ARBITRATION AWARD

Arbitrator: P E VAN ZYL
Case Reference No.: KZNRFBC 9533
Date of award: 03 MARCH 2010

In the arbitration between:

SATAWU obo S E MALIMELA & ANOTHER ________ **Union/Employee party**

and

IMPERIAL DISTRIBUTION ________ **Employer party**

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DETAILS OF HEARING AND REPRESENTATION:

1. This matter was set down as an arbitration hearing on 23 February 2010 at the offices of the Bargaining Council for the Road Freight Industry in Durban between SATAWU obo S E Malimela, the applicant and Imperial Distribution, the respondent. Mr Madladla, the union official, appeared on behalf of the applicant and Ms Kunnie appeared on behalf of the respondent.

ISSUE IN DISPUTE:

2. Whether the applicant's dismissal was both substantively and procedurally fair or not.

BACKGROUND OF THE DISPUTE:

3. This matter was referred to the Bargaining Council on 19 October 2009 for conciliation by S E Malimela and 1 other. A conciliation hearing was scheduled for 09 November 2009. Only the first applicant, S E Malimela and his union representative attended that hearing. It does not appear from the file as what had happened to the second applicant. A certificate of non-resolution was issued in respect of the first applicant only.

4. The union thereafter filed a request for arbitration in respect of the first applicant only. That matter was set down for an arbitration hearing on 12 January 2010. On that day it became part-heard and was postponed.

5. It was set down again for a continuation of the arbitration hearing on 23 February 2010. On that day the evidence was concluded and the parties agreed to furnish me with written closing arguments by no later than 26 February 2010. I then reserved judgment in the matter.

6. Herewith my determination and reasons therefore.

SURVEY OF ARGUMENTS AND EVIDENCE:

FACTS OF THE RESPONDENT'S CASE

7. Mr Harichandra testified that he was employed as a Distribution & Warehouse Supervisor. On a particular day two drivers, Ernst and David approached him and informed him that each had a box of disprins short from their trucks. He went with them to check their loads and discovered that each had a box missing. He then checked the warehouse floor, but could not find the missing boxes. He reported the matter to management.

8. Harichandra further testified that he had picked one load and Mbuli had picked another load. The loads were all next to each other. It was normal practice for the driver of a truck to seal his truck after the loads had been loaded. After the truck is sealed it is parked off at head office and the driver and his assistant go home.

9. The driver and his assistant are responsible to shrink -wrap their load. It was the supervisor's duty to supervise the loading, which was done by Mfundu, the forklift driver.

10. The normal procedure for loading was for the driver and his assistant to check their load in the afternoon. If there was any problem they should report that to the supervisor. If the load was in order they (the driver and his assistant) would shrink-wrap it and pull it out of the warehouse. The forklift driver would then load the whole load into the truck. He (Harichandra) could not see what was going into the truck, as the driver and his assistant had shrink-wrapped the load.

11. He (Harichandra) referred to Exhibit "A13", which was a copy of the driver's trip sheet. The applicant signed that trip sheet thereby acknowledging that his load was in order.

12. Exhibits "A14-23" were copies of the pick slips, which did not contain any boxes of disprins for the applicant's load.

13. Harichandra further denied that he had framed the applicant. With regard to an allegation that he did so because of an argument relating to an injury on duty, he testified that the applicant was busy with a delivery when a pallet fell on him. He (Harichandra) had nothing to do with that incident and again denied that he had framed the applicant because of that.

14. Ms Lotriet testified that she was employed as the Contracts Manager for the Reckitt contract.

15. On Monday, 05 October 2009, Shane (Harichandra) came to the office and informed them that there were two cases short. She went with Julian (Kruis) to the warehouse to check what was going on. They discovered that both David and Ernst had a case of disprins missing from their respective loads. Shane stated that the cases could not have gone missing, as he had checked all the other loads and the disprins were not there. He (Shane) then said that there was only one other vehicle that had already been loaded and parked off. That vehicle had a registration number ND 446506 and was allocated to the applicant.

16. Lotriet and Julian went to Barrier Lane where the vehicle was parked. They called the security guard to observe whilst they opened the truck to look inside. Julian went through all the pallets and discovered the two cases of disprins on one of the pallets. The disprins were found shrink-wrapped on one of the pallets. They checked to see if the disprins were part of that load, but they did not appear on any of the invoices and should not have been on that truck. They closed the vehicle up again and the security guard indicated that he would make an entry in the Occurrence Book (OB).

17. She (Lotriet) and Julian went back to the Reckitt site to check with Shane what had happened. He told them that the applicant and his assistant, Siyabonga, had checked their load, shrink-wrapped it and put it outside to be loaded. The applicant signed his trip sheet and the vehicle was sealed and parked off.

18. According to Lotriet it was the driver and his assistant's duty to check their load and it was the driver's duty to sign the trip sheet.

19. Lotriet further testified that the contract with that specific customer only started on 15 September 2009 and they had three months to prove themselves. The incident relating to the disprins happened within the three-month period.

20. She further referred to Exhibits "A42-47" and explained that she had been involved in the applicant's induction programme. The applicant was aware of the fact that fraud and unauthorised possession of the company's property or the property of the customer constituted serious breaches of the rules, as he had signed the code of conduct containing that rule. The applicant was also aware that the driver was responsible for the loading/unloading, handling and securement of any load in transit. It was also the driver's responsibility to properly handle all documents relevant to the movement of vehicles and goods. In addition the driver was responsible for confirming that goods as indicated on the waybills in fact corresponded with the actual load carried at all times. The applicant had signed the code of conduct relating specifically to drivers thereby acknowledging that he had read and understood the rules.

21. Mr Nayer testified that the respondent employed him as a Customer Services Manager for the past two and a half years. He chaired the applicant's disciplinary hearing. He confirmed the correctness of his minutes of the hearing set out in the bundle of documents as Exhibits "A8-41". The applicant was given the right to call witnesses and to cross-examine the respondent's witnesses.

22. Nayer further referred to Exhibit "A41", which was a copy of his findings and stated that the applicant was already on a final written warning, which had been issued only the previous month.

23. He (Nayer) denied that he was part of a conspiracy to frame the applicant.

24. Mr Kruis testified that he was employed as the KZN Region Relief Manager. He started the Reckitt contract.

25. He further testified that he acted as the initiator in the applicant's hearing.

26. On the day in question Shane called him and told him that there were two cases of disprins short. They checked the warehouse floor, but could not find them. Shane was sure that the cases had been there, as he had picked them himself.

27. They went to the applicant's truck, which had been parked in Barrier Lane. Kruis broke the seal and checked the load in the presence of the security guard and found two cases of disprins in the middle of a pallet. The cases were shrink-wrapped and he had to break the shrink-wrap to get them out. Those cases were not listed for delivery on any of the documents relating to that vehicle. They removed the cases and sealed the truck again. They took the two cases to the other two trucks for delivery. Due to operational reasons they did not wait for the applicant to open the truck, as the cases of disprins were meant for other customers and they could not let those customers run out of stock.

28. Kruis further testified that the driver and his assistant were responsible for the load, but ultimately it was the driver's responsibility, as he signs the trip sheet off. Both the driver and his assistant were responsible to shrink-wrap the goods. The forklift driver loads the goods onto the truck.

29. The contract with that particular customer started on 14 September 2009 and the respondent was given three months in which to prove itself.

FACTS OF THE APPLICANT'S CASE

30. The applicant testified that the people who packed the goods were not supposed to pack them and then say that he had packed them.

31. After they had checked the goods he (the applicant) went to the office where he had to submit some documents. When he returned from the office he saw that the truck had already been loaded. His assistant was present when it was loaded, but he (the applicant) was not present. The applicant was just asked to seal the truck, as it had already been loaded.

32. The following day when he came to fetch the truck he was told not to take it, as they had found goods in it whist he was not there. He was shocked to hear that they had found goods whilst he was not present. He was dismissed for that, but his assistant is still working for the respondent.

33. According to the applicant it was obvious that they had planned to get rid of him.

34. The standard procedure for trucks to be loaded is for the driver, his assistant and the supervisor to be present. It did not happen in his case, as they did not wait for him to load the truck.

35. The applicant further testified that he called his assistant as a witness in the disciplinary hearing, but the chairman refused to let him come and give evidence. He further stated that nobody took minutes during the hearing. He was informed verbally of the outcome and it was later confirmed in writing.

36. He (the applicant) further denied any knowledge of the goods on his truck. He asked them to show him the goods at the hearing, but they told him that they had loaded the goods onto the other trucks.

ANALYSIS OF EVIDENCE AND ARGUMENT

37. The applicant was charged with unauthorised possession of stock.

38. It was the respondent's case that the applicant had two cases of disprins on his truck, which he was not authorised to have.

39. The applicant denied any knowledge of the two cases and further alleged that he had been framed by the respondent because the truck was loaded in his absence and he had an argument with Harichandra about an injury on duty.

40. Harichandra testified that the applicant and his assistant had checked their load and had shrink-wrapped it. That version was confirmed by the applicant's own evidence. During his evidence in chief he testified that after they had **finished checking** the

goods he went to the office to submit some documents. During his cross-examination he was asked as to how it happened that two boxes of disprins from two different trucks were found on his truck. He replied that the disprins were not amongst the goods **he had checked** on the floor. That is a clear indication that he had checked his goods. Mr Madladla, in his closing argument, also indicated that the applicant had testified that **he (the applicant) and his assistant had checked their load correctly and had put it aside.**

41. The applicant never disputed the evidence that he and his assistant had shrink-wrapped their load. His version was just that the goods were loaded in his absence. Harichandra and Kruis testified that it was the forklift driver's duty to load the shrink-wrapped pallets onto the truck. During cross-examination Mr Madladla put it to Harichandra that it was easy for the forklift driver to load the wrong load. Harichandra denied that and stated that the truck driver and his assistant pulled the load, wrapped it and then put it outside on pallets from where the forklift driver would pick it up and put it on the truck. The forklift driver had nothing to do with picking the load, wrapping it and putting it outside. He (the forklift driver) merely picked the pallets up and put them on the truck. It follows then that even if the pallets were loaded in the applicant's absence those were the pallets that he had already checked and shrink-wrapped.

42. Both Lotriet and Kruis testified that the two cases of disprins were found wrapped together with other goods in the middle of a pallet inside the applicant's truck. The applicant could not give any explanation as to how those cases ended up shrink-wrapped inside his truck. There was no evidence tendered to the effect that anybody had opened the shrink-wrapped goods and placed two cases of disprins inside it. The applicant and/or his assistant had shrink-wrapped their load and the two cases of disprins were found inside the shrink-wrap they had done. I can go as far as to find that the **only** reasonable inference to be drawn from the evidence is that it was the applicant and/or his assistant who had placed the two cases in the shrink-wrap they had done. It is not necessary for me to go that far as the law only requires an employer to prove the employee's "guilt" on **a balance of probabilities**. I find that the more probable inference to be drawn is that the applicant and/or his assistant had shrink-wrapped those cases together with other goods in their load. If the applicant had been

framed, as alleged, then one would have expected those cases of disprins to have been separately shrink-wrapped and put into the truck.

43. I accordingly find that the applicant was in unauthorised possession of stock.

44. I shall now deal with the allegation that the applicant had been framed. It was put to Harichandra during his cross-examination that he had framed the applicant because of an argument relating to the applicant's injury on duty. Harichandra denied that he had framed the applicant and further stated that the injury had happened whilst the applicant did a delivery at another site. He (Harichandra) had nothing to do with that injury. Even if I were to accept that that there had been some argument between the applicant and Harichandra then there was no explanation as to why Lotriet, Nayer and Kruis would all have conspired to get rid of the applicant. There was no evidence that any of them had an argument with the applicant. Furthermore it is highly unlikely that those four people as well as the two other drivers would all have conspired to get rid of the applicant. After all the applicant was only a driver who had been with the respondent for just over four months. Why on earth would the respondent get six people to conspire to get rid of the applicant?

45. I accordingly find that there was absolutely no substance in the applicant's allegation that he had been framed.

46. The applicant did not deny that he was well aware of the company rules relating to the driver's responsibilities. He failed to carry out his responsibility to check his load properly and as a result he ended up with two cases of disprins that he was not authorised to have in his possession. That is a very serious offence in terms of the respondent's code of conduct.

47. I accordingly find that the applicant's dismissal was substantively fair.

48. With regard to the procedural fairness of the dismissal it was the applicant's case that he was not allowed to call his witness at the disciplinary hearing. Nayer denied that he had not allowed the applicant that opportunity. What I find very interesting is that the applicant had also not called his witness at the arbitration hearing. There was a bald

allegation that the witness was scared to give evidence, as he was still working for the respondent. I do not accept that. Mr Madladla could have subpoenaed him to come and give evidence. It should also be noted that the initial dispute was referred by the applicant (Malimela) and 1 other. It is not clear who the other applicant was, but one can assume that it must have been the applicant's assistant, who was also going to be his witness. There is no indication on the file as to what had happened to the other applicant in the initial referral. If that other applicant had indeed been the applicant's assistant then I find it very strange that he was now unwilling to testify because he was scared.

49. The applicant further denied that no minutes were taken during his hearing and he alleged that everything was fabricated. I find that very hard to believe. It is highly improbable that Nyer, who had nothing to do with the applicant, would concoct some 30 odd pages of minutes. He knew nothing about the case and how on earth would he have known what the witnesses and the applicant had to say to record their respective versions. Mr Madladla argued that there should have been an independent minute taker. There is nothing in the Labour Relations Act or the Code of Good Practice contained in Schedule 8 to the Act or the law that requires that. Mr Madladla did not refer me to any authority or case law requiring that an independent minute taker should take minutes at a disciplinary hearing. I accordingly find that the applicant's dismissal was also procedurally fair.

50. With regard to the argument of inconsistency it should be noted that inconsistency per se does not automatically renders a dismissal unfair.

51. In **National Union of Metal Workers of South Africa v Henred Fruehauf Trailers 1995 (4) SA 456,** the principle of parity was inter alia addressed.

In that case 44 employees were dismissed for failing to adhere to a final ultimatum. Those 44 employees comprised only 2% of the entire workforce. The employer distinguished between them and the other 98% on the basis that they failed to adhere to the final ultimatum. They were not arbitrarily chosen, but they were working on that particular day and they did not adhere to the final ultimatum.

The court reinstated those 44 employees inter alia because they comprised only 2% of the total workforce of some 2000, all of whom had been engaged in illegal industrial action in the form of an overtime ban and a go-slow.

At **463G-464A** it was held that:

"Equity requires that the courts should have regard to the so-called 'parity principle'. This has been described as a basic tenet of fairness which requires that like cases should be treated alike. (See Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229-30.) So it has been held by the English Court of Appeal that the word 'equity', as used in a United Kingdom statute dealing with the fairness of dismissals, 'comprehends the concept that employees who behave in much the same way should have meted out to them much the same punishment'...

In the circumstances of this case, a denial of reinstatement would not be in accordance with fairness and justice."

52. In **SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd (1999) 20 ILJ 2302 (LAC), Conradie JA** held at **2313C** that:

" In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle'... There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness...

Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case...

If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value

judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself."

53. In that case 34 out of 37 employees were dismissed. The court upheld the dismissal of all the employees and set aside the order of the Industrial court to reinstate 17 of them. The Industrial court had reinstated 17 employees because they had taken part in a demonstration for the first time. The other employees were already on a final warning for similar conduct. In coming to that conclusion the court held that the Industrial court had seriously misjudged the seriousness of the applicants' misconduct.

54. At **2314G-I** it was held that:

"In coming to this conclusion I believe that the Industrial Court seriously misjudged the gravity of their misdemeanour. As I have said earlier they caused the respondent extensive and long lasting damage. They deserved to be dismissed. That the other individual appellants doubly deserved to be dismissed did not mean that they should have escaped the same fate."

55. In the present case there was no evidence as to why the applicant's assistant was not dismissed. Ms Kunnie, in her closing argument, stated that the assistant had not been dismissed because he had not signed the trip sheet and therefore did not take responsibility for the load. Closing arguments do not constitute evidence and I can have no regard to that statement. No evidence was led during the arbitration hearing that that was the reason as to why the assistant had not been dismissed. That, however, does not necessarily mean that the applicant's dismissal was unfair. It was common cause that he had signed the trip sheet and therefore he was ultimately responsible for his load. For the reasons set out above I have found that he was in unauthorised possession of two cases of disprins and his dismissal was substantively fair. Furthermore there was evidence to the effect that the applicant was already on a final written warning during his first three months' of employment. There was, however, no evidence as to what the warning was for apart from Ms Kunnie's closing argument to state that it was for refusing to obey a reasonable and lawful instruction.

Again there was no evidence tendered during the arbitration hearing to that effect. Be that as it may I find that the applicant's misconduct on its own was serious enough to warrant a dismissal.

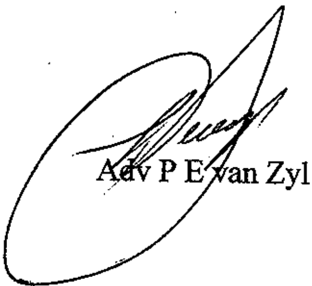
56. Under the circumstances I find that there was no merit in the allegation of inconsistency.

57. Ms Kunnie requested that costs should be awarded against the applicant. I am of the view that this matter was not so frivolous and vexatious that costs should be awarded. The respondent may well be criticised for opening the applicant's truck in his absence and he might well have felt justified in challenging his dismissal as a result of that.

Award

58. The application is accordingly dismissed and no order is made as to costs.

Signed at Durban this 03rd day of March 2010.



Adv P E van Zyl