NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY

In the matter between

T RAMOSELI **Applicant**

And

RAILIT TOTAL TRANSPORT (PTY) LTD **Respondent**

ARBITRATION AWARD

Case Number:	NBCRFI ref D174/F/2301/06A Tokiso Ref: Tokiso N7/275
Date/s of arbitration:	12 September 2007
Date of award:	19 September 2007
Head-note:	Unfair dismissal: Substantive and procedural fairness.

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DETAILS OF HEARING AND REPRESENTATION

The present dispute was referred to arbitration as an unfair dismissal dispute and the hearing was held at the Council premises in Bloemfontein on 12 September 2007.

The applicant represented himself. The respondent was represented by Ms S Maskowitz. My thanks are due to both representatives for their assistance.

Application for postponement

After the applicant's testimony he applied for a postponement so that Council could subpoena three witnesses for him; the applicant was opposed by the respondent. Having heard submissions from both parties on the application, I made a verbal ruling refusing the applications for reasons which are set out below.

With regard to the documentation pertaining to witnesses, it appears that the applicant requested Council in writing on 12 June 2007 to subpoena the three witnesses; no reply was received and the request was not followed up. The pre-arbitration meeting resulted in a disagreement with the applicant stating that Council would subpoena witnesses while the respondent said each party was responsible for securing its own witnesses; as a result no pre-arbitration minute had been signed. The notice of arbitration requested both parties in writing to confirm which witnesses would be called for arbitration and the applicant did not respond to this.

With regard to costs, it is clear that both parties and Council would incur costs should the case not be finalized on the day of the hearing. The applicant made it clear that he was not in a position to pay any costs awarded against him should that turn out to be the case.

With regard to the purpose for which the witnesses would be called, the applicant stated that the only reason they would be called is to confirm his version that he was helping the other driver and that this led to a verbal argument, nothing else; this was confirmed to some extent in the documentation handed in at arbitration. Both these aspects of the applicant's case were not

disputed by the respondent and it is therefore clear that the calling of these witnesses would not add materially to the applicant's case.

Having regard to all the above aspects as a whole, I found that insufficient grounds had been laid to grant a postponement in this matter in order to call the three witnesses of the applicant and the application for postponement was refused.

BACKGROUND

The respondent is a transport company with a branch at Welkom where the applicant was employed. The applicant was suspended on 28 August 2007 after an incident involving him and a colleague, D Mosenoge, and charged with failing to comply with the respondent's rules and procedures regarding assault and/or fighting in the workplace. After a disciplinary inquiry the applicant was found guilty and dismissed on 6 September 2006 and this was confirmed on appeal. He then referred the present dispute to the Council where it remained unresolved at conciliation and proceeded to arbitration. No pre-arbitration minute was signed by the parties owing to a dispute over the content thereof.

ISSUES IN DISPUTE

The substantive fairness of the applicant's dismissal is in dispute with regard to whether the applicant was guilty on the charge against him and the fairness of the sanction.

The procedural fairness of the applicant's dismissal is in dispute with regard to the fact that the applicant was suspended and charged whereas the other person involved in the confrontation was not.

SURVEY OF EVIDENCE AND ARGUMENT

Both parties made the use of witness testimony and the employer handed in documentation , the contents of which were accepted as being what they purported to be and to which no objection was made.

The case for the respondent

Mr M D Mosenogi was at the relevant time a driver for the respondent and the applicant was his assistant.

According to Mr Mosenogi, the applicant was required to assist him to sort parcels and to only help others when this task was finished. On 28 August 2006 the applicant did not help him but helped another team. Mosenogi called the applicant several times but was ignored, then the applicant swore at him rudely three times and Mosenogi swore back. Then the applicant came quickly towards to Mosenogi and hit Masenogi once on his right cheek with his right open hand. This did not require medical attention but was painful and made Mosenogi angry.

A colleague separated the two men and took them to the manager Mr J Thibatsana where the applicant admitted hitting Mosenogi.

Mr Mosenogi said that the rule in the workplace was that anyone fighting would be dismissed and that is why he did not hit back

When the applicant put to the witness that he was helping another driver (Ralepana), Mosenogi said that at that time the applicant was just waiting and drinking tea in his left hand.

Ms M Mile is a cleaner for the respondent.

On the day of the incident, Ms Mile heard loud voices from the kitchen and she went to look. She saw the applicant and Mr Mosenogi arguing. Thereafter she saw the applicant hit Mosenogi with his open right hand on Mosenogi's left cheek, though she first said it was Mosenogi's right cheek

and then corrected this. Ms Mile said she did not see the applicant's left hand as the applicant had his back to her at the time. She then reported the incident to the manager.

Ms Mile said the rule at work was that a person would be dismissed for fighting.

In argument, it was submitted that the dismissal of the applicant was substantively and procedurally fair and should be confirmed.

The case for the applicant

Mr T S Ramoseli is the applicant in this matter.

The applicant said that he was a driver and not an assistant driver; he denied being demoted to an assistant. He worked in a team with Mr Mosenogi on the same route but he also drove the truck; his salary was that of a general worker and not that of a driver and he was dissatisfied with this.

On 28 August 2006, according to the applicant, he was helping his driver Mr Mosenogi to pack items together as they worked on the same route. The applicant took some irons with a forklift to the corner and then went to the kitchen to make coffee as he knew Mosenogi was nearly finished with the packing and sorting of parcels. He had tea and placed the cup on the last box of another driver Mr Ralepoma and was on his way to help Ralepoma and his assistants when Mosenogi called him to help sort checkers out. The applicant replied that Mosenogi was nearly finished and that he was helping Ralepoma so they could speed up the process of loading. On the way to Ralepoma, Mosenogi said he was not there to work for the applicant, the applicant replied in a similar vein, he said they must work together as a team, that he was going to help Ralepoma, and thereafter he can drive in Mosenogi's truck to load it as well. Then Mosenogi told the applicant that he was undermining him (Mosenogi) and that he would hit the applicant until he shit himself. During this argument the applicant was helping Ralepoma, he had the last box, he took his tea and went to Mosenogi and said the thing was now getting personal and if Mosenogi says he will hit him until he shits himself then this is not going to work.

Mosenogi advanced on the applicant and pointed his fingers in the applicant's face, the applicant pushed him back – he didn't hit Mosenogi because he was holding his cup of tea in his right hand; in cross-examination he said the cup was not empty but was full as he had not drunk it before putting it on the box. The applicant and stepped back and Mosenogi came after him, still pointing fingers in the applicant's face and touching his chin. The applicant softly pushed Mosenogi back three times with his left hand to defend himself against the pointing fingers and no colleague separated them. The applicant said he had not disputed the respondent's version at arbitration because he had not been given a chance to ask questions; he said he had not put this version at his inquiry as there were no cameras. He said everything Mosenogi said was a lie and Mosenogi was just used by the manager to get rid of the applicant; he said everyone involved in the case had been dismissed (later he claimed they had all resigned) because of this case, though Ms Miles was not and she was just a liar. Although it was put to the applicant that Mosenogi had been dismissed for an unrelated matter in mid-2007, the applicant said Masenogi had resigned.

Then the manager Thibatsana called the two men into his office and asked the applicant why he was fighting Mosenogi, the applicant denied doing that, and Thibetsana said fighting would lead to dismissal. Then Thibetsana suspended the applicant but not Mosenogi.

The applicant stated that he could be expected to help his colleague but not at the time Mosenogi wanted help as he thought it was better to help the other driver. He also said he was unaware of the respondent's rules because he had not signed them or the disciplinary code, nor had he been given a copy of such documents.

In argument, it was submitted that the applicant's dismissal was both substantively and procedurally unfair and the applicant asked for retrospective reinstatement.

ANALYSIS OF EVIDENCE AND ARGUMENT

Substantive Fairness

Guilt on the charge

The testimony of Mr Mosenogi and Ms Mile was satisfactory and they came across credible witnesses with no motive to fabricate. This does not mean that their testimony was faultless – Mr Mosenogi said he was hit on the right cheek with the right hand and Ms Mile initially said it was the right cheek before correcting herself - but overall their observations are consistent and there is nothing other than speculation to support the applicant's conspiracy theory about the witnesses. The testimony of both witnesses was clear and simple with regard to the actual assault. The applicant himself did not disagree with the main thrust of Mosenogi and Mile's evidence despite disputing certain other details – the applicant was unrepresented but was reminded on a number of occasions to inform each witness where he disagreed with their testimony. Other witnesses to this event were no longer with the respondent but their version is set out in the record of the disciplinary inquiry and essentially corroborates the version of the respondent's witnesses; this is mentioned simply for completeness and reliance has not been placed on this hearsay evidence as it is not necessary to do so.

The applicant's version consisted of a bare denial with regard to the actual assault testified to by the respondent's witnesses; his version of pushing and pointing was not put to the respondent's witnesses fro comment, as was the matter of the teacup being in his right hand which was the hand that was alleged to have hit Mr Mosenogi. Then, when this was raised with the applicant he could do more than fall back on conspiracy theory and a lack of chance to ask questions which were singularly unconvincing. As the applicant himself indicated during the application for postponement after his testimony, the other witnesses he asked to have subpoenaed would not have added anything beyond the background to the physical assault and so the applicant is, to all purposes and effects, a single witness.

Having considered the evidence led at arbitration, I find it probable that the applicant did hit Mr Mosenogi in the face with an open hand on 28 August 2007.

Despite the applicant's claims that he did not know the rule because he had not signed a contract or a disciplinary code, I find that an offence such as that with which the applicant was charged is not dependent on having a copy of the code; even the applicant conceded as much and his

protestations in this regard did little to advance his case. I find that the applicant was aware – or can reasonably be expected to be aware – of the rule prohibiting fighting in the workplace or assault. It is also clear from clause 6.1.3 of the disciplinary code itself that both fighting and assault on another person with hands constitutes violent behaviour.

I therefore find the applicant guilty on the charge against him of failing to comply with the respondent's rules regarding fighting and/or assault at the workplace.

Sanction

The applicant alleged that his dismissal was too harsh, that he was the sole breadwinner at home and that this was his first such offence. The respondent argued that this was a serious offence and that employees knew that guilt on such a charge would normally lead to dismissal.

The applicant has been found guilty of striking his colleague with an open hand. The provocation for this was minimal, as the evidence shows, and there is nothing to indicate that that applicant was not the aggressor. While the strike was not serious enough to warrant medical treatment, it undisputedly and understandably caused physical pain and emotional anger to the victim. And the assault was to a senior colleague who was clearly entitled to ask for the assistance of the applicant, whether or not the applicant agreed with this. Nor did the applicant show any remorse and he denied this misconduct to the end, which does not help his case. The disciplinary code describes this misconduct as 'serious'; the evidence of the respondent's witnesses that such misconduct would normally lead to dismissal was not disputed and it indicates the application of this rule in the respondent workplace.

It is possible that I may personally not have imposed the sanction of dismissal in this instance as it was a first and isolated offence, despite the aggravating circumstances described above. But that is not the point – it is by now trite law that it is for an employer to set the standards for conduct in the workplace and to enforce them; it is not for an arbitrator to interfere with this as long as the sanction falls within the range of appropriate penalties and is not clearly unfair.

I therefore find that the sanction of dismissal is appropriate in this instance.

Conclusion

The dismissal of the applicant is found to be substantively fair.

Procedural Fairness

The failure of the respondent to suspend Mr Mosenogi

I have found above that the applicant was guilty of striking Mr Mosenogi in the face with his hand. The evidence indicates that an investigation was conducted on the spot, after which the evidence was that the applicant was the aggressor and a decision was made to suspend him pending the disciplinary inquiry. The applicant argues that it was unfair not to also suspend Mosenogi.

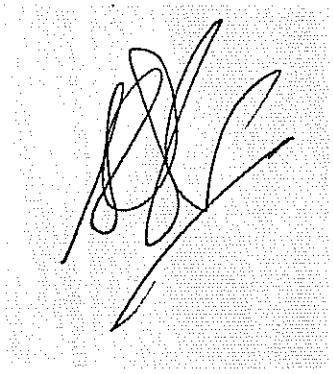
I find that the reasons advanced for suspending the applicant and not Mr Mosenogi are convincing. In any event, no prejudice to the applicant has been demonstrated by this suspension in respect of his dismissal. There is no basis whatsoever to find that this suspension renders the dismissal of the applicant procedurally unfair.

I find the dismissal of the applicant to be procedurally fair.

AWARD

1. **The dismissal of the applicant is found to be substantively and procedurally fair and is confirmed.**

2. **There is no order as to costs.**



ADV ANTONY OSLER

Arbitrator