



ARBITRATION AWARD

Arbitrator: **Bulelani Busakwe**
Case Reference No.: **PERFBC27472**
Date of award: **9 December 2013**

In the **ARBITRATION** between

Siyabulela Jan

(Employee)

And

Barloworld Logistics

(Employer)

Union/Applicant's representative: ***In person***

Union/Applicant's address: ***355 Neti Street***

KwaDwesi Extension

Port Elizabeth

6201

Telephone: ***073 113 4239***

Telefax:

E-mail: ***siyabulelajan@gmail.com***

Respondent's representative: ***Mr. Heinrich Grobler***

Respondent's address: ***Ferguson Road***

Deal Party

Port Elizabeth

6001

Telephone: ***041 486 1353***

Telefax: ***041 486 1594***

E-mail: ***hgrobler@bwtsgroup.com***

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for arbitration on 2 December 2013 in terms of Section 191(5)(a) of the Labour Relations Act, No 66 of 1995 (“the LRA”). The proceedings were electronically recorded. The employee, Mr. Siyabulela Jan, was present and represented himself. The respondent, Barloworld Logistics, was represented by Mr. Heinrich Grobler, the employer’s senior employee relations officer.

ISSUE TO BE DECIDED

2. I am required to determine whether the applicant’s dismissal was procedurally and substantively fair.

BACKGROUND

3. The employee was a truck driver. He commenced employment on 15 April 2013. He earned a monthly salary of R7161-04 as at the date of his dismissal on 23 September 2013. The employee was dismissed pursuant to a disciplinary enquiry that found him guilty of:
 - a) *“...negligently damaged the vehicle...by falling asleep at the wheel...”*
 - b) *“...provided misleading information...regarding damages...”*
 - c) *“...provided misleading information when you stated that a wild animal...was the cause of accident...”*
4. The employee believes that his dismissal was procedurally and substantively unfair. The procedural challenge is premised on the fact that the employee was not given a fair opportunity to state his case and/or that he was not notified of the second sitting of the enquiry. Substantive fairness is attacked on the basis that a lesser sanction should have been imposed – dismissal was harsh. The applicant seeks retrospective reinstatement. The employer believes that the applicant’s dismissal was fair in all respects.

SURVEY OF EVIDENCE AND ARGUMENT

5. The employer submitted a bundle of documents, video footage and called one witness. The employee testified in support of his case. I have considered all the evidence and arguments made, but because the LRA, requires brief reasons [section 138(7) of the LRA], I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings and the determination of the dispute.
6. The employee was on duty on 23 August 2013. He worked night shift that day. He was off-duty from the morning of 24 August and reported for duty again in the morning on 26 August 2013. He was assigned to make a delivery at Cookhouse. On his way to Cookhouse the employee loss control of the truck and hit a tree as he fell asleep on the wheel. The delivery at Cookhouse could not be made. The truck was damaged extensively to the tune of almost R65 000-00.
7. The employee contacted the fleet controller to advise him of what had happened. The following day the employee was requested to make a written statement of what had happened. He duly wrote the statement. In his statement he stated that whilst driving, he saw an animal on the road, tried to swerve and in the process hit a tree causing the bumper and lights of the truck to be damaged.
8. The employer conducted an informal investigation and found the employee's statement was a lie. Charges were proffered against the employee. He was served with the notice to attend a disciplinary enquiry on 29 August 2013. The disciplinary enquiry was held on 5 September and 20 September 2013. The employee did not dispute that the fell asleep at the wheel as per charge. He did not dispute that his statement contained lies about what happened that day. The employee disputed that he gave false information regarding the extent of the damage to the fleet controller.
9. The respondent's witness, Mr. Stone Foster ("Stone"), testified that he presided over the employee's disciplinary enquiry. The employee pleaded guilty to two of the three charges against him, namely sleeping on the wheel and dishonesty by saying that an animal caused the incident. Furthermore the evidence showed that the employee gave the fleet controller false information about damages to the truck, thus he was found guilty of dishonesty as in that respect as well.
10. Stone stated that during the first sitting of the disciplinary enquiry both parties presented their versions including factors in mitigation and aggravation. During the second sitting the employee

was advised of the outcome of the disciplinary enquiry. Due to the seriousness of the charges, the only appropriate sanction was dismissal.

11. The employee testified that he did not get a proper opportunity to present his version. During the first sitting of the disciplinary enquiry he and his representative did not say much. His representative was not present during the second sitting because the employer did not give them a proper notice of the date. The employee believes that his dismissal was unfair because the statement he had given on 27 August 2013 was given because of pressure exacted on him to make a statement. The employee contended that he had no intention to lie but was scared. He argued that the sanction of dismissal was harsh.

ANALYSIS OF EVIDENCE AND ARGUMENTS

12. Section of 185 of the LRA states that every employee has a right not to be unfairly dismissed. The dismissal of an employee must be procedurally and substantively fair. Procedural fairness refers to the process followed in effecting an employee's dismissal. Substantive fairness refers to the fact that there must be a valid reason for the employee's dismissal.

Was the applicant's dismissal procedurally fair?

13. Item 4 of Schedule 8 to the LRA anticipates that before the dismissal of an employee is effected an investigation must have been conducted. Such a process does not have to be formal. It is also accepted that where circumstances require that there be a departure from holding an enquiry the dismissal may still be found to be procedurally fair provided that such a departure is justifiable. The essence of what is required is that the employer must notify employee of allegations, employee must be allowed reasonable time to prepare, employee entitled to assistance by trade union representative or fellow employee, employee must have opportunity to state a case in response, decision of employer communicated to employee, and employee must be reminded of right to refer matter to CCMA/Bargaining Council.
14. The requirements mentioned above were followed by the employer. There is clear documentary evidence and oral evidence that the employee was given an opportunity to state his case. During the disciplinary enquiry he gave a statement of what had happened over and above the written statement he had earlier made. He presented factors in mitigation. The chairperson of the

disciplinary enquiry at the end of the first sitting advised both parties that he would consider the evidence at his disposal and make a decision.

15. The second sitting was held in order for the chairperson of the disciplinary enquiry to advise the parties of his decision, which he did. I accept that the employee was not properly notified of the second sitting. This resulted in the employee's representative not to be present on that day. The employer must be blamed for the mishap. The disciplinary enquiry chairperson should have played a proactive role by confirming with the parties regarding attendance. Nonetheless this factor does not render the dismissal procedurally unfair. There is no prescript as to how a decision of the chairperson of a disciplinary enquiry must be communicated to the employee. What is a legal required is that the employee is entitled to a decision with reasons for the decision. This was duly done by the employer. Consequently I find the employee's dismissal procedurally fair.

Was the applicant's dismissal substantively unfair?

16. Item 7 of Schedule 8 to the LRA lays the foundation of what should be considered in arriving at a conclusion whether dismissal was substantively fair. The questions to be considered are whether the employee contravened a rule, was the rule valid or reasonable, was the employee aware of the rule, was the rule consistently applied and was dismissal an appropriate sanction?
17. The employee fell asleep whilst driving a valued load which was destined for Cookhouse. The client could not receive the delivery as scheduled. The employee had almost 2 days rest prior to making the delivery. He fell asleep midday. The employee caused extensive damage to the truck he was driving. When the employee was asked to give an account of what happened. He resorted to fabricating stories. He said he was tired because he had gone to the gym that morning. This turned up to be a lie. He said that the reason for the incident was because of an animal which had suddenly crossed the road. This turned up to be a lie as well.
18. The lies given by the employee were not in any way prompted by any sort of conduct from the employer. The employee elected to fabricate information on his own. No one induced the lies. The employee had ample opportunity to come clean but decided to stay on his chosen dark path. It matters not whether the employee also lied about the extent of the damage or not. The fact is that the lies he admitted to belatedly at the disciplinary enquiry, are serious. When one considers the incident along with the lies told by the employee, it has to be concluded that his conduct destroyed

any chance to repair the employment relationship. He irreparably broke the trust expected of him as an employee. His conduct is serious enough to warrant dismissal. Accordingly I find that the employee's dismissal was substantively fair.

AWARD

19. The dismissal of the applicant, Siyabulela Jan, was procedurally and substantively fair.

20. The applicant, Siyabulela Jan, is not entitled to any relief.

Signed and dated at Port Elizabeth on 9 December 2013.

Signature: _____



NBCRFI Arbitrator: ***Bulelani Busakwe*** _____