



ARBITRATION AWARD

Arbitrator: W de J. Stapelberg
Case Reference No.: GPRFBC 6771
Date of award: 28 January 2011

In the arbitration between:

ELKIA PELLE Employee
party

and

INITIATIVE SA INVESTMENT Employer
party

Union/Employee's representative Himself

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1. DETAILS OF HEARING AND REPRESENTATION

This matter started on 20 November 2009 before Adv. Ronnie Bracks when the Applicant's representative objected to the Respondent's representative.

A Ruling was issued on 4 December 2009, where adv. Bracks issued a Ruling that the Respondent's representative has locus standi to represent the Respondent.

The matter continued before me on 17 February 2010 and on 14 April 2010 the Respondent's case was completed.

On 20 May 2010 the matter was set down to continue and the Respondent tabled letters from the Head Office of the union to indicate that the Applicant's representative is not an official of the union and cannot represent on their behalf. The matter was postponed to give the Applicant's representative an opportunity to sort out the representation problem.

On 3 November 2010 the matter again could not continue and a Ruling was issued on 10 November 2010 that the Applicant's representative (Boitumelo Ramagale) lacked locus standi to represent the Applicant.

On 18 November 2010 the Applicant wrote a letter to the Council to proceed with the matter and that he will represent himself.

On 12 January 2011 the arbitration was completed and the parties were given till 18 January 2011 to submit closing arguments.

During the Respondent's version and specifically during cross examination the Applicant's representative had much to say about the Respondent's representative. These arguments will not be referred to or dealt with as adv. Ronnie Bracks made his Ruling in this regard.

The Applicant handed in a Bundle of documents, Bundle C pages 1 to 37 and the Respondent handed in Bundle B pages 1 to 38 as well as Addendum B1. Addendum B1 was disputed by the Applicant. The pre arbitration minutes were handed in as Bundle A.

Further pages were added to Bundle B and C during the proceedings.

The proceedings were electronically recorded and the proceedings were held in English.

2. ISSUE IN DISPUTE

Whether the dismissal of the Applicant, Elkia Pelle, was procedurally and substantively fair.

3. OPENING STATEMENTS

The Applicant stated that on the day in question that he was charged with dereliction, of duties he was not even on duty. The Applicant also argued that before his dismissal he reported a number of grievances which were not addressed.

He was appointed verbally with no letter of appointment or any policy or list of tasks given to him.

The Applicant alleged that his dismissal was both procedurally and substantively unfair and he requested reinstatement with back pay.

The Respondent stated that the company is small and young in the industry. They are transporting coal for Eskom and they have a flat organizational structure. The Applicant, as Logistics Manager, reported directly to a director of the Company.

The Applicant was in control of the drivers and vehicles and was responsible for safety and security of assets.

The Applicant was charged with dereliction of duties, gross negligence and failing to act in the best interests of the Respondent.

The Applicant was a senior employee and he had a fair hearing with all rights afforded to him. He already had a final written warning and dismissal was the appropriate sanction.

The Applicant appealed against his dismissal but the appeal chairperson upheld the sanction against the Applicant.

The Respondent stated that it is not true that the Respondent made the Applicant's life intolerable and if that was the case the Applicant could have declared a constructive dismissal.

4. SURVEY OF EVIDENCE AND ARGUMENT

4.1 Respondent's version

4.1.1 Testimony of Jan Harm Petrus Strydom (Jan)

Jan was sworn in and stated that he was the chairperson at the Applicant's hearing.

Jan stated that he assists the Company with IR, HR and Bargaining Council issues on a part time basis.

Jan stated that on his arrival on 1 April 2009 as chairperson he greeted everybody and went to the board room. Jan stated that he did not discuss the matter with anybody at the Respondent.

Jan confirmed that pages 14 to 16 of B is a summary of the record of the hearing. Jan stated that before the start of the hearing he made sure the Applicant's rights were afforded him in respect of things like the notice, representative, interpreter, etc.

The charges were read to the Applicant and he stated that he doesn't understand why he was charged. Jan stated that he then entered a plea of "not guilty".

Jan stated that he listened to the evidence of the 3 witnesses called by the Respondent and the Applicant's evidence and afterwards requested the parties to present mitigating and aggravating factors.

Jan stated that he found the Applicant guilty on all 3 charges. These charges were very serious charges and dismissal was the appropriate sanction.

4.1.2 Cross examination of Jan Strydom

Jan denied that he was biased, despite advising the Respondent on HR and IR matters and chairing disciplinary hearings. Jan was asked about the charges and the meaning of dereliction of duties. Jan explained that the Applicant failed to do his job as Logistics Manager by failing to properly control the vehicles and drivers.

Jan denied that he was talking to witnesses and directing them during the Applicant's hearing.

It was put to Jan that the date on the Notice is in respect of the incident dated 6 March 2009 and the Applicant was not prepared for any incidence that happened on 7 March 2009. Jan stated that it was a typing error and it was corrected at the beginning of the hearing and the Applicant never objected that the matter be proceeded with.

Jan denied that the outcome of the disciplinary hearing was given to the Applicant on the day of the hearing and stated that it was done a few days or a week after the hearing. Jan stated that he e-mailed the outcome to the Company. Jan denied that the Applicant was not afforded an opportunity to cross examine witnesses and stated that evidence will be lead in this regard.

Jan stated that the date on page 16 of B is a typing error and should be 6 April 2009 and not 6 March 2009. The outcome was given to the Applicant on 14 April 2009.

It was put to Jan that the Applicant denies any knowledge of document B1. Jan stated that this document setting out duties of the Logistics Manager was compiled after a number of meetings and workshops with the Applicant's participation.

4.1.3 Testimony of Thandeka Mgojo (Thandeka)

Thandeka was sworn in and stated that she is the Operations Director for the Respondent and the Applicant reported to her.

Thandeka denied that she had any discussions with Jan before the hearing. Jan only greeted her and proceeded to the board room.

Thandeka confirmed that Jan informed the Applicant of his rights and she made the mistake with the date of the day of the incident. The Applicant, however, had no objection to proceed with the matter.

Thandeka confirmed that the Applicant never informed the hearing about witnesses he wanted to call or a representative that he wanted to utilize.

Thandeka confirmed that the Disciplinary Code on page 10 of C and the Code on page 35 of B are the same.

Thandeka stated that the charges against the Applicant arose from an accident that driver Zama was involved in on Saturday 7 March 2009. She got a phone call from Bongi and she (Thandeka) then phoned Khosi, the site supervisor at the mine.

Thandeka stated that it was between 23h00 and 24h00 hours when she tried to get hold of the Applicant. She tried over and over again and finally spoke to him at about 01h00 on Sunday morning.

Thandeka confirmed that the Applicant already had a final written warning on file.

Thandeka confirmed that the notification for the hearing was compiled by her.

Thandeka stated that the Applicant informed her that on Saturday 7 March 2009 he spoke with the drivers at about 11h00. The Applicant told her that he left the yard at 18h00 and 2 of the drivers were not back (Addis and Zama).

Addis came from Hendrina which is about 50km from the yard and he should have been back in the yard by 13h00. Thandeka stated that the Applicant should

have followed up which he failed to do. Zama was coming from Majuba which is about 2 hours from the yard. The Applicant told her that he spoke with Zama at about 16h00 and Zama should have been back in the yard by 18h00, after off loading.

Thandeka stated that it is the duty of the Logistics Manager to ensure the safeguarding of all Company assets and he should not leave the yard till all the trucks are back and secured. Thandeka was referred to document B1 and stated that as a small company they employed a specialist company to do job profiling for them.

Thandeka stated that all 4 logistics managers were involved in the exercise which included the Applicant. The 2nd page shows that the Applicant was responsible for managing the people under his control, which included drivers and workshop staff.

Under “technical competencies” it shows that the Applicant must have an “understanding of transportation logistics”. That is to ensure that correct scheduling is done to ensure that loads are maximized.

Thandeka explained that the Applicant was on duty when the specific incident happened as the other Logistics Manager exchanged his working weekend with the applicant, to attend to his son’s school activities.

Thandeka confirmed that the Applicant had everything to be able to do his work such as a cell phone, 2 bakkies and tools in the workshop.

Thandeka stated that drivers work shifts and from Mondays to Fridays they transport coal from the mines to Eskom on a 24 hour basis. Saturdays they only work a portion of the day and Sundays depend on any special needs.

Thandeka stated that the Logistics Managers supervise the drivers and the trucks to ensure that everything runs on time and smoothly. Trucks must go out on time, the delivery by the drivers are monitored, that the required loads reach Eskom. The Logistics Manager is also in charge of the workshop and have the overall responsibility to look after the Company’s assets.

Thandeka confirmed that the Applicant was a senior staff member earning R16 689.60 per month. Thandeka denied that there was any effort or plan to get rid of the Applicant.

Thandeka confirmed that before the hearing of the Applicant he was a good worker and she had no problems with him. Thandeka confirmed that the Applicant first worked in Sasol before he was transferred to Ermelo in December 2007 and the Applicant was aware that he had to work alternate weekends.

The Applicant worked many weekends before the final incident happened. Thandeka was shown a grievance letter allegedly written by the Applicant and she stated that she doesn’t remember seeing such a letter before and that it was not handed in at the disciplinary hearing

4.1.4 Cross examination of Thandeka Mgojo

Thandeka was asked various questions regarding the company’s policies and procedures and she confirmed these policies and procedures.

Thandeka stated that she didn't see any reason to call Zama and Addis as witnesses to the Applicant's hearing as she accepted what the Applicant told her about his communication with them.

Thandeka was questioned on the outcome of the hearing that was not signed by the chairperson and she stated that it was sent by e-mail and she never saw a reason that it should be signed.

Reference was made to page 15 of C of the Code where it stated that the hearing must be reconvened to listen to mitigating and aggravating factors and Thandeka confirmed that her representative, Jan, do HR work for the company denied that the Applicant's case was discussed with him, before the hearing. Thandeka was questioned on the typing error of the date of the incident that was on the 7th and not the 6th of March 2009 as reflected on page 14 of B. She denied that this could have had an effect on the Applicant's preparation.

Thandeka confirmed that the summary of the disciplinary hearing doesn't show any cross examination took place but she denied that the chairperson was biased.

Reference was made to page 15 of B where it indicates that the Applicant spoke with Addis at 11h00. It was put to Thandeka that the Applicant will dispute that. Thandeka stated that it happened as it was recorded.

Thandeka stated that she took the Applicant's word that he left the yard at 18h00 on that Saturday 7 March 2009 and two trucks were not back in the yard. The accident happened around 22h00 and she could only get hold of the Applicant at 01h00. Thandeka stated that the Applicant didn't do his job namely to ensure that all trucks are accounted for, before leaving the yard.

4.1.5 Re-examination of Thandeka Mgojo

Thandeka confirmed that Applicant at no stage informed her that the trucks were delayed.

4.1.6 Testimony of witness Sibongile Modise (Bongi)

Bongi was sworn in and testified that she is the CEO of the company. Bongi confirmed that the Applicant's hearing was held on 1 April 2009, but denied that the chairperson discussed the matter with her before the time. Bongi stated that the chairperson greeted her on 1 April 2009 and proceeded to the board room.

Bongi confirmed that the Applicant asked questions at the hearing.

Bongi stated that on the day of the incident she received a call from the site manager that one of their drivers was involved in an accident. Bongi stated that she tried to get hold of the Applicant but was unable to. Bongi confirmed that the Logistics Manager must ensure all trucks are in the yard at the end of a shift. The Logistics Manager must give drivers support and assistance where needed. Bongi confirmed that the Applicant was part of management and apart from his salary he received a car allowance and had the use of a Company bakkie.

Reference was made to the job profile in document B1 and Bongi stated that an outside company had discussions with the 4 Logistics Managers, before this document was compiled.

Reference was made to page 2 of B1, where it is stated a function of the Applicant is: “managing people”. On page 6 it states “correct scheduling of trucks” and page 9 the following under “quality requirements”

Accurate:

- Proper planning of time scheduling
- Routing of trucks where there is coal
- Minimum standing time and turnaround time

Timely:

- Timeous truck scheduling
- Estimated time of arrivals

Bongi confirmed that the above was required during the week as well as over weekends.

The Applicant worked alternate weekends since he started with the Company.

Bongi stated that the Applicant was employed when they got their second contract and they needed to employ more staff. The Applicant submitted his CV and he was interviewed. During his interview the job requirements were fully discussed and the Applicant had no objections to work on Saturdays.

Reference was made to the notification and disciplinary hearing that was held on 22 January 2009 (pages 29 and 31 of B).

Bongi explained that the disciplinary hearing of 22 January 2009 arose from the Applicant’s failure to carry out his duties on 2, 3 and 4 January 2009 when he was not at the yard in Ermelo. The Applicant sent her sms messages about the movements of the trucks and she assumed that he was at the yard, while he was at home. During this period trucks were overloaded due to a lack of personal supervision of the Applicant and she (Bongi) had to sort out the problems. The Applicant was found guilty of dereliction of duties, failing to follow company policies and procedures and failure to report for duty from 2 to 4 January 2009.

The chairperson recommended dismissal as the Applicant already had a final written warning.

Bongi stated that she decided to again issue to the Applicant a final written warning. Bongi confirmed that the Applicant developed a pattern of behavior of not doing his duty, both hearings in January and April 2009 had to do with dereliction of duties. Bongi was questioned on the death in the Applicant’s family. Bongi stated that the Applicant never requested leave to deal with a death in the family only afterwards did he inform her about a death in his family.

4.1.7 Cross examination of Bongi Modise

Bongi confirmed that she testified at the Applicant’s hearing in April 2009 but it is not reflected in the summary of the hearing on pages 14 to 16 of B. It was pointed out to Bongi that various documents were clearly marked with the name of the Respondent, but that B1, the job description document is without any name of the Respondent.

Bongi maintained that it was their document and that the Applicant participated in the process to get to the final document.

Bongi also stated that the Applicant received B1 but he didn't sign for the document. Bongi stated that when they started the company they were only 4 people and did not issue letters of employment, this was only done after they started to grow in 2007/2008.

New employees were issued contracts of employment but due to an oversight the first employees, including the Applicant were not issued with a contract. Bongi was questioned on the Applicant's hearing of January 2009 and stated that during the hearing the Applicant never presented a doctor's certificate or a death certificate to explain his absence.

Bongi stated that the Applicant deceived her by sending her sms messages about the trucks. She assumed that he was in Ermelo doing his duties while he was in Sharpeville. Bongi showed sms messages from the Applicant as it appeared on her cell phone on 3 January 2009 and 4 January 2009.

It was alleged that the Applicant was not given documents to prepare for his hearing and he was not given an opportunity to cross examine witnesses at the hearing. This was denied by Bongi.

4.1.8 Testimony of Thebogo Uriel Samson (Thebogo)

Thebogo was sworn in and stated that he works for the Respondent as a Logistics Manager at Ermelo depot.

Thebogo stated that his duties are to ensure that the fleet is run optimally and that the trucks are properly maintained.

Thebogo confirmed that he and the Applicant work alternate weekends. Thebogo confirmed that he was off on Saturday 7 March 2009 and the Applicant was on duty.

Thebogo confirmed that on a Saturday all trucks should be in the yard by 18h00 and the Logistics Manager must wait till all trucks are back. Thebogo confirmed that a truck from Majubu to Ermelo should not take longer than 2 hours and from Hendrina not more than 1 hour and if it takes longer you should contact the driver.

Thebogo confirmed that he and the Applicant was involved in the compilation of document B1, the job profile of a Logistics Manager.

Thebogo confirmed that the Applicant was aware of the requirements of the job as Logistics Manager.

4.1.9 Cross examination of Thebogo Samson

Thebogo confirmed that he did not testify at the Applicant's hearing but denied that he was coached to testify at this Arbitration.

Thebogo confirmed that if a vehicle is in an accident during a shift, the Logistics Manager must go to the accident scene to take statements. A mechanic should also go to the accident scene. Thebogo was not aware of any action taken against the mechanic for not being available to go to the accident scene on 7 March 2009.

Thebogo was asked if you have to attend funerals if your mind could be affected and he replied that he doesn't know.

4.1.10 Re examination of Thebogo Samson

Thebogo stated that he and the Applicant stood in for each other for weekends on a number of occasions. Thebogo stated that January and February 2009 was not a good period for the Applicant due to funerals he had to attend.

Thebogo stated that when you stand in for somebody you assume full responsibility. Thebogo stated that during January and February 2009 he stood in for the Applicant on two occasions.

5. APPLICANT'S VERSION

5.1 Testimony of Elkia Pelle

Elkia was sworn in and stated that he started to work for the Respondent in 2007 and he was dismissed in April 2009. At the time of his dismissal his salary was R16800 per month.

Elkia stated that he was employed with the Respondent without being given a contract of employment and he was not aware of the policies and procedures or the Code of Conduct of the Respondent. Elkia stated that he was charged with dereliction of duties but he was not given an explanation of what that meant. Elkia stated that he is still challenging the role of the Company's representative, Jan Strydom as he did everything. He was doing HR work for the company, he was the chairperson of his hearing and he took the minutes.

At this arbitration he (Jan) is defending his own decision and Elkia is questioning the lawfulness of that. Elkia stated that the Notice of his hearing referred to an incident on 6 March 2009 and he challenged that and requested a postponement. He prepared for charges of 6 March 2009 and not 7 March 2009. Elkia stated that he was not given an opportunity to cross examine the company's witnesses and Jan was the only person who cross examined.

Elkia also alleged that Jan was leading evidence for the company.

5.1.1 Cross examination of Elkia Pella

Under cross examination Elkia denied that the Company called witnesses. Elkia admitted that Modise asked questions but added that Jan also asked questions. Elkia could only remember that Jan asked him where he was and added that Jan was not supposed to ask such questions.

Jan stated that he could ask questions when information is left out or when clarity is required. Elkia disagreed but could not remember any other questions that Jan allegedly asked him. Elkia also alleged that it was unfair that Jan as the chairperson was taking notes of the hearing and said that Jan was biased.

Elkia also accused Jan of talking with management before the hearing. This was denied by Jan.

Elkia denied that the charges were explained to him. Elkia was asked why did he fail to establish where the drivers were before he left. Elkia stated he tried to contact them but could not get hold of them.

Elkia admitted that he just left it when he was unable to contact them. It was put to Elkia that a Logistics Manager would not just leave it, but will phone others, even the police. Elkia stated that he would have done it, if it was part of his job description.

It was put to Elkia that 3 witnesses testified that it was part of his job description. Elkia stated that nothing was in writing. Elkia was referred to page 2 of B1, dealing with “managing people”. Elkia stated that it means to make sure that everyone is carrying out their duties.

Elkia was asked if it means that after 5 hours a driver is not back that he is still carrying out his duties and Elkia confirmed that it is correct. Elkia stated that he disputes document B1 despite the fact that 2 witnesses testified that Elkia participated in the creation of the document.

In reply to a question, Elkia stated that he didn’t understand his responsibilities and was “working out of my head”. Elkia was asked why he didn’t wait for Addis to return on 7 March 2009 before leaving. Elkia stated that his knock off time was 18h00.

Elkia stated that on the day of the incident he was not on duty but after further questions he admitted that he exchanged weekends with another manager and he was on duty. Elkia admitted that apart from trying to contact the drivers who had not returned to the yard he did not contact any manager, but he denied that he neglected his duties.

5.1.2 Re examination of Elkia Pelle

None.

6. CLOSING ARGUMENTS

Both parties submitted closing arguments which were taken into account.

7. ANALYSIS OF EVIDENCE AND ARGUMENT

The Applicant had much to say about the Respondent’s representative and despite a Ruling issued by another commissioner that the Respondent’s representative could represent the Respondent, these arguments were again and again referred to.

In the closing argument of the Respondent’s representative he attached a letter from the Road Freight Employers’ Association that his term as office bearer has been extended to 31 December 2011.

During the proceedings, at the close of the Respondent’s case it was found that the Applicant’s representative had no locus standi and the Applicant dealt with his own case after the matter was postponed on 2 occasions to afford the Applicant’s representative the opportunity to sort out his capacity to represent. The Applicant was charged with the following charges

1.1 failing to act in the best interest of the empoloyer in that your employer could not contact you on Saturday 6 March 2009 when an emergency occurred in spite of the fact that you were on duty and had a company’s cell phone.

1.2 Dereliction of duty – in that you failed to perform Your duties as Logistics Manager o Saturday 6 March 2009

2. Gross negligence: in that you neglected to perform your duties on 6 March 2009

The Applicant was unconvincing that he prepared for 6 March 2009 and not for 7 March 2009. 6 March 2009 was on a Friday and no incidence happened on that day. The charges clearly states that the incident happened on Saturday and the Applicant was well aware of what he had to prepare himself for.

The Applicant also argued that the case against him had to do with poor performance and the Respondent failed to follow the correct procedure.

Thebogo testified that the Applicant was able to perform at the correct standard as a manager and Thandeka also confirmed that the Applicant was able to do his work properly.

The Applicant was correctly charged with misconduct as he neglected his duties as a manger. Thebogo testified convincingly that the Applicant was part of the process to develop document B1, dealing with the work of a Logistics Manager and I cannot accept that a Manager, such as the Applicant earning a salary in excess of R16000 can plead ignorance as to what is expected of him.

The Applicant wants me to believe that he doesn't understand what dereliction of duties means. He had ample time to have established the meaning as he was issued with a final written warning in January 2009, for dereliction of duty.

The final written warning issued in January 2009 also showed deception on the Applicant's part in that while at home he would sms messages to Bongji about truck movements, as if he was at the yard.

On a balance of probabilities I find that the version of the Respondent is more probable than the version of the Applicant. As the Logistics Manager it was the Applicant's duty to look after the assets of the Respondent and to ensure that these assets are kept safely.

By leaving at 18h00 without making sure that the trucks were safe or by contacting his supervisors the Applicant neglected his duties.

Schedule 8 of the LRA, item 7, sets out the principles for substantive fairness. There must be a valid rule in place and the employee could reasonably be expected to be aware of the rule. The rule was consistently applied and dismissal was the appropriate sanction.

To expect from a Logistics Manager to control the staff under his supervision and the assets of the company is not an unreasonable rule and the Applicant was aware of this requirement.

One of the purposes of the Labour Relations Act is to advance economic development and managers have a duty in this regard. If they fail they not only jeopardize their own jobs but also the jobs of many other employees.

During cross examine of the Respondent's witness different versions were put to them and it was said that the Applicant could substantiate these versions. This however did not take place and the Applicant did not even present a version of what happened on Saturday 7 March 2009 or of any contact that he had with the drivers that had not returned. He simply left at 18h00 as it was his knock off time with no concern about the trucks and drivers.

No evidence was lead that the rule was not consistently applied. Dismissal was the appropriate sanction as the Respondent followed a system of progressive discipline and the Applicant was already on a final written warning for a similar offense.

Procedurally the Applicant's unhappiness was basically about the Respondent's representative and the various roles played by the representative.

The Applicant's testimony in this regard would have carried more weight if he showed himself more reliable in other areas of his testimony.

The Applicant's allegations that the representative discussed the matter with management was denied by the Respondent's managers and the Applicant was not able to indicate what questions were asked to him when the representative allegedly cross examined him.

8. AWARD

I find the dismissal of the Applicant, Elkia Pelle, was substantively and procedurally fair.

The application is dismissed.

No order as to cost is made



W de J Stapelberg
Arbitrator