NBCRFLI
National Bargaining Council for the Road Freight and Logistics Industry
Your Road Freight Partner.

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Case number: GPRFBC23853

In the arbitration between:

NTM obo B. MBONJWA **Union/Employee party**

and

SEBENZI LOGISTICS (PTY) LTD **Employer party**

Union/Employee's representative: Mr. Mokobane

Union/Employee's address: **3 West Street**
Kempton Park
1620
Telephone: **011 394 3744 fax: 011 394 3748**

Employer's representative: Ms. Bosch

Employer's address: **4 2nd Street**
Commercial Industrial Park
Midrand,1685
Telephone: **011 541 9000 fax: 011 310 1946**

DETAILS OF HEARING AND REPRESENTATION:

The above arbitration was held on the 9th of April, 4th of June, 6th of August and the 3rd of September 2013 at the NBCRFLI offices, Braamfontein. Mr. Mokobane, an official of NTM (the Union) represented the Applicant and Ms. Bosch, an official of GDP employer's organisation, appeared on behalf of the Respondent. An interpreter was provided for the Applicant and witness. The proceedings were digitally recorded and witnesses gave evidence under oath.

ISSUE IN DISPUTE:

Whether the dismissal of the Applicant was procedurally and substantively fair.

BACKGROUND OF THE DISPUTE:

Both parties submitted documents to the arbitration and the Applicant was given an opportunity to go through the documents prior to the start of the arbitration.

On the 6th of August 2013 the Respondent submitted the affidavit of Mr. Wilesmith (bundle C) and indicated that Mr. Wilesmith was not available to attend the arbitration. The Respondent submitted further that the affidavit merely confirmed that Mr. Wilesmith was not involved in the disciplinary hearing of the Applicant. I indicated to the parties that the affidavit was admissible as it was relevant to the matter before me but that the parties should address the issue of weight to be attached to the affidavit as the veracity could not be tested as Mr. Wilesmith would not be testifying at the arbitration.

After narrowing the issues the parties agreed that the following are common cause:

1) That the Applicant was employed as a Packer from 1 March 2001 and earned a salary of R939.60 per week at the time of her dismissal.
2) That the Applicant received notice to attend the disciplinary hearing but was not present at the hearing held on the 26th of November 2012.
3) That the disciplinary hearing proceeded in the absence of the Applicant.
4) That the Applicant was dismissed on the 27th of November 2012.
5) That the Applicant clocked in at 07h34 on the 19th of November 2012.
6) That work starts at 07h30.
7) That the Applicant left the Respondent's premises on the 19th of November 2012.
8) That the Applicant lodged an appeal on the 28th of November 2012.

The parties agreed that the following remained in dispute:

1) Whether the shop steward requested a postponement of the disciplinary hearing because the Applicant had to attend a meeting at her children's school on the 26th of November 2012.
2) Whether the Applicant required permission to leave her workplace and the Respondent's premises on the 19th of November 2012.
3) Whether the Applicant was issued with the warnings on pages 14 and 15 Respondent bundle.

SURVEY OF ARGUMENTS & EVIDENCE:

Mr. Wessels, previous Operations Manager, stated that his duties included overseeing the staff in operations such as the drivers and packers. Mr. Wessels testified that he had taken disciplinary action against the Applicant as she had not followed procedures as she had arrived late and left the Respondent's premises without permission on the 19th of November 2012. Mr. Wessels denied that only the Applicant had been charged for reporting late to work and stated that employees who reported late were given written warnings. Mr. Wessels denied that it was common practice that if an employee was not booked to go out that they would be allowed to go home. Mr. Wessels stated that the Respondent would not call in and employee, not assign any duties to the employee and then let the employee go home and be paid for the day.

Mr. Wessels stated that at no stage had the Applicant informed him that she was not available to attend the disciplinary hearing on the 26th of November 2012. Mr. Wessels testified that when he had issued the notice to attend the disciplinary hearing the Applicant had said that he (Wessels) could do what he wanted and had refused to sign the notice. Mr. Wessels testified further that the Operations Assistant, Mr. Colin Karelse, had been in the office at the time and he had signed the notice as a witness (See page 1 Respondent bundle). Mr. Wessels stated that the two shop stewards had been present at the time. Mr. Wessels stated that at no stage had the Applicant or anyone else, including Mr. Wilesmith, requested that the disciplinary hearing be postponed but if the request had been made he would have granted it. Mr. Wessels stated further that on the morning of the disciplinary hearing he had asked some of the Applicant's co-workers and the security guard if they had seen the Applicant. Mr. Wessels stated that as it was still early he had left the matter there. Mr. Wessels testified that he would not have gone to look for the Applicant if the shop stewards had requested a postponement. Mr. Wessels testified further that one of the two shop stewards worked at the workshop and would therefore have been on the premises, but he had not come and requested that the hearing be postponed. Mr. Wessels stated further that when the Applicant had not arrived for the disciplinary hearing he had tried to call her but there had been no answer. Mr. Wessels testified that no one had approached him on the day of the disciplinary hearing to request a postponement. Mr. Wessels testified further that the Applicant had not indicated to the Respondent who would be representing her at the disciplinary hearing as per the notice to attend the disciplinary hearing and the Respondent could not force the Applicant to have a representative. Mr. Wessels stated that he had not seen the letter from the Applicant's children's school until the day of the arbitration (See page 1 Applicant bundle).

Mr. Wessels testified that all the staff knew that they had to ask him for permission to leave early or report late for work. Mr. Wessels stated that the rule was in place to control the movement of staff and so that the Respondent was aware of where the employees were at all times. Mr. Wessels stated further that if it was necessary to do a head count if there was an incident at the workplace, the Respondent needed to know where all the employees were. Mr. Wessels testified that the Applicant was aware of the procedure to be followed when she left the workplace as she had previously asked for permission and had been employed by the Respondent for twelve years. Mr. Wessels testified further that he had also issued warnings to the Applicant regarding reporting on time and returning to the premises after a trip and she was therefore aware of the correct procedure.

With regard to the final written warning (See page 14 Respondent bundle) Mr. Wessels testified that it sometimes happened that when employees returned from a client they would get off the vehicle on the way back and thus did not return with the vehicle to the Respondent's premises. Mr. Wessels stated that s the Respondent did not therefore know the whereabouts of the employees the Respondent had instituted a procedure that employees must return to the premises to clock out. Mr. Wessels testified further that when he issued a written warning he would have a witness present to sign if the employee refused to sign. Mr. Wessels stated that the Respondent considered the failure to clock out in the afternoon to be a very serious offence. With regard to the written warning (See page 15 Respondent bundle) Mr. Wessels testified that if an employee was late for work then they would be late at the client and therefore the Respondent stressed that employees must be on time in the morning. Mr. Wessels testified further that employees had been told not to sign anything so that they could dispute that they had been issued with warnings. Mr. Wessels stated that there was no witness signature on the written warning (See page 15 Respondent bundle) because when he had issued the warning Mr. Karelse had not been present and he could not therefore ask Mr. Karelse to sign.

Mr. Wessels testified that on the morning of the 19th of November 2012 the Applicant had been booked to stay at the Respondent's premises. Mr. Wessels stated that at around 10h00 he had gone to look for the Applicant to ask her to assist with some administrative work but could not find her. Mr. Wessels stated further that he had checked on the clock in system and saw that the Applicant had clocked in. Mr. Wessels testified that he had returned to his office and had tried to phone the Applicant in case she was in the yard but there was no response to his call. Mr. Wessels testified further that he had then asked the security guard at the gate if he had seen the Applicant and the security guard had informed him that the Applicant had left with the Driver named Jack. Mr. Wessels stated that on the 20th of November 2012 he had asked the Applicant where she had been but all the Applicant had said to him was that he could do what he liked. Mr. Wessels denied that the Applicant had requested permission to go to the bank on the 19th of November 2012. Mr. Wessels testified that employees had the right to have a shop steward present and if the Applicant had wanted representation this was her choice. Mr. Wessels testified further that when he had asked the Applicant on the 20th of November 2012 where she had been on the 19th of November he did not have a shop steward present as the Applicant could chose to answer him or not. Mr. Wessels stated further that if an employee was not booked out with a crew then they were expected to assist with tasks t the Respondent. Mr. Wessels testified that prior to this incident the Applicant and other employees would come and ask for permission to leave the premises and he would grant permission by either giving the employee two hours off or arrange for the employee to take family responsibility leave.

Mr. Wessels testified that the Applicant's conduct had soured the relationship as he could no longer trust the Applicant as she was dishonest. Mr. Wessels testified further that if the Applicant could not be trusted in the workplace then he could not trust the Applicant at a client's home. Mr. Wessels stated that he needed to trust employees to go out and do their work as he could not go and check on everyone. Mr. Wessels stated further that if he could not trust the Applicant not to leave the Respondent's premises then he could not trust the Applicant not to leave the client's premises. Mr. Wessels agreed that he was no longer employed by the Respondent. Mr. Wessels

denied that the warnings and the charges at the disciplinary hearing were not similar and stated that they fell under the same category of time management.

The Applicant testified that she had been employed as a packer and had not been trained to perform other duties. The Applicant was referred to her contract of employment that she would be required to perform duties from time to time and stated that if she had been asked to perform such tasks she would have done them, but she was never asked (See page 18 Respondent bundle). The Applicant testified further that she had not been aware that she had reported late for work as the employees hired a taxi and they had therefore arrived together. The Applicant stated that there had been other employees clocking in behind her and they were not told that they were late. When it was put to the Applicant that another employee had been dismissed for late coming on the 19th of November 2012, the Applicant stated that she had not been aware of this. The Applicant denied that she had been given a written warning for late coming or that she had refused to sign for a warning.

The Applicant testified that she had not left the Respondent's premises without permission but had asked permission from Mr. Wessels at around 08h30. The Applicant testified further that she was aware of the procedure that she had to ask for permission to leave the Respondent's premises. The Applicant stated that she was not certain why Mr. Wessels had charged her for leaving the workplace but thought he had forgotten that he had given her permission to leave. The Applicant testified that if an employee had permission to leave then it was not necessary to return to the Respondent's premises on that day. The Applicant testified further that when employees were finished with a job they were allowed to take transport from where they were and then clock out the next morning. The Applicant stated that the Respondent was aware of this practice and did not have a problem with it. The Applicant denied that Mr. Wessels had called her on the 19th of November 2012. The Applicant further denied that she had been issued with a similar warning for leaving the workplace.

The Applicant testified that she had received the notice to attend a disciplinary hearing and was aware of the date of the hearing. The Applicant testified further that she had asked the shop stewards the day before the disciplinary hearing to ask for a postponement as she had to go to her children's school on that day. The Applicant stated that the shop stewards had informed her that management would get back to them about the request for postponement but she had never received any further feedback. The Applicant stated further that she had only asked the school to give her a letter indicating where she had been after she had received her dismissal letter (See page 1 Applicant bundle). The Applicant agreed that if she was absent from work she was required to report this but stated that she did not report to management but to the shop stewards who would then inform management. The Applicant further agreed that she had not reported that she would be absent on the day of her disciplinary hearing and stated that this was because she had asked the shop stewards to postpone the hearing. The Applicant stated further that she had not returned to work after the meeting at school ended at 12h30 as they worked only in the mornings. The Applicant requested that she be reinstated as she did not see that there would be any problem as Mr. Wessels was no longer employed by the Respondent.

Mr. Moganedi, Packer and shop steward, testified that the Respondent did not have a relationship with the shop stewards and did not work with them. Mr. Moganedi testified

further that he had not been present when either of the warnings or the notice to attend the disciplinary hearing had been issued to the Applicant. Mr. Moganedi stated that he had never discussed the disciplinary matters of the Applicant with the Respondent's management and had never seen the warnings. Mr. Moganedi stated further that the Respondent would not call in the shop steward or employee when a warning was issued but would just place the warning on the employee's file. Mr. Moganedi testified that as a shop steward he had tried to speak with Mr. Wessels about this but Mr. Wessels had not answered him in a good manner. Mr. Moganedi testified further that he would then usually go to Mr. Wilesmith but Mr. Wilesmith would tell him to speak to Mr. Wessels. Mr. Moganedi denied that he was saying that management had a poor relationship with the shop stewards because he had been dismissed for assaulting senior management. Mr. Moganedi stated that the shop stewards preferred employees to report to them and the shop stewards would then inform management. Mr. Moganedi stated further that this was to avoid any disagreement or argument between management and the employee. Mr. Moganedi stated that if management said that the employee should be present, then they would call the employee.

Mr. Moganedi testified that he was aware of the Applicant's disciplinary hearing and that both the shop stewards were supposed to represent the Applicant. Mr. Moganedi testified further that the Applicant had informed him that she would not be at work on the date of the hearing and requested him to ask for the hearing to be postponed. Mr. Moganedi stated that the Applicant had called him at 07h30 on the 22nd of November 2013. Mr. Moganedi stated that he and the other shop steward had approached Mr. Wessels to request a postponement but Mr. Wessels had been rude to them. Mr. Moganedi stated further that they had then approached Mr. Wilesmith who had said that he understood and that the hearing should be postponed, but had not given a new date for the hearing. When it was put to Mr. Moganedi that both Mr. Wessels and Mr. Wilesmith denied that he had requested a postponement Mr. Moganedi stated that they would say this as management did not get along with the shop stewards. Mr. Moganedi stated that the Respondent knew there were two shop stewards and that they would both be present at a disciplinary hearing. Mr. Moganedi denied that more than one shop steward was not allowed to represent an employee at a disciplinary hearing at the Respondent.

Mr. Moganedi testified that if an employee had not been booked to go out then they could go home of they requested permission to do so. Mr. Moganedi testified further that the Respondent allowed them to leave the vehicle if they were far away from the Respondent's premises and would be too late for their transport. Mr. Moganedi stated that they would then clock out the following morning.

At the time of writing I had not received closing arguments from the Applicant and I have therefore only considered the submissions of the Respondent. As closing arguments were submitted in writing what appears here is a summary of the most salient points raised.

The Respondent submitted that it had followed corrective discipline prior to dismissing the Applicant. The Respondent submitted further that warnings had been issued to the Applicant, including a final written warning on the 16th of November 2012, in an attempt to rectify the Applicant's conduct, but to no avail.

The Respondent submitted that the Applicant had failed to attend her disciplinary hearing as she had decided to be absent from work and absent from her disciplinary hearing in order to attend a meeting at her child's school. The Respondent submitted further that during the arbitration the Applicant had stated that she had known two days in advance that she would attend the school meeting but had not thought it necessary to inform management of her intended absence, even though she had confirmed that she was aware of the Respondent's rule regarding absenteeism. The Respondent contended that the Applicant had two days to inform management of her absence from work and her decision not to attend her disciplinary hearing but had chosen not to inform management. The Respondent argued further that notwithstanding the instructions contained on the notice to attend the disciplinary hearing regarding her inability to attend the hearing the Applicant had done nothing, which shows a total disregard for rules, authority and following instructions.

The Respondent submitted that the Applicant's letter from the school indicated that the meeting had concluded at 12h30 but the Applicant had decided not to return to work after 12h30. The Respondent contended that this showed that the Applicant did not regard her employment as of the utmost importance. The Respondent submitted further that the Applicant had been absent on the day of her disciplinary hearing but had only obtained the letter from the school to explain her absence after she had been dismissed. The Respondent submitted that Mr. Wessels had clearly stated that the Applicant had not informed him of the name of the shop steward who would represent her at the hearing and thus Mr. Moganedi had been booked out on that day. The Respondent argued that the Applicant had been provided with an opportunity to attend a disciplinary hearing but had wilfully decided not to attend.

The Respondent submitted that the Applicant was an unreliable and untruthful witness and could therefore not be relied upon. The Respondent submitted further that during opening statements the Union had argued that no permission was required in order for an employee to leave the company premises when an employee was not booked out and this was put to Mr. Wessels. The Respondent contended that this version then changed when the Applicant alleged that she had in fact obtained permission from Mr. Wessels, but this version was never put to Mr. Wessels. The Respondent argued further that the Applicant had contradicted herself several times during her evidence. The Respondent submitted that it had initially been stated that the application for postponement of the hearing had been denied but Mr. Moganedi had testified that he had requested a postponement and that it had been agreed to. The Respondent submitted further that as Mr. Moganedi had been dismissed for assaulting his superior he had used the arbitration as a platform to voice his personal issues against the Respondent and could not be relied upon.

The Respondent submitted that the Applicant's dismissal was procedurally and substantively fair especially as the Applicant had been employed in a position of trust. The Respondent submitted further that the employer must be able to trust an employee to report for work on time and actually remain at work. The Respondent referred to *NUM & Another v Amcoal Colliery t/a Arnot Colliery & Another* (2000) 8 BLLR 869 (LAC) where the Labour Appeal Court held that "the second appellant was on a final warning meant that he had been warned, that he was on the verge of dismissal and that any further transgression would mean that the respondent was left with little option but to dismiss them. The imposition of any punishment less severe than dismissal would have been at odds with the logic and purpose of punishment."

The Respondent submitted that at the time of the Applicant's dismissal the Applicant had a final written warning and a written warning on record and was therefore warned that she was on the verge of dismissal. The Respondent submitted further that the trust relationship had been destroyed beyond repair as a direct result of the Applicant's misconduct. The Respondent contended that the Applicant had repeated her actions in disregarding company rules and procedures thereby showing that she could not be trusted to respect authority and follow rules and procedures. The Respondent argued further that no employer can operate a business and no employment relationship can exist with such constant defiance and disregarding of rules and procedures by an employee.

The Respondent submitted that the requirement to report for duty on time and not leave your place of work without permission can be seen as not only common knowledge but also a required standard, which is reasonable and fair. The Respondent submitted further that it had acted reasonably in expecting the Applicant to report for duty on time and to actually remain at work during working hours.

The Respondent submitted that the Applicant's claim is frivolous and vexatious and requested that the Applicant's case be dismissed with costs. The Respondent contended that the Applicant had pursued action well knowing that she had not prospects of success and the fact that the Applicant had changed her version during the arbitration showed the frivolous nature of the Applicant's case.

ANALYSIS OF ARGUMENTS & EVIDENCE:

I will deal with the procedural issues in dispute first. It is common cause that the Applicant received the notice to attend the disciplinary hearing and that the Applicant did not attend the hearing held on the 26th of November 2012. The Applicant has contended that a request was made to postpone the disciplinary hearing and that the hearing should not therefore have proceeded in the absence of the Applicant.

In weighing the evidence before me, I must determine the probabilities of the Respondent and the Applicant's version regarding the request for postponement. In *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport, (2000) 21 ILJ 2585 (SCA) at 9H,* it was held that the inference drawn from the evidence just has to be 'the most natural or acceptable inference', and not the only inference. In *Bates and Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Co (1985) 3 SA 916 A at 9391-J* it was held as follows:

'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).'

Mr. Wessels testified that neither the Applicant nor the shop stewards had approached him at any time to request that the disciplinary hearing be postponed and that if such a request had been made he would have postponed the hearing given the circumstances. The Applicant however stated that she had asked the shop stewards to request a postponement and was informed by the shop stewards that they were awaiting feedback from management. Mr. Moganedi nonetheless testified that when the shop stewards had spoken with Mr. Wilesmith they had been under the impression

that the hearing had been postponed and were awaiting a new date for the hearing. There would then have been no reason for the shop stewards to have told the Applicant that they were awaiting feedback on the request as postponement had ostensively been granted. If the shop stewards had told the Applicant that they were still waiting for feedback on the request for postponement then surely it would have been reasonable for the Applicant to have followed up with either the shop stewards or Mr. Wessels to ensure that the hearing had in fact been postponed, and yet the Applicant inexplicably failed to do so. If indeed the Applicant had a good reason not to attend the disciplinary hearing and was under the impression that the hearing had been postponed, then surely this would have been reflected on her appeal application and yet this is conspicuously absent from her submission (See page 22 Respondent bundle). It is further apparent that the Applicant did not report for duty on the 26th of November despite the fact that the meeting at the school was due to start only at 11h00 and that the Applicant did not return to work after the conclusion of the meeting at 12h30. If the Applicant required the whole day in order to attend this meeting then the Applicant should conceivably have applied for leave or requested permission to be absent for the day. It nonetheless appears that the Applicant did not request leave for the day or inform the Respondent, as she indicated she was aware of the procedure to follow if she was to be absent, that she would not be at work on the 26th of November 2012. As the notice to attend the disciplinary hearing indicates that the hearing was to begin at 12h00, I agree with the Respondent's contention that the Applicant was in fact absent without permission or explanation for the entire day of the 26th of November 2012

I further do not agree with the Union's contention during the arbitration that it was the Respondent's duty to check with the shop stewards whether the Applicant would attend the disciplinary hearing. It was Mr. Wessels' unchallenged evidence that the Applicant had not informed the Respondent of her choice of representative as per the notice to attend the disciplinary hearing and Mr. Wessels could not then assume that either of the shop stewards would in fact be representing her. It should be pointed out that an employee has the right to choose his/her representative and this implies the right not to be represented or not to be represented by a shop steward. This is a right which must be exercised by the employee and not the employer.

Having considered the evidence before me I am not persuaded that either the Applicant or the shop stewards requested a postponement of the disciplinary hearing. I further agree with the Respondent's submission that an employer is required to provide an opportunity to an employee to respond to allegations against him/her and it is for the employee to make use of such opportunity. In the present matter I am of the view that the Applicant was given timeous notice to attend a disciplinary hearing and that the allegations against her contained sufficient detail for the Applicant to have prepared her defence. The Applicant nonetheless determined that she would not attend the disciplinary hearing and thus waived her right to defend herself against the allegations. I am therefore persuaded that the dismissal of the Applicant was procedurally fair.

The Applicant was charged with gross misconduct for "reporting late for duty without permission and without notifying management of such lateness, and leaving workplace without permission and/or authorisation from management: in that on 19 November 2012 you clocked in and reported for duty at 07h34 instead of 07h30 and then left your workplace and premises without permission in that you requested a

driver to drop you off in Midrand. And failed to notify management of leaving your place of work."

Employees have a fundamental duty to render service, and their employers have a commensurate right to expect them to do so. The essential element of this duty is that employees are expected to be at their workplaces during working hours, unless they have an adequate reason to be absent. The onus rests on the employee to provide an explanation for his absence (see *Metal & Allied Workers Union and Horizon Engineering (Pty) Ltd* (1989) 10 ILJ 782 (ARB)). It is further a Common law requirement that an employee devote his/her time, energy and skills to furthering the interests of the employer's business (See Premier *Medical Equipment (Pty) Ltd v Winkler* 1971 (3) SA 866 (W) with regard to the fiduciary duties of employees). It is in addition, the prerogative of the employer to determine the standard of work, both qualitative and quantitative, that an employee is required to meet.

It was common cause that the Applicant was required to report for duty at 07h30 and that on the 19th of November 2012 she clocked in at 07h34. The essence of this charge has thus been admitted by the Applicant. It appears that the Applicant's unhappiness with this charge is based on the fact that she was reliant on the employee arranged transport and that she had been singled out for discipline even though other employees had also arrived late. It was nonetheless put to the Applicant that other employees who had reported late for work were issued with written warnings and that one employee had been dismissed, which the Applicant stated she had not been aware of. In light of this I accept that the Respondent had disciplined employees for the same offence and that the Respondent had not acted inconsistently. It is apparent from the Applicant's evidence that she utilized transport arranged by the employees and I infer from this that the Applicant's contention is that she cannot be held solely responsible for her time of arrival. I am nonetheless of the view that as the employees are aware of the requirement to clock in by 07h30, it is the employees', and the Applicant's, responsibility to ensure that their transport arrives timeously. The fact that the Applicant was four minutes late, which is not excessive, and that she utilized communal transport are factors which go to mitigation of sanction rather than to the breach of the rule.

The charge relating to the Applicant's failure to obtain permission to leave her workplace on the 19th of November 2012, is more serious offence. It is common cause that the Applicant left the Respondent's premises on the 19th of November 2012 and that she did not clock out or return to the Respondent's premises on that day. The evidence regarding the clocking in and out if employees disembarked from the vehicle before it returned to the Respondent's premises does not in my view take the matter further as it was not alleged that the Applicant failed to return to the Respondent's premises after being booked out. In fact, both the Applicant and Mr. Moganedi testified in agreement with Mr. Wessels that if an employee needed to attend to personal business during working hours the employee was required to seek permission to do so. I agree with the Respondent's submission that it was initially argued by the Applicant that employees who had not been booked out were not required to remain at the Respondent's premises and could go home, but the Applicant's own evidence was that permission must be acquired before they could leave.

It was further put to Mr. Wessels that there was no written rule in this regard and thus the rule did not exist. I do not agree. Not every rule is required to be written and

knowledge of a rule such as requesting permission to leave the workplace may be reasonably inferred if a practice has been established or an employee should reasonably be aware of the existence of such a rule. In the present instance it is apparent that employees and more specifically the Applicant, were aware of the rule and that the rule was practiced in the workplace. The rule may further in my view be reasonably implied in terms of the Applicant's contract of employment which sets the terms and conditions of employment including working hours and the common law requirement that an employee be at the workplace during working hours. A workplace rule according to Grogan, is reasonable if "it is operationally justified – i.e. if it serves to promote the employer's business and the welfare of employees – and if it does not impose an unreasonable burden on the employee." (Workplace Law, Grogan,J page 162.). In this regard it was Mr. Wessels' evidence that the Respondent needed to know the whereabouts of its employees in case of an incident at the workplace. I believe that this is sufficient reason to have such a rule in the workplace.

The Applicant testified that she had in fact requested permission to go to the bank on the 19th of November 2012, but Mr. Wessels stated that the Applicant had not requested permission to leave and he had not been aware that she had left the premises until he looked for her at around 10h00. It was however not put to Mr. Wessels that he had not asked the Applicant on the 20th of November 2012 where she had been on the 19th of November and I therefore accept that this discussion did in fact occur. If then, as the Applicant testified, she had asked for permission to go to the bank, why did the Applicant not remind Mr. Wessels of this? Indeed, I agree with the Respondent that the first time it was contended that Mr. Wessels had in fact given the Applicant permission to leave was when the Applicant testified. In *ABSA Brokers (Pty) Ltd v CCMA & others* (unreported case number JA45/03 of the Labour Appeal Court, 26 May 2005) the Court held, and I concur, that "It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *Van Tonder v Killian NO en Ander* (1992) 1 SA 67 (T) at 721). He has not only a right to cross-examination, but, indeed, also a responsibility to cross-examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart and Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19 (A)). A failure to cross-examine may, in general, imply an acceptance of the witness' testimony..." Given that Mr. Wessels went to look for the Applicant on the 19th of November, that the Applicant when asked, gave no explanation for her absence, that the Applicant failed to clock out when she left the premises and did not return to work on the 19th of November despite a reasonable likelihood that the Applicant's business at her bank could not have taken an entire day to complete, adds to the probabilities that the Applicant did not in fact request permission to leave work on the 19th of November 2012. When considering the evidence before me, including the inconsistencies and improbabilities of the Applicant's case, I am of the view that the Applicant did not request permission to leave the workplace on the 19th of November 2012.

With regard to the warnings, the Applicant denied that she had been issued with the warnings and it was Mr. Moganedi's contention that the Respondent would issue warnings to employees but not inform the employee of this. I find this to be improbable as the very purpose of a warning is to place an employee on terms and to provide an

opportunity to an employee to correct their behaviour. Not to inform an employee of a written warning and the reason therefore defeats this purpose and does not in fact serve the interests of the employer. The fact that the Applicant and the shop stewards did not sign the warnings does not automatically imply that the warnings were not issued. Indeed, an employee is not obliged to sign such warnings but a failure to sign does not invalidate the warning. Mr. Wessels testified that he had issued both the warnings to the Applicant and that Mr. Karelse had only signed as a witness on the final written warning (See page 14 Respondent bundle) as Mr. Karelse had not been present when he had issued the Applicant with the written warning (See page 15 Respondent bundle). If Mr. Wessels had issued the warnings without informing the Applicant he would surely have ensured that the warnings were correctly completed in order to ensure that they appeared legitimate. The fact that Mr. Wessels did not insert a witness signature after the fact in my view shows that Mr. Wessels' version is more probable. Having considered the evidence before me I am persuaded that Mr. Wessels' version is more probable than that of the Applicant and I therefore accept that the Applicant had two valid warnings on record at the time of her dismissal.

It is accepted that earlier warnings may only be taken into consideration when determining sanction for a later offence if the misconduct for which the warning was issued was similar to the latest offence. It is however not always possible or even desirable to categorise offences so strictly that one type of misconduct can be distinguishable from another as one type of misconduct may contain elements of different offences. Grogan (Dismissal page 103) suggests that the proper approach is to extract the essence of the particular offences under consideration and proposes four categories, namely, those related to time; those related to dishonesty; those related to negligent work performance and those related to unacceptable conduct in the workplace. In the present instance I agree with Mr. Wessels that the warnings and the offences with which the Applicant was charged are similar offences in that they relate to time management. I am therefore of the view that the warnings should be considered when determining appropriate sanction.

When determining an appropriate sanction consideration should be had not only to the gravity of the offence but also the merits of the case, the applicability of progressive disciplinary measures and the circumstances of the employee. Regard should also be had to the harm caused by the conduct, the actual prejudice suffered, the extent to which the trust relationship has been impaired and the effect of the conduct on other employees. In terms of the Constitutional Court judgment in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* I am required to determine whether the sanction, given all the circumstances, was fair and that the 'reasonable employer test' is not applicable. The Court further held that an arbitrator should consider, *inter alia*, the interests of both the employee and the employer, the reasons for the rule and for the proscribing of the penalty and the importance of the rule for the running of the business. In *Motsamai v Reverite Building Products* (2011) 2 BLLR 144 (LAC) in dealing with the issue of sanction the Court held that "It is now accepted that when an Arbitrator arbitrates a dispute, it is the Arbitrator who must decide what is the appropriate sanction having regard to: all of the evidence presented to him/her; the company's code of conduct; and, of course the nature and seriousness [of the] misconduct. The fact that the decision is that of the Arbitrator does not mean that it can be made in a vacuum. Like any other decision the decision that the Arbitrator arrives at in respect of the sanction must also be one that is reasonable in all the circumstances."

With regard to sanction the CCMA Guidelines on Misconduct Dismissals provides:
98. The second enquiry is into the circumstances of the contravention. Those circumstances may aggravate or mitigate the gravity of the contravention. Aggravating factors may include wilfulness, lack of remorse, not admitting to a blatant contravention of a rule, dishonesty in the disciplinary hearing, the nature of the job, and damage and loss to the employer caused by the contravention. Aggravating circumstances may have the effect of justifying a more severe sanction than one prescribed in the code or normally imposed by employers either generally or in the sector, or may offset personal circumstances which may otherwise have justified a different sanction. Mitigating factors may include pleading guilty, remorse, a willingness to submit to a lesser sanction that may reduce the chance of future contraventions of the rule, and the absence of any damage or loss to the employer.

I have taken into consideration that the Applicant has been employed by the Respondent for a substantial amount of time but concur with the Court in *Woolworths (Pty) Ltd v CCMA & others* (2011) ZALAC 15; JA 30/10(26 July 2011) that "The fact that an employee has had a long and faithful service with the employer thus far is indeed an important and persuasive factor against a decision to dismiss the employee for misconduct, but is by no means a decisive one. In *Toyota South Africa Motors (Pty) Ltd v Radebe and Others,* the Court held "Although a long period of service of an employee will usually be a mitigating factor where such an employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal." In the present instance I am of the view that as the Applicant did not arrive excessively late and that she utilized communal transport are factors which mitigate against the imposition of the sanction of dismissal for the charge of reporting late for duty on the 19th of November, despite the fact that the Applicant had been issued with a written warning for the same offence on the 8th of November 2012. The charge relating to leaving the workplace without permission is however serious and is in my view aggravated by the Applicant's lack of remorse and her wilful disregard of the Respondent's procedures of which she was clearly aware. In addition the Applicant had been issued with a written and a final written warning during November 2012 and should have been acutely aware of the need to comply with the Respondent's rules and procedures regarding time management, but failed to safeguard her employment.

I further agree with the Respondent's contention that the rule was reasonable and justifiable in terms of the Respondent's operational requirements. The Respondent in addition led evidence regarding the trust relationship and that the Respondent's inability to trust the Applicant related to the duties which the Applicant performed (See *Edcon Ltd V Pillemers NO & others (2009) 30 ILJ 2642 (SCA)* in this regard). In this regard I agree that the Applicant held a position of trust as she would be sent to a client's home to perform her duties and the Respondent must be able to trust that the Applicant will remain at her job without having to check up on the Applicant. I further concur with the Court in *Threewaterskloof Municipality v South African Local Government Bargaining Council (Western Cape) & Others* (2010) 31 ILJ 2475 LC) which held that "The general principle that, conduct on the part of the employee which is incompatible with the trust and confidence necessary for the continuation of an employment relationship will entitle the employer to bring it to an end, is a long

established one." In the present instance I am persuaded that dismissal is the appropriate sanction.

I have given careful consideration to the Respondent's request that costs be awarded against the Applicant and her Union but I am not persuaded that there are sufficient grounds to do so in the present matter.

AWARD:

1) The dismissal of the Applicant was procedurally and substantively fair.
2) The dismissal is upheld.
3) There is no order as to costs.

Signed and dated at Braamfontein on 27 September 2013

NBCRFI Panellist: K. DRISCOLL