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**ARBITRATION AWARD**

 Panellist MAPALO TSATSIMPE

 Case No GPRFBC 20340

 Date of ruling 11 August 2012

**In the matter between:**

**SATAWU OBO LUCRETIA MARCIA BEMBE**

 **Applicant**

**and**

**F.H BERTLING LOGISTICS (PTY) LTD Respondent**

**Applicant’s contact details: Standard Bank Building, 1st Floor**

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1. **DETAILS OF HEARING AND REPRESENTATION:**
	1. Arbitration took place on 18 June; 23 and 24 July 2012 at the offices of the National Bargaining Council for the Road Freight and Logistics Industries (hereinafter referred to as “the Council”). Ms Lucretia Marcia Bembe (hereinafter referred to as “the Applicant”) was present and represented by Mr. R Seroka, an official of SATAWU and F. H Bertling Logistics (Pty) Ltd (hereinafter referred to as “the Respondent”) was present and represented by Mr. G De Villiers - Mohr, an official of GDP (employers’ association).
	2. The proceedings were electronically recorded. I also took notes but my notes are not verbatim. The Respondent handed in a bundle of documents (R). The Applicant accepted the bundle save for pages 13 to 15 (minutes of her disciplinary hearing). The Applicant handed in her bundle of documents (A) and the Respondent accepted it as is.
	3. It was agreed that the parties should submit their arguments in writing. The arguments were to be received by 31 July 2012. I provided the parties with my personal email address to make sure that no time was wasted as the receipt of thereof would impact on the fourteen day period within which an award should be rendered. I received the Respondent’s closing arguments on 30 July 2012. I waited for the Applicant’s and as on 11 August 2012 (the day I completed the award) I had not received her closing arguments. I checked with the Council as to whether it had received her arguments and the indication was that no arguments were received. I must mention that my decision would be based on evidence led and not on arguments and/or statements from the bar (opening and/or closing and comments).
2. **ISSUE TO BE DECIDED:**
	1. Arbitration takes place in terms of the Labour Relations Act, 66 of 1995 (the Act). I am in terms of the Act required to determine if the Applicant’s dismissal was substantively and procedurally fair. I am also required to; if I find her dismissal to be unfair, determine the appropriate remedy in line with the Act.
	2. The Applicant seeks reinstatement.
3. **BACKGROUND TO THE DISPUTE:**
	1. The Applicant was employed by the Respondent from June 2006. She was employed as the receptionist and later moved to Procurement Section on promotion. Her line manager at Procurement was Mr. Michael Joubert. The Applicant’s salary was at the time of her dismissal R16 040, 00 per month.
	2. The Applicant was charged with misconduct, found guilty thereof and dismissed. She referred her alleged unfair dismissal dispute to the Council and the dispute was conciliated but remained unresolved, hence arbitration.
	3. The Respondent is a transport company mainly focusing on logistics. It is registered within the laws of this country and is subjected to the Act and other laws governing employment.
4. **EVIDENCE AND ARGUMENTS:**

4.1 The Respondent’s evidence is in essence that (Messrs. M Joubert and S Griessel and Ms Kim Cooper were called in as witnesses):

* + 1. The Respondent stated that it has rules wherein all its employees are required to protect its information and not disclose it to anyone (clients and/or suppliers included) without authorisation. It said it also expects of its employees, regardless of their position to respect one another. According to its evidence where an employee is aggrieved about something or a fellow employee, its grievance procedure should be followed and his/her grievance would then be dealt with in terms of that procedure. It said its policies are made available to all its employees on joining it and are also available on intranet. It said the Applicant had acknowledged receipt of its policies.
		2. It testified that the Applicant had a tendency of insulting fellow employees. According to its evidence a number of employees had complained about the way she deals with them. It said one of its employees (Martha) had lodged a complaint to the effect that she was insulting and belittling her. The Respondent said a formal grievance hearing was conducted where it was concluded that the Applicant did insult the said employee and this led to it reprimanding her and counselling her. It said her unacceptable behaviour continued instead of stopping.
		3. The Respondent testified that when the Applicant joined it she was a receptionist. It said a vacancy arose in its Procurement department and added that as part of its recruitment policy and its intention to empower its employees Mr. Joubert (the Procurement Manager) suggested that the Applicant be given that position and given the necessary training. It said the employee who was in that position, Ellen made sure that before she left she trained the Applicant. It said while training the Applicant Ellen experienced difficulties with the Applicant as the Applicant tried to undermine her and would not listen. It said Mr. Joubert had on a number of occasions intervened and pointed to the Applicant that it should be to her interest to listen to Ellen so that she could learn. It said the Applicant was very difficult and she would do as it pleased her.
		4. The Respondent said after Ellen had left the department was manned by Mr. Joubert and the Applicant. It said there was help there and there from other employees. It said it came to light that the Applicant was communicating information she was not allowed to communicate to clients/suppliers. It added she would also tell clients/suppliers internal politics which the clients/suppliers did not have to know. According to the Respondent the Applicant was on a number of occasions warned not to disclose information that had nothing to do with the clients/suppliers to them and she would not listen.
		5. Mr. Joubert testified that the Applicant had on a number of occasions sent emails to clients/suppliers lying about him. He said the Applicant would ridicule him saying things that were untrue about him. According to his evidence the Applicant conducted herself in an unacceptable manner. He said he would stay from work without permission, come late to work and leave early. He said he sought the advice of the Human Resources Manager and he was advised to warn her. He said he then issued her with a written warning and the Applicant screamed at him and told him to fire her instead. He said the HR manager was there when that happened.
		6. Mr. Joubert said the Applicant then sent detailed email to the Directors of the Respondent telling them how useless he was and that she could run the department without him. He also said she continued wasting time discussing him with clients and/or suppliers and lying about him and telling them that he was unable to perform his duties. He referred to a number of emails wherein the Applicant and one Janna Mavlyanova, who worked for a client in the UK had discussed him.
		7. Mr. Joubert said he could no longer take the Applicant’s abuse and insults and he then asked the HR for help. He said this resulted in the Applicant being charged with misconduct. The Respondent’s evidence was that the Applicant was notified about the scheduled disciplinary hearing and said she was made aware of her rights.
		8. Mr. Joubert stated that he discovered after the Applicant was dismissed that she had sent an anonymous letter to the Respondent again ridiculing him. He said although he was not 100% sure that the Applicant was the author the contents thereof resembled the words that the Applicant used to say about him. He said the anonymous letter was faxed from an area around the Applicant’s place of residence. He said a client also told him that the Applicant had said something to that effect.
		9. According to the Respondent Mr. Griessel was the chairperson of the Applicant’s hearing. He testified. He denied being biased against the Applicant. He said he followed his checklist making sure that the Applicant was aware of her rights and that she knew that she could be represented, have an interpreter, call witnesses and cross examine the Respondent’s witnesses. He said the Applicant confirmed that she was aware of her rights. Mr. Griessel denied that the Applicant was interrupted when she gave her story. He said the Respondent began with its testimony and after it had told its story the Applicant was given the same opportunity without being interrupted. He admitted that the Applicant had handed in her cellular phone claiming that she had recorded a conversation with Mr. Joubert. He said upon trying to play it nothing came out of it.
		10. Ms Cooper was employed as the Human Resources Manager. She corroborated Mr. Joubert’s evidence. She stressed that where an employee is not happy with a fellow employee, the Respondent’s grievance procedure was there to address whatever grievances. She said the Applicant knew the procedure very well and added that if she was not happy with how Mr. Joubert treated her; the route to follow was the grievance procedure. Her evidence was that she was made aware of the Applicant’s unacceptable behaviour and said she tried to intervene to show her the right way of dealing with any grievance if she had one.
		11. She said she was confident that the Applicant was aware of the Respondent’s policies and that she simply chose not to comply with them. She said the Applicant had a tendency of undermining and insulting people and referred to the grievance that was lodged by Martha, her fellow employee. She said the Applicant was counselled with the hope that her behaviour would improve. According to Ms Cooper the email that the Applicant had sent to the MD was ridiculing Mr. Joubert and was not in keeping with the Respondent’s policies. Ms Cooper confirmed that the Applicant had filed an appeal. She said her appeal could not be dealt with because she had at the same time she had filed the appeal referred her dispute to the Council. She said having an appeal would have been a useless exercise as her dispute was already escalated to the Council.
		12. The Respondent maintained that it dismissed the Applicant fairly and in accordance with a fair procedure. In brief, the Respondent argued that it has discharged its onus of proving that it dismissed the Applicant fairly. It argued that its witnesses were consistent, did not contradict themselves and did not lie as the Applicant claimed they did. It further argued that its witnesses had no reason to lie and said contrary to what the Applicant said it had accommodated her for so long hoping that she would mend her behaviour. It said the Applicant’s evidence was not probable and should not be favoured. It referred to a number of judgments which it said supported its case.
		13. The Respondent asked that its decision to dismiss the Applicant be upheld and that her case be dismissed.

4.2 The Applicant’s case is in essence that (the Applicant and Mr. S. Bowale testified):

4.2.1 The Applicant confirmed that she had sent an email to the Managing Director about Mr. Joubert. She stated that the reason for that was that she wanted the MD to witness what was happening. Her evidence was that she was frustrated with a number of things and needed the MD to intervene. she said she was issued a warning that she was not happy with because it was based on lies. She said the warning was for the absence which was authorised by Mr. Joubert and she could not understand why she should be warned when permission to be absent was sought and given. The Applicant stated that Mr. Joubert had told her that she should resign and said it was clear that he wanted her to leave.

4.2.2 The Applicant testified that it was not the first time she had asked the MD and other directors to intervene. She said she could not understand why it was made an issue and said the only reason why it was an issue was that Mr. Joubert was scared that the directors would not about the errors he had made. She explained that Mr. Joubert had issued her with a warning and this had shocked her as the warning was for conflicting statements. She said she had done nothing wrong to be given a warning and she thought the directors would intervene as the warning was unjust.

4.2.3 The Applicant denied being guilty as charged. She admitted to having communicated with Janna and said she was merely responding to Janna’s emails. She said Janna was aware about the warning she had received and all that she was saying was that Mr. Joubert should focus on his job and not discipline her for something that she Janna started. She said Mr. Joubert had sent wrong quotes to the client and this was a concern to the client. She said it was the client’s view that a lot of time was wasted on personal issue instead of getting the job done and done correctly. The Applicant referred to the emails between her and Janna and said they were just jokes and were not intended to harm or insult.

4.2.4 The Applicant testified that she and Jana (an employee of a client based in the UK) were friends and she said she used to confide in her. She said Janna was, as a friend, aware of what she was going through at work more so because the treatment at work used to affect her and her family.

4.2.5 The Applicant denied that the job description contained in the Respondent’s bundle was hers. She said she was given a job description but it was not the one in the bundle. She also denied having acknowledged in her contract of employment policies of the Respondent.

4.2.6 The Applicant stated that Mr. Joubert treated her unfairly. She said when Ellen was still employed she (the Applicant) assisted her. She said the Respondent however refused to get someone to assist her. She said she had addressed the issue of not having an assistant with Mr. Joubert and added that it fell on deaf ears as she got no one to help. She said she had on a number of occasions taken work home because she had no one helping her. She said there were instances when Mr. Joubert had sent out wrong quotes to clients and said that was seen by clients as unprofessional. She said she had to spend time correcting his incorrect work. She admitted that a fellow employee Hermano Juvane had helped her but said he was not helping her alone. She also said Mr. Juvane was also not there for long.

4.2.7 The Applicant stated that she felt that Mr. Joubert was attacking her. She said he would accuse her for taking extended lunch disregarding the fact that when she did it was because she had skipped her tea breaks due to work load. She said every time she arrived late for work or left earlier it would be on the basis that she had asked and permission would have been granted. She said Mr. Joubert was the one who used to come late to work, leaving early and not even telling her that he would not be coming. She said she used to be under huge pressure doing his job when he failed to report for duty. She said there was an instance where she attended an authorised training and Mr. Joubert pretended that he did not know where she was. She said she had told the clients/suppliers that she would be on training and told that that Mr. Joubert would deal with whatever they needed. She said the said email was copied to Mr. Joubert to make sure that he attended to clients/suppliers.

4.2.8 The Applicant confirmed that she attended the hearing on 20 March 2012. She said what was written on the minutes was not what transpired at that meeting. She said she had recorded a conversation between her and Mr. Joubert on her cellular phone and added that she had played it at the hearing. Her evidence was that the chairperson simply ignored her recording and chose the story told by the Respondent. She said she had since lost her cellular phone hence she could not avail the recording referred to. The Applicant testified that her dismissal was unfair. She said that she then lodged an appeal and added that the Respondent did not deal with her appeal.

4.2.9 Mr. Bowale testified that he was present at the Applicant’s disciplinary hearing. He said he represented the Applicant. His evidence was that Mr. Joubert and Ms Cooper were interfering with the Applicant’s evidence. He said Ms Cooper kept moving from her seat to the chairperson’s telling him what to do.

4.2.10 Mr. Bowale corroborated the Applicant’s evidence that she had played a cellular phone recording at the hearing. His evidence was that the chairperson decided to ignore that evidence and did not even mention it in his minutes.

1. ANALYSIS OF EVIDENCE AND ARGUMENTS :

5.1 An employer is required to; where dismissal is common cause, demonstrate through evidence that the dismissal was for a reason and in accordance with a fair procedure. The Applicant challenged the fairness of her dismissal. Anyone assessing the fairness of an employee’s dismissal is required to, in terms of Sections 138, 188 and 203 take the Code of Good Practice (Schedule 8) into account. I will be, in assessing the fairness of the Applicant’s dismissal, guided by the act and schedule 8. It should be mentioned that unlike in other courts, the test used in labour related matters is the balance of probabilities and not the beyond reasonable doubt test.

5.2 Evidence was led through five witnesses (three for the Respondent and two for the Applicant). It is this evidence that I would be analysing to determine if the Applicant’s dismissal was fair. I would only consider evidence relevant to the dismissal (what she was charged with and dismissed for). the Applicant was charged with misconduct as per page 2 of bundle R and page 7 of bundle A. the Applicant’s case was that she was not guilty as charged, hence her challenge of substantive fairness. She also challenged procedural fairness. I would deal with these elements separately below staring with substantive fairness.

5.3 Was the dismissal of the Applicant substantively fair?

5.3.1 It is common cause that the Applicant had sent emails to the Director relating to Mr. Joubert. The Applicant’s case was that she wanted the directors’ intervention. I have gone through the said emails. It is my conclusion having read the emails that the Applicant was not looking for the Directors’ intervention. She actually ridiculed her manager. The emails informed the directors that Mr. Joubert was not delivering as the manager and further telling that that she does a better job compared to him and that she could run the department without him.

5.3.2 Ms Cooper, the Human Resources Manager talked to the HR policies. Her evidence was that if and when an employee is not happy with something or someone s/he could utilise the Respondent’s grievance policy to address his/her concern. She said the Applicant had a tendency of passing the Respondent’s policies and chose to do things her own way. She said if the Applicant was frustrated as she alleged she should have utilised the Respondent’s grievance procedure.

5.3.3 The timing of the emails to the Directors is also important. Mr. Joubert had issued the Applicant with a written warning for absenting herself from work without permission. The Applicant was not happy with the warning. She testified that she was not happy that she was given the warning and said she ended up raising her voice because she felt that she was being harassed and forced into signing a warning she did not agree with. It was after that incident that she wanted the Directors’ “intervention”. I am not convinced that the Applicant wanted the intervention of the directors as she claimed.

5.3.4 The Applicant tried to run away from the fact that there were policies that employees should follow. She however in her own evidence indicated that policies were there and that employees could access them via intranet. She said she had no faith in the HR Manager and Mr. Joubert hence she approached the directors. She also said it was not the first time that she had asked for the directors’ intervention. It was not disputed that it was not the first time that the Applicant had approached the directors. However this does not nullify the existence of the Respondent’s policies that she was like other employees required to follow. Policies are there for a reason and employees could not be allowed to pick and chose when they want to follow them. It is my view that the Applicant had, having gone through her emails to the directors, defamed Mr. Joubert and attacked his character.

5.3.5 The Applicant was further charged with sending emails to a client defaming Mr. Joubert’s character. It was common cause that the Applicant and Ms Janna Mavlyanova, an employee of a client based in the UK had conversed about Mr. Joubert and his inability to perform his function. The Applicant’s defence was that Ms Mavlyanova started and that she was merely responding. I have gone through the emails between these two and it is clear that the Applicant started and that she was not just responding. There was no way that Ms Mavlyanova could know about the internal fights (hearings and warnings) if nobody told her.

5.3.6 The Applicant stated in her evidence that Ms Mavlyanova was her friend and that she used to, due to stress created by the Respondent confide in her. Assuming the client did start, the Applicant should not have responded especially in the manner she responded. Her conduct was uncalled for, unprofessional and not only destroyed Mr. Joubert’s character but the character and reputation of the Respondent. The Applicant was/is guilty as charged.

5.3.7 It was also alleged that the Applicant had disregarded the Respondent’s policies relating to leave and/or absence. According to the Respondent there were times where the Applicant would just call few minutes before working hours to say she was not coming. It was also stated that she would leave early without permission and absent herself. According to the Respondent she would give conflicting stories and that could not be tolerated. The Applicant testified that whenever she was absent it would be because she had asked and permission was given. She said where she was off due to ill health she would submit her doctor’s note. She referred to emails where she pointed that a number of times she had asked to leave early and she was told that she could.

5.3.8 I am not convinced, having considered the evidence led (orally and documented) that the Applicant was guilty on this charge. Evidence showed that whenever she left early or arrived late, permission was sought and granted. It is correct that the notices were short but the Respondent allowed and condoned them when it told her that she could go early or arrive late.

5.4 Was the dismissal of the Applicant procedurally fair?

5.4.1 According to the Applicant the Human Resources Manager interrupted when she was giving her evidence. The HR Manager (Ms Cooper) testified and she denied that having interrupted the Applicant when she testified. The chairperson also testified and he too denied that the HR Manager interrupted when the Applicant testified. It should be mentioned that I was provided with, as part of the two bundles (A and R) a copy of the minutes of the hearing. The Applicant alleged that the minutes did not reflect what happened. Her evidence was that her evidence was not there.

5.4.2 The Applicant alleged that the chairperson recorded the hearing. The chairperson admitted that he recorded the hearing on his cellular phone and added that it was to remind him of what had happened. He said he reduced the recording to writing and said the essence of what was said was in the minutes he submitted. According to him the minutes in the bundle reflect accurately what happened at the hearing. He said he was independent and had no reason to be biased against the Applicant.

5.4.3 The Applicant’s witness Mr. Bowale came with another dimension to what had happened at the hearing. His evidence was that he represented the Applicant. He said the HR manager kept moving from her seat to the chairperson’s seat telling the chairperson what to do. This was completely new and when put to him that the Applicant has never said what he said he said he did not know why the applicant did not mention that. What is interesting is the difference between what she saw happening at the hearing and what her witness saw happening. Although the Applicant claimed that the minutes were not accurate, I went through the transcript and could not find anything inappropriate. It is my view that the Applicant’s claim that the procedure was unfair is just but a wild claim with no substance.

5.5 A decision maker is required to; in addition to determining if an employee’s dismissal was fair, determine if the sanction was appropriate. I have considered the Applicant’s circumstances (length of service, position, personal circumstances, disciplinary record, demeanour), the nature of the offence committed, whether if reinstated she could work on her behaviour and I have concluded having considered all that the decision to dismiss her was appropriate.

1. AWARD:

6.1 I have determined that the Applicant’s dismissal was fair both substantively and procedurally.

6.2 I have consequently dismissed her case.

6.3 There is no order as to costs.

Signed and dated at Johannesburg on 11 August 2012.

**COMMISSIONER: MAPALO TSATSIMPE**