

IN THE BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY

Commissioner: ADVOCATE LC. SHANDU
Case No.: GPRFBC10883
Date of Award: 10 MAY 2010

In the ARBITRATION between:

BENSON PHAKATHI
(Union / Applicant/ Employee)

and

DHL EXCEL SUPPLY CHAIN
(Respondent/ Employee)

Union/Applicant's representative: N/A
Union/Applicant's address: P.O. BOX 7006
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Respondent's representative: ESTELLE DE BEER
Respondent's address: 127 SAREL ROAD
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DETAILS OF HEARING AND REPRESENTATION

- [1] This was an arbitration process set-down for hearing on 28 April 2010 at the premises of the National Bargaining Council for the Road Freight Industry in Pretoria at 09h00.
- [2] The employee Benson Phakathi was present and represented himself. The employer DHL Excel Supply Chain was represented by Estelle De Beer an official from Employer Organisation GDP.
- [3] The proceedings were mechanically recorded and handwritten notes were also taken.

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 three witnesses, i.e. Hendrik Janse Van Nieuwenhouzen, Jakob Jakobus van der Venter and Stefanus Johannes Groenewald, to lead evidence in support of the employer's case. The summary of the evidence and argument presented by the employer follows hereunder:

- [5] On 6 July 2009 the employee was issued with a notice to attend a disciplinary hearing which was to take place on 10 July 2009. The employee was charged with gross negligence and suspicion of dishonesty as per page 1 – 3 of the employer's bundle of documents. The charges against the employee related to two boxes going missing on the employee's stock. An investigation was done and it revealed that the employee's vehicles and another vehicle were parked next to each other. Both these vehicles had specific boxes or stock that had to be loaded on each vehicle. The employee left his stock unattended. The people loading on the other vehicle loaded the two boxes that were supposed to go to the employee's vehicle. The employee did not check that the stock he loaded was correct. He left the depot and only informed the manager about the stock shortage afterwards. It was at this stage that the employer went through a video footage and saw the two boxes being loaded onto the other vehicle.
- [6] The employee and his assistant were taken through the polygraph test. The employee failed the polygraph test while his assistant passed it. The driver of the other vehicle to which the two missing boxes were loaded also went for polygraph test and he also failed it.
- [7] The employee as a driver is the person responsible for the stock. It was very negligent of the employee to leave the stock unattended and to later not check whether it was correct. The

employer has been experiencing big problems with stock loss and this has a negative impact on the relationship the employer has with its clients. The stock that went missing belongs to British Tobacco and the likelihood is that it was sold to illegal traders. A client might not renew the contract as a result of stock losses and this might affect the future of about 1000 employees.

- [8] The incident that led to the employee's dismissal resulted in the employment relationship of trust being totally broken. The employer loads stock to the value of R500 000 on each vehicle. If the employee can steal two boxes there is nothing stopping him from stealing the whole vehicle.
- [9] The employer suffered losses to the value of R12 000 as a result of the two boxes going missing.

Employee

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

- [10] In the morning of the date of the incident they offloaded boxes of cigarettes from the truck. They placed them down. Thereafter they went to the person who was issuing invoices. After receiving his invoice he saw that his route was Soshanguve. He left the assistant to check the invoice because he was busy jumpstarting the car. When he was finished jumpstarting the car he did not recount the stock because he had left the assistant with the stock. After loading he took the invoices and drove off. The missing boxes belonged to a client Metcash and he had loaded them at the back. When he arrived at Metcash he realised that two boxes were missing. He called the depot manager to inform him about the missing stock. The manager asked him if he signed the invoices stating that he checked the stock and he answered that he did. The manager said he was going to check the video footage. The manager later told him that he saw the people that took the stock and that he should not worry. He was later suspended.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [11] 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 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.
- [12] 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.
- [13] The charges against the employee relates to gross negligence and suspicion of theft.

[14] The evidence of the employer established that the employee indeed on the day mentioned was a driver of a vehicle which lost two boxes of stock. The evidence of the employer also demonstrated that the employee in as much as he claimed that he left the stock with an assistant; he is the person that was ultimately responsible for the stock. The employee even during his evidence testified that he signed for the stock. Signing for the stock can only mean he was agreeing that the stock was correct. It was grossly negligent of the employee to leave the stock unlocked and to later just drive off without recounting the stock. If anything the actions of the employee were also suspicious. I fail to understand why the employee acted in the manner he did. The employee did not deny the employer's testimony that there had been huge stock loss problems. This then required of the employee to be extra careful with the stock and should he not have left it with someone who did not really carry any responsibility for it. While the polygraph test does not offer conclusive proof that the employee was guilty of a dishonest act; it is helpful in demonstrating that the employee was deceptive in his actions. This then give weight to the employer's contention that it suspected the employee of theft.

[15] The evidence of the employer proved that the employee was correctly found guilty of the offences he was charged with.

[16] On the appropriateness of the sanction of a dismissal I note the decision of *Sidumo & Amoder 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, 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..."

[17] The evidence of the employer showed that the conduct of the employee could not have been remedied by applying progressive discipline. The employee was not only grossly negligent but there was also a reasonable suspicion of theft with regard to his conduct. Taking into account all the aforementioned factors I 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 a fair sanction.

[18] On procedure the employee 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

[19] The dismissal of the employee, Benson Phakathi, was both procedurally and substantively fair.

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

[21] The case is dismissed.

Thus done and signed at Pretoria on 10 May 2010

Advocate LC Shandu

Panellist