't know how to operate a metered truck. In addition, he signed on page 34 that he had been trained on using a meter. The Applicant was thus dishonest when he alleged he didn't know how to drive a metered truck.

On 16 May 2008 Kock undertook a Job Observation (page 33) to see if the Applicant could handle the truck and product safely. He found the Applicant competent and both he and the Applicant signed the document.

The Applicant did know how to drive an International truck. International trucks constituted 80% of their fleet and he was assessed on that vehicle when he was hired. The minimum experience to be hired as a driver was 3 years but the Applicant had even more than that. He was "perfect" with all the trucks and had even driven freightliner International trucks which were very similar to Eagle International. Kock disputed that there was any basis for the Applicant to claim he didn't know how to drive the International truck. It was the same as a DAF and they operated in the same high and low ranges. A driver was expected to drive all different trucks and it was even confirmed at the interview.

On cross-examination Kock confirmed he assessed the Applicant on an International truck. The fleet number was 1331. There was no supporting documentation for page 30 and the document alone proved the Applicant was qualified to drive the International Truck. One had to read page 33 and 34 together as the N Cap Assessment. Evaluating a driver entailed watching him to see if he was competent. If not, he had to be trained. If he was competent, the certificate was issued. The Applicant signed page 34 which proved he had been trained. He was thus fit to load, drive and use a metered and non-metered truck. Despite that he had told a Shell Controller that he wasn't able to use a metered truck.

Moonsamy put to him that the Applicant was not tested on the Eagle International by Kock but by Anand. Kock disputed that and insisted he did the assessment. If the Applicant hadn't been declared competent on the truck he would not have been hired. The entry "40" on the tachograph (page 31) showed where the Applicant took over driving the vehicle. Kock didn't make notes on the tachograph printout or send it for analysis because he was an accredited trainer and quite capable of seeing if a driver was competent or not.

Issa and Welcome were both evaluated the same day as the Applicant. Kock agreed that page 30 had a reverse side and a copy of the document was made and handed in. He conceded that he had not ticked every block on the reverse side but said he only did that when the driver was lacking. If the driver wasn't competent, he filled in the red sections. If there was nothing marked in red, the driver was competent. There were no other documents

that formed part of the competency evaluation. The Applicant operated the truck, checked mirrors and did a brake test. The Applicant was competent to drive the truck.

On re-examination Kock said that once a driver was assessed, he was deemed fit to drive the vehicle. He was not trained again. Kock did not forge the signature at page 30 or any other document. It was important that he sign legitimately on an evaluation because it would come back to him if he hired a driver who was later proved incompetent. The documents were completed as soon as he did his assessment.

On 27 August Respondent produced Issa's entire original file but the Applicant still refused to accept that they were trained on the same day. The Respondent sought leave to introduce the test result of Issa Isaac and I agreed. The documents were added to the bundle at page 42 and 43 and Mr Nadar was recalled to introduce the documents.

Colin Nadar testified that Issa Isaac's assessment took place on 9 January 2008 (page 42). The Respondent wanted to recruit between 7-9 drivers at that time and tested a group at the same time. The Applicant was tested with Isaac and that was proved by the assessment and the tachograph. Isaac was also tested on an Eagle truck with the same fleet and trailer number. Isaac had driven an Eagle truck after he was hired and he never complained and alleged he was not trained to do so. Page 43 and page 31 were identical because they were trained at the same time.

On cross-examination Nadar disputed that the Applicant was tested by Anand and said the documents proved Kock trained him. Drivers were tested at training centre in Jacobs and he retrieved the documents from there. Issa was not interviewed at the same time as the Applicant so they did not commence work on the same day, but they were assessed at the same time. The Applicant referred to page 42 and disputed it was signature. Nadar concurred and said it was Isaac's signature. The Applicant then disputed his own signature on page 30.

Dumisani Alpheus Mdletshe testified that he was on nightshift on the day of the incident. He arrived at work in the afternoon and went to collect his documents. Upon checking them, the controller approached and told him not to take his normal truck. He was told to wait for the Eagle truck. The Applicant told the controller that he had never driven an Eagle truck and so the controller sent Naren to drive the Eagle Truck and gave him an Atos. The Applicant was not told it was a problem and he worked as normal for the shift. He was only suspended the following day.

He was unhappy about his hearing because the controller, Vinesh, was not called to testify. Vinesh told the Respondent the Applicant refused to take the truck but he didn't refuse. He just said he had never driven the truck and so they gave him something else to drive. It was never a problem at the time.

The Applicant was assessed by Dick Kock on a DAF and a Scania truck but never on an Eagle Truck. It happened once that Rennie, another controller, asked him to take an Eagle truck to Pinetown. Before he got out of the gate, the mechanic stopped him and told him to go back. The mechanic went to the office and reported that the Applicant couldn't drive an Eagle truck and didn't even know how to change its gears. He didn't recall the date but it was sometime in May 2008. That was when Kock was contacted to come and teach him to drive an Eagle truck but he never arrived. The Applicant was told he had gone to East London.

On cross-examination Mr Kolobe put to the Applicant that he may have been assessed by Anand Naidoo but his driving was tested by Dick Kock. He explained that when a driver came looking for a job he was evaluated to determine if he could drive. If he passed the assessment, he was employed. The Applicant disputed that he was evaluated by Kock and insisted he was only evaluated by Naidoo. He also disputed that the Respondent only used Eagle trucks for its assessments and evaluations. The Applicant denied signing the evaluation at page 30 but admitted signing all his other take-on documents.

The Applicant admitted that Anand assessed him on an Eagle truck. He showed him how to sit and how to deal with the truck but said they shouldn't worry about changing the gears because they would learn it as they went along. He did not drive the vehicle at all. Mr Kolobe put to him that his version was highly improbable but the Applicant insisted he was right. He drove around on the premises but never changed the truck out of gear. Anand did not give him any forms to sign. When he was hired, he wrote down what types of trucks he could drive (ie Freight Liner) and handed in that list. Mr Kolobe put to him that they had mostly Eagle trucks and would not hire a driver who could not drive an Eagle as they could be posted to any site after being hired. The Applicant disagreed and said he was told he would work at Shell Island View when he was hired because 8 drivers had just been dismissed at that site.

The Applicant admitted he signed several warnings in the year he was employed. It was whilst driving the trucks he knew how to drive.

The Applicant had been unable to secure his witnesses for the arbitration and advised that Anand Naidoo now resided in Johannesburg and it was too expensive to fly him down for the hearing. He asked that we obtain his evidence via telephone conference and the Respondent had no objection. We stood down for the Applicant to make the arrangements and, on our return, the interpreter advised that the Applicant asked him to call the witness during the break. He did so and told Anand he would be contacted shortly to testify. When the Applicant dialled his number, however, the cell phone had been switched off and went to voicemail. We tried numerous times thereafter but eventually had to concede that the witness did not wish to testify. Instead the Applicant called Issa Isaac, a fellow driver, also by way of teleconference.

Issa Isaac testified that Dick Kock tested them when they were hired. He was not, however, tested with the Applicant and the Applicant was already working when he was hired. He didn't recall the date on which he was tested but it was at Jacobs.

On cross-examination he confirmed that Dick took him for his road test when he was employed. Dick took him on an Eagle and an Atos and he signed a document when his training was finished. Isaac was assessed at Island View but wrote a maths test at Jacobs. He could not dispute that his assessment was on 9 January 2008 but said he was not sure of the date of the Applicant's assessment. He was adamant he was not assessed with the Applicant. He was with two other drivers at Island View and the Applicant was not amongst them.

SUMMARY OF ARGUMENT:

Respondent

Mr Kolobe argued that the Applicant was appointed in good faith and with no question as to his competence as a driver. Despite that, he was disciplined and received 4 warnings during his employment. He was also given remedial training in accordance with company procedure. The Applicant, however, did not change and on 14 October 2008 refused a direct instruction to drive an Eagle truck. He was charged with Gross Insubordination and the hearing was postponed numerous times at the Applicant's request. He was finally dismissed in December. In deciding to terminate his services the Respondent had regard to his poor record and the fact that they had to have complete trust in their drivers because they transported a hazardous substance.

The Applicant claimed he was not assessed by Kock but by Anand but that was not corroborated by any witness or document. Instead, the Respondent had produced both oral

and documentary evidence to refute that and to show that Dick Kock assessed the Applicant on an Eagle and found him competent. The Applicant's version was improbable given that his own witness confirmed he was evaluated on the Eagle by Kock. In addition, the Applicant admitted signing the other documents bar page 30, which seemed somewhat convenient. It was true that Anand was a trainer employed by the Respondent but he generally did the classroom assessments. If he had done the road test as well, that would have been supported by documentation. The Respondent had produced the original files and there was no way to manufacture the documents.

Applicant

The Applicant alleged that Dick lied in his evidence and insisted he never tested him. The tachograph report showed he and Issa were tested together but that wasn't true and Issa verified that. The signature on the evaluation form was forged and he had not been assessed on an Eagle Truck. The Applicant denied that he was insubordinate or that he refused to work and said he just told the controller he couldn't drive an Eagle truck. The controller ought to have been called to testify that he was insubordinate.

ANALYSIS OF ARGUMENTS & EVIDENCE

The Applicant has alleged that an unfair dismissal took place. Section 192 of the Labour Relations Act 66 of 1995 (the Act) places the onus on the employer to show the dismissal was fair, both substantively and procedurally. Insofar as substantive fairness is concerned, the Code of Good Practice sets out guidelines for employers to follow in dismissing an employee for misconduct. Specifically subsection 7 of Schedule 8 requires one to show:

- a) That the employee contravened a rule;
- b) That the rule was valid and reasonable;
- c) That the employee knew or should have known the rule;
- d) That the rule was applied consistently; and
- e) That dismissal was a fair sanction

In this case the Applicant was charged with:

1. False Information – deliberately giving untrue, erroneous or misleading information or testimony whether verbally or in writing
2. Dishonesty
3. Serious case of Poor Workmanship

4. Failure to carry out normal laid out procedures
5. Failure of drivers to notify control from site of returning with product in tanker

It was not disputed that prohibitions against such conduct were valid and reasonable workplace rules and the Applicant did not deny being aware of the rules. He denied, however, that he was guilty of any breach of the rules. There was no challenge to the consistency of the Respondent's application of the rules but the Applicant disputed that dismissal was an appropriate sanction.

The issues to be decided are therefore whether the Applicant actually broke the rules and whether dismissal was a fair sanction.

The Respondent's version was put forward by Colin Nadar ("Nadar") and Dick Kock ("Kock"). Both witnesses were clear and unambiguous when testifying and did not waver in their evidence under cross-examination. The Applicant alleged in his closing argument that Kock had lied but that was not put to him when he testified nor was any reason given for him to be dishonest. I therefore accept the version of the Respondent's witnesses.

The Applicant called Issa Isaac as his witness. Isaac confirmed that he was assessed by Dick Kock on an Eagle truck but that it was not at the same time as the Applicant. His driving test was done at Island View and not at Jacobs.

The Applicant himself was a fairly reliable witness but I have some doubt about the probability of his version. I refer inter alia to the following:

- The Applicant's defence was that he was not aware how to drive an Eagle truck but on his own version he was evaluated on the truck by Anand
- He claimed he never went out of the yard and didn't change gear during his assessment which seems very unlikely
- The Applicant couldn't explain why, if Anand did do his assessment, he didn't sign the competency certificate
- He claimed Kock forged the certificate but could offer no reason for him to do so
- The certificate was the only document in respect of which the Applicant challenged his signature
- His witness, Issa, was tested by Kock on an Eagle in line with the Respondent's version that all new drivers were assessed on the Eagle. The Applicant could not explain why he was singled out for different treatment

- ❑ The Applicant didn't dispute the Respondent's version that drivers who were not found competent were not hired
- ❑ He didn't deny that 80% of the Respondent's fleet comprised of Eagle Trucks
- ❑ The Applicant didn't dispute that he had claimed not to know how to drive a Metered truck but had subsequently been found to be competent
- ❑ He claimed that he had previously been prevented from driving an Eagle truck by Rennie, the controller, but this was not put to the Respondent's witnesses and Rennie was not called to corroborate this
- ❑ The Applicant alleged he gave in a list of the trucks he was prepared to drive but didn't deny that the Respondent used at least 3 different types of trucks and that all drivers were expected to drive a variety of vehicles
- ❑ He admitted he had experience on a Freight liner and didn't dispute Kock's evidence that it was similar to an Eagle

The Applicant admitted that he refused to drive an Eagle Truck on 14 October 2008. His defence was that he was not competent to drive an Eagle. The Respondent disputed that and produced his competency certificate as well as the testimony of Dick Kock who averred that he had evaluated the Applicant on the Eagle Truck when he was hired. The Applicant claimed that Kock lied and fabricated the document at page 30 but could offer no reason for him to do so. It was his version that he was evaluated by Anand on the Eagle Truck, but that he never actually drove it and didn't even change gears. Regretfully the Applicant was unable to produce any evidence to support his version and Anand appears to have deliberately evaded testifying at the arbitration.

In the premises and bearing in mind the oral and documentary evidence produced by the Respondent, I must find that the Respondent has proved on a balance of probability that the Applicant was indeed assessed on an Eagle Truck and found competent. There is therefore no reasonable basis for him to have refused his instruction and the assertion made by him to the Shell controller was clearly false.

Much was made of the fact that the Applicant was trained on the same day as Issa but I am not entirely sure of the relevance of that fact. Issa confirmed he was tested by Kock on an Eagle Truck but disputed the Applicant was part of his group. He was not, however, able to recall the date of his evaluation and it is thus possible that he and the Applicant were tested on the same day, albeit at different venues. Unfortunately that was not put to Kock when he

testified so I am unable to draw that conclusion. Be that as it may, I do not believe that discrepancy alone undermines Kock's credibility or shows him to be a dishonest witness.

Viewed in toto I can find no basis to defend the Applicant's conduct and as such I find him guilty on both charges 1 and 2. The balance of the charges related to another incident and the Applicant's dismissal was only based on the incident of 14 October 2008.

The final issue to be determined is the sanction that was imposed.

Ngcobo AJP in the County Fair Foods (Pty) Ltd v CCMA & others case (1999 (8) LAC 1.11.46), said that a commissioner should not simply substitute his/her value judgment for that of the employer and should only interfere with sanction where same is warranted. This view was confirmed in the case of Nampak Corrugated Wadeville v Khoza (1999) 2 BLLR 108 LAC, wherein the court held that it had to determine whether the sanction imposed was reasonable in the circumstances not whether it would have made the same decision. The most recent confirmation of this principle came from the Constitutional Court in Sidumo v Rustenburg Platinum Mines Limited (Rustenburg Section) & Others Case No. CCT 85/06 dated 5 October 2007.

Mr Kolobe argued that the Applicant knowingly refused a reasonable instruction. He was dishonest when he claimed he didn't know how to drive an Eagle truck and the Respondent had lost all trust in him as a result of the incident. The client, Shell, was upset about the Applicant's conduct and the Respondent could not afford to jeopardize that contract. The Applicant had a poor disciplinary record during his nine months of employment and attempts to rehabilitate him had failed. Mr Kolobe argued that he appeared unable to comply with the Respondent's rules and procedures and could not remain in their employ.

The Applicant submitted little argument in mitigation of sanction other than to deny guilt and aver that Kock had lied.

I concur with the Respondent that the sanction is reasonable in the circumstances. The Applicant was found guilty on serious charges, both of which relate to dishonesty and impact on the trust relationship. It was common cause that he had been disciplined 4 times in 9 months for various offences and that this was not the first incident in which he had falsely represented his competence on a particular vehicle. The Respondent had followed

progressive discipline and it would appear that the Applicant was simply incapable of being rehabilitated.

I therefore uphold the sanction of dismissal and find the dismissal to be substantively fair in all respects.

In relation to the procedure, the Applicant was unhappy with the fact that the controller was not called to testify at his hearing and certain other witnesses were not called to his appeal. Mr Nadar explained that the Respondent had no need to call the controller because it was common cause that the Applicant refused the instruction. In relation to the appeal, it was up to the Applicant to call any witnesses he required. The Applicant could not refute either of these assertions and, if anything, it would appear the Respondent went out of its way to accommodate him in relation to the enquiry. In the absence of any other evidence, I find no basis for a claim of procedural unfairness.

AWARD

The application is dismissed.

Signed and dated at on.....

NBCRFI Arbitrator: _____