



ARBITRATION AWARD

Arbitrator: Thandiwe Tshayana
Case Reference No.: GPRFBC16066
Date of award: 10 September 2011

In the arbitration between:

Mfana Elbie Phoku Union/Employee party

and

Unitrans Fuel & Chemical Employer party

Union/Employee's representative: Jan Mahlare

Union/Employee's address: 7186 Batho Sigcawu Street
Extension 7 Ivory Park 1685

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Employer's representative: R Oelofse

Employer's address: 3 Vereeniging Road
Alrode

Telephone: (011) 389-7320 fax: 086 674 4826

1. DETAILS OF HEARING AND REPRESENTATION:

The matter was set down for arbitration on 8 August 2011 and was finalised on 8 September 2011 at the offices of the National Bargaining Council for the Road Freight and Logistics Industries in Braamfontein. The applicant was represented by Jan Mahlare (Union official) and the respondent was represented by R Oelofse (Employer's organisation official).

2. ISSUE IN DISPUTE:

I have to decide whether the dismissal of the applicant was substantively and procedurally fair or not.

3. BACKGROUND OF THE DISPUTE:

The applicant was employed by the respondent as a driver in February 2005. He was dismissed on 2 March 2011. The applicant is challenging both the substantive and procedural fairness of his dismissal and is seeking compensation as a remedy. He was earning R1160.00 per week at the time of his dismissal.

4. SURVEY OF EVIDENCE AND ARGUMENTS

Respondent's evidence

Respondent's evidence was led by Eugene Jordan, Johan Van der Merwe and Etienne Steynburg. Mr Jordan testified that he was the contract's manager and based in Kroonstad. The applicant's accident was between Ventersburg and Finburg. He was called to the scene as he was the closest person to the scene. When he arrived the applicant was still in the vehicle and he took photos of the scene. He talked to the third party in the scene and he told him that the applicant was reckless. He confirmed what he was told by the third party by what he saw at the scene of the accident. It showed that the applicant was driving on the wrong side of the road. He just asked the applicant how he was doing.

When he was asked during cross-examination how he confirmed that the applicant was driving on the wrong side of the road he said he confirmed because of the skid marks on the road. He also confirmed that it was his assumption that the applicant was speeding.

Mr Van der Merwe testified that he was involved with safety and quality to do investigation on the accident. When he arrived at the scene of the accident the vehicle had overturned and the cylinders were thrown off the road. The tachograph was broken. He noticed marks on the right side of the road and there was nobody. The next day he went to visit the applicant in hospital and he said his legs were injured. Mr Van der Merwe stated that he went to the third party for a statement. From the skid marks he could see that applicant's vehicle was on the right side of the road.

During cross-examination he stated that he was a witness during the applicant's disciplinary hearing. He does not know if the third party was called as a witness. When it was put to him that the third party hindered the applicant and he swerved to the right hand side he did not have an answer.

Mr Ettiene Steynburg testified that he was the assistant contract manager. On 18 October 2010 he was contacted by somebody who said that there was an accident which was reported to the contract manager. At the accident scene he found the vehicle lying across the road and the pallets lying around. The applicant's statement did not correspond with the observation of the scene. The tachograph was not there. The applicant seemed not to be wearing the safety clothing during the accident. According to the tracker report the speed limit at the time of impact was 100km and the applicant was not supposed to drive more than 80km. The applicant was trained on carrying dangerous goods.

Mr Steynburg further testified that the applicant was suspended in January 2011 due to the extent of injury. On 23 January 2011 he was issued with the notice to attend a disciplinary hearing which was supposed to be on 2 February 2011. The hearing was postponed to 9 February 2011. The charges were withdrawn due to lack of structure and evidence. Mr Steynburg stated that after the hearing he was told by the chairperson that he did not have a case and the charges were withdrawn. The applicant was re-charged with the new chairperson and the new initiator after the charges were withdrawn by the previous chairperson.

During cross-examination Mr Steynburg stated that he does not blame the applicant for the missing tachograph. He also does not know if the safety clothing was removed by the emergency people or not from the applicant.

Applicant's evidence

The applicant testified that he was driving from Bloemfontein about 8 km from Ventersburg. He was driving on the left lane of the double lane and there was a truck that was following him. There was a lady who was sitting at the resting area in front as he was approaching. The truck that was driving behind him overtook him on the right lane and as soon as the driver saw the lady who was sitting in the resting area he quickly moved back in front of him and stopped without indicating. The applicant stated that in order to avoid colliding with the truck from behind he swerved to the right lane and the pup trailer jack knifed and overturned and the load fell on the road. He was unable to control the truck and it fell on the left. He stated that he could not swerve to the left as the road was narrowing and there was gravel on the side. He stated that there were highway patrol people who assisted him as his legs were stuck because he was injured. The truck was cut off by the ambulance personnel.

The applicant further testified that at the time of the accident he was driving at 79 to 80km. He stated that the respondent's trucks cannot drive more than 80km. He also stated that the tracker was not functioning at the time. The applicant testified that he could understand if the respondent showed him the tachograph chart to prove that he was driving at 100km. He testified that the tachograph machine was supposed to be in the truck and he does not know who removed it. He also stated that all the respondent's trucks have a drive cam that registers everything that is happening in the distance of 8 metres around

truck. He also does not know what happened to the drive cam. He also stated that it is improbable to drive on the lane of oncoming traffic when he had two lanes to drive on.

The applicant also testified that the chairperson who held the first hearing withdrew the charges against him. He said there was not enough evidence to charge him. The respondent decided to change chairperson and the initiator and call another disciplinary enquiry. On the second hearing his representative asked for the minutes of the previous hearing and he was told that they were thrown away because the case was dismissed. He decided with his representative that there is nothing they can say if the case was dismissed in the previous hearing.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

The applicant was charged and dismissed for damage to company property and gross negligence. It is common cause that the applicant was called to a first hearing on 2 February 2011 and it was postponed to 9 February 2011. It is also common cause that after the hearing the chairperson withdrew the charges against the applicant as the respondent had no case. The applicant's undisputed version is that the case was dismissed. It is common cause that the applicant was called to a second hearing for the same charges with a different chairperson and an initiator. It is the applicant's undisputed version that after his representative asked for the minutes of the first hearing he was told that they were thrown away as the case was dismissed. It is therefore clear from evidence led that the applicant was charged twice for the same offence. It appears that the respondent did not like the finding of the initial chairperson and it decided recharge the applicant for the same charges with a different chairperson and initiator.

The applicant was dismissed for causing damage to company property and gross negligence after he was involved in an accident. Respondent relies on the circumstantial evidence to prove its case, more especially the skid marks on the road. None of the respondent's witnesses were present when the accident occurred. The applicant gave a clear and detailed version on how the accident occurred. His evidence is that he was driving on the left lane on a two lane road. Another truck came fast from behind him and it overtook on the right. It immediately stopped in front of him next to the lady who was sitting in the resting area without indicating. The applicant explained that in order to avoid colliding with the truck on the back he swerved to the right hand lane and the pup trailer jack knifed and lost the load.

It is the applicant's undisputed version that the skid marks that were seen by the respondent's witnesses on the lane of the oncoming traffic could be the skid marks of the pup trailer. This version is highly probable as the trailer fell across the road. I therefore find it difficult to understand why the respondent's witnesses believe that the applicant intentionally drove on the side of the oncoming traffic as they were not present when the accident occurred. Even the drawing that was made by one of the respondent's witnesses after taking the statement from the hospital does not correspond with it. I am also

persuaded by the applicant's version that it was highly improbable for him to drive on the side of the oncoming traffic when he had two lanes to drive on.

It is also the respondent's evidence that according to the tracker report the applicant was driving at 100km at the time of the accident. This is disputed by the applicant. His version is that respondent's trucks do not drive over 80km. He also stated that the tracker was not working at the time of the accident. The applicant also testified that it is the techo chart that was supposed to show the speed he was driving. It is common cause that the techograph was missing from the truck and the techo chart could not be produced. It is respondent's version that it does not know who removed it. I do not believe that the applicant could know what happened to the techo machine as he was injured during the accident.

Respondent's first witness Mr Jordan testified that he was the first person who went to the scene of the accident and he found the applicant still trapped in the truck. It is therefore a mystery that the techograph just disappeared and it is highly unlikely that the applicant had anything to do with it as he was injured and trapped in the truck. Respondent's version is that the applicant was not wearing safety clothing at the time of the accident. Mr Steynburg also stated that he does not know if the safety clothing was removed by emergency personnel. Respondent also refers to the statement of the third party who was not called as a witness during the arbitration hearing. One of the respondent's witnesses also stated that he does not know if the said third party was called during the disciplinary hearing. I therefore do not attach any weight to the said statement as documents do not speak for themselves.

It is therefore clear that the respondent just wanted to blame the applicant for the accident. This is evident from the fact that even after the initial chairperson withdrew the charges and dismissed the case respondent went further to get a different chairperson and an initiator in order to dismiss the applicant. In the circumstances I find the dismissal of the applicant to be both substantively and procedurally unfair.

The applicant is seeking compensation as remedy for his dismissal. The Labour Relations Act requires that a commissioner should award compensation which is just and equitable. The dismissal of the applicant is both substantively and procedurally unfair. He applicant worked for six years for the applicant. Taking this into consideration and all the evidence before me I find that a just and equitable compensation is ten months salary.

6. Award

- 6.1 I find the dismissal of the applicant (Mfana Elbie Phoku) by the respondent (Unitrans Fuel & Chemical) to be both substantively and procedurally unfair.
- 6.2 I order the respondent to pay the applicant R50228.00 compensation which is equivalent to ten months salary calculated as $R1160.00 \times 4.33 = R5022.80 \times 10$ months.
- 6.3 The respondent must comply with the above order within seven days of receipt of this award.
- 6.4 I make no order as to costs.

Signed and dated at Braamfontein on this the 10th day of September 2011.

Thandiwe Tshayana _____

NBCRFI Panellist: _____