



Arbitration Award

Case Number: GAJB7012-24

Commissioner: Nokuthula Langa

Date of Award: 24-Jul-2024

In the ARBITRATION between

DYPUSA obo Sekgopotso, Makgeru

(Union/Applicant)

and

SG Convenience

(Respondent)

APPROVED

DETAILS OF HEARING AND REPRESENTATION

- 1) This is the award in the arbitration between DYPUSA obo Sekgopotse Makgeru, the employee, and SG Convenience, the employer. The arbitration was held under the auspices of the CCMA in terms of section 191 (5) (a) of the Labour Relations Act 66 of 1995 as amended ("the LRA") and the award is issued in terms of section 138 (7) of the LRA.
- 2) This arbitration was scheduled for 15 July 2024, and it was held on 18 and 19 July 2024 at the CCMA premises in Ekurhuleni. Trade Union official Mr Vincent Thangoane represented the applicant whereas the respondent was represented by Mr Michael Quma, its IR Manager. The CCMA provided an interpretation service.
- 3) The proceedings were digitally recorded; this recording and my notes taken during the proceedings have been filed with the Commission.

ISSUE TO BE DECIDED

- 4) I am required to determine whether the applicant was fairly dismissed, and if not, I am to determine appropriate relief. The only issue in dispute is the substantive fairness of the dismissal. The applicant is disputing both charges against him.

BACKGROUND TO THE ISSUE

- 5) The applicant was dismissed on 20 March 2024, and he referred the dispute on 25 March 2024. He requested arbitration on 22 April 2024. The matter was set down for arbitration. It is common cause that the applicant was employed on 04 August 2023. At the time of his dismissal, he was employed as a Picker and earned R4 900 per month.
- 6) It is further common cause that there are written statements which are part of the evidence. The applicant was issued with a final written warning on 12 March 2024 which was challenged at the CCMA while he was still working.
- 7) The applicant was charged with disobeying reasonable and lawful job instructions in that he failed to reach 100 cases per hour on his daily shift from Monday to Friday. This issue of not reaching target is disputed.
- 8) The second charge against the applicant is gross insubordination in that he deliberately ignored an instruction from the line manager when he was called to the office.
- 9) The respondent contends that the applicant failed to meet contractual obligations to pick 100 cases per hour and he deliberately ignored an instruction from his line manager when he called him to the office.

SURVEY OF EVIDENCE AND ARGUMENT

- 10) The parties submitted two bundles of documents each as evidence. The respondent's bundles are R1 and R2 whereas the applicant's bundles are A1 and A2.

Overview of the Respondent's case:

- 11) Testimony on behalf of the respondent was heard from Eugene De Jager its National Health and Safety and Risk Manager. He testified that he has occupied his position for five and a half years and he was the chairperson at the applicant's disciplinary hearing. The applicant was dismissed for not meeting his picking stats, he was given a written warning, thereafter a final written warning and then taken to a disciplinary hearing for not meeting his KPIs. He was then dismissed based upon facts that were presented in the hearing.
- 12) He further testified that he captured the statement of the applicant during the hearing whereby he accepted that he is not up to scratch, he performs poorly due to not having a PPT machine. He was using rolltainers, he blames his age and says he cannot work from 07h00 to 00h00 at night. It affects his picking. He also did not go to the office when his line manager Martin Smith called him. The applicant signed KPIs, and he received a written warning as well as a final written warning.
- 13) Mr Eugene De Jager further testified that it is up to the individual to get the machine, if you come first, you get the machine, if you delay, unfortunately you still need to do your job. He also testified that the applicant's age was taken into account, and the target was brought down from 130 to 100 cases per hour and he still did not meet it after they had spoken to him. He referred to the applicant's pick stats that showed that not once did Mr Makgeru reach the required stats, this was a record for one week.
- 14) He also testified that the company's disciplinary code provides that disobeying reasonable and lawful job instructions has two levels minor and serious. For minor the sanction is written warning for first offence, final written warning for second offence and dismissal for third offence. It was the applicant's third offence, hence the dismissal and him being treated differently to the other employees. The other employees were issued with final written warnings, and they are still employed. Mr Makgeru was dismissed because he had reached his third offence, others had not reached the point of the hearing. In the statement of Mr Martin Smith he stated that the applicant had a warning of 08 March 2024 and a final written warning for 12 March 2024. He was treated fairly because he committed the same offence for the third time.
- 15) He further testified that Mr Martin Smith wrote that Mr Makgeru caused extra overtime for people who later had to pick the cases he did not pick, and the whole operation up to dispatching was affected as the pick had a ripple effect on the whole operation.
- 16) In terms of the charge of insubordination the applicant failed to go to the line manager when he was called four times. It was not up to him to stop picking if his manager calls him. The applicant showed remorse for this transgression. If the applicant were to be reinstated the business would be impacted as it is a fast-paced environment where they need to get the items or products out. The business is much faster now and much efficient, the applicant will not remotely reach picking stats.
- 17) During the cross-examination Mr De Jager testified that he recommended the applicant's dismissal on 14 March 2024. The final written warning had been issued to the applicant on 12 March 2024 and the incident that led to the disciplinary hearing occurred on 13 March 2024. It was put to him that he cooked the documents as the notice to attend the disciplinary hearing was dated 11 March 2024. Mr De Jager changed his testimony about the occurrence of the incident that led to the hearing and said he cannot say definitely when the offence was committed. It was put to him that the date for that incident is not available.
- 18) He further testified that as the chairperson he conducted the hearing, and the applicant was charged by his line manager Mr Martin Smith. It was put to him that he continued with the hearing with the charges that did not have a date and he did not ask the employer the reason for charges to be without the date of commission.

- 19) He also testified that he is assuming that had the applicant gone to the office when Mr Martin Smith called him, he would have given him counselling. He testified that the statement of Mr Martin Smith was captured by him during the hearing. He did not know if Mr Martin Smith was going to testify. It was put to him that he testified that the applicant was called four times when he is not the one who called him. He denied that Mr Martin Smith is a liar because even the applicant, Mr Makgeru confirmed that he did not go to the office when he was called by Mr Smith. It was put to him that Mr Makgeru decided to first finish his task.
- 20) It was further put to Mr De Jager that he disregarded the statement of the applicant. His testimony was that he considered that if Mr Makgeru does not waste time in the morning he can find the machine. He must rush to get the PPT machine before others. Since there is a first come first served principle he was asked what must the applicant do if someone else has taken the machine and he responded that if he does not make the effort, he would not get the machine and his target as discussed every morning at 07h00 will not be reached.
- 21) He also testified that when the applicant was employed, he signed KPI's which is the target he must meet irrespective of what he used, between PPT machine and rolltainer. He was dismissed for failing to meet 100 cases per hour and the insubordination. He also testified that the other employees who did not reach 100 cases per hour were not dismissed because they have different levels of offences with the applicant. He could not produce evidence that the applicant committed the offence for the third time and the reason why the applicant's dismissal was not related to poor performance. It was put to Mr De Jager that the applicant was dismissed without the third offence. It was further put to him that there was inconsistency in that the applicant and other employees committed similar offences but they were treated differently.
- 22) Mr Eugene De Jager was agitated, and this was shown in the manner he answered questions. When further questioned about the final written warning and the offence leading to the disciplinary hearing, he said he is not Mr Martin Smith. He did not know the number of hours worked by the applicant on a shift. He testified that it is not fair for an employee to work from 07h00 am until 00h00 midnight, but if he is asked and agrees, he has agreed.
- 23) He testified that Mr Makgeru's conduct resulted in financial loss by not reaching the 100 cases per hour because whoever takes over from him must do what he was supposed to do this results in overtime and delays the trucks because he does not want to work late. It was put to him that he does not have proof of financial loss, he was told by Mr Martin Smith, yet there are other workers failing to reach the target and financial loss is not mentioned in that regard.
- 24) Mr Eugene De Jager testified that Mr Martin Smith has resigned from the Respondent. He also testified that he was not biased when he chaired the disciplinary hearing. He explained how the process was conducted.

Overview of the Applicant's case: The Applicant was the only witness in his case

- 25) Sekgopotse Makgeru was sworn in and he testified that on 12 March 2024 he was called to the office by Mr Martin Smith and he was issued with a notice to attend the disciplinary hearing. He further testified that Mr Smith came to him again and asked him to complete his task first and then come to the office.
- 26) He testified that before they knocked off he was called with nine of his colleagues by Mr Martin Smith, when they got to the office all 10 of them were issued with final written warnings. The warnings were for not reaching 100 cases per hour on 12 March 2024. He does not know the reason for his dismissal when his colleagues were not dismissed.

- 27) Mr Makgeru testified that a rolltainer is a trolley used to pick stock from the shelf to the case. They also use PPT machines which they borrow from and lend to each other as employees there are 42 employees and there are 12 PPT machines, which means the PPT machines are not enough to accommodate every employee. He also testified that he indicated in his statement that he cannot work from 07h00 to 00h00 midnight because they are compelled to work overtime.
- 28) He also testified that he was not aware that he caused financial loss to the company, he heard for the first time during Mr De Jager's testimony. Furthermore when he was notified of the disciplinary hearing of 14 March 2024 he did not know the reason for booking him for a hearing. In his statement he explained that he was pushing to finish his task, he does not remember leaving before the work is finished. He did not disrespect Mr Martin Smith, he was sorry if he felt offended. He did not refuse going to the office and his statement does not say he refused.
- 29) During cross examination Mr Makgeru testified that it was wrong of the respondent to issue him with the notice to attend the disciplinary hearing and a final written warning on the same day because of the way it was done which was not according to procedure. It was put to him that the warning he received was for that day's work on 12 March 2024. The notice was issued early on 12 March 2024 whereas the final written warning was issued later in the day.
- 30) Mr Makgeru further testified that he was forced to work overtime, from 07h00 to 00h00 whereas the working hours in South Africa are 8 hours per day. This overtime was paid although it was after pay queries. He addressed this with his manager, and he did not have access to IR. It was put to him that he is using this as an excuse for non-performance.
- 31) The applicant testified that it may be difficult to use the rolltainer depending on the items loaded. Sometimes it is too heavy, some stock is heavy, and some fragile. He has even lost weight from size 36 to 32 because of the hard work and working long hours. He explained that the PPT is the machine that carries the trolley. It was put to the applicant that the reason he is not reaching his target is that he wants to work while seated, do easy tasks using machinery.
- 32) The applicant conceded that he signed KPIs which had the cases to be done per hour as 130 and it was reduced to 100. He confirmed that he did not ask what he was charged with when he was handed the notice to attend the disciplinary hearing because it should have been written on the charge sheet. It was put to him that he knew what he was signing for, and the applicant did not have a comment for that statement.
- 33) The applicant clarified that he was not aware of any charges before 12 March 2024. He received the final written warning on 12 March 2024 before he knocked off from work with his 9 colleagues. He was not the only employee whose target was reduced. He did not work slow intentionally, he would use the rolltainer when there is no PPT machine and they carry fragile stock which requires them to be careful inside the warehouse.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 34) Section 188 (1) of the LRA states that a dismissal of this nature is unfair if the employer fails to prove that the reason for dismissal is a fair reason and that the dismissal was effected in accordance with a fair procedure. In this matter before me only the substantive fairness of the dismissal is in dispute.
- 35) On the undisputed testimony before me, the applicant was dismissed after a disciplinary hearing that was held on 14 March 2024. The Applicant had been notified of this hearing early on 12 March 2024 whereas he was also issued with a final written warning before he knocked off on the same day. His notice to attend the hearing did not specify the date for which he committed an offence and was being charged. The

respondent's witness Mr Eugene De Jager failed to identify the date or the incident for which the applicant was taken to the disciplinary hearing and eventually dismissed. The applicant also emphasised that he was not aware of any charge before 12 March 2024. He was notified of the disciplinary hearing when he only had a written warning. Later on 12 March 2024 the Applicant was issued with a final written warning and it is apparent that the notice to attend the disciplinary hearing was not for the final written warning. It would not make sense for him to be taken to a disciplinary hearing for the incident of that day because it happened after he had already been issued with the notice to attend the disciplinary hearing.

- 36) It is common cause that the applicant was issued with a written warning on 08 March 2024, no other incident was reported before he received the notice to attend the disciplinary hearing and later the final written warning on 12 March 2024. I find that the respondent has failed to prove why it was necessary to take the applicant for a disciplinary hearing which recommended his dismissal. The only incident on record is that of 12 March 2024 of which the applicant received a final written warning. The dismissal of the applicant based on the first charge of failing to reach 100 cases is substantively unfair as such an incident has not been identified nor was it proven in any way during the arbitration process.
- 37) The incident of the applicant not going to the office immediately when he was called by his line manager is undisputed. However considering the explanation given to Mr Martin Smith it was not defiance of authority, he was concerned about finishing work which makes sense given the expected performance within an hour. The applicant justified his delay in that he wanted to finalise the work and he showed remorse that Mr Martin Smith was offended. Mr Eugene De Jager confirmed. I therefore find that it is harsh to dismiss the applicant based on this charge as there is no record of him being a repeat offender in this regard. I find that the applicant's dismissal was unfair on the second charge of insubordination as well. The dismissal of the applicant was substantively unfair on both charges.
- 38) The respondent argued that the dates should not be of concern, I however differ with the respondent in that the dates are essential in determining whether there was misconduct warranting dismissal on the level as alleged especially since there are other employees who were issued with final written warnings and were not dismissed or taken to the disciplinary hearing. The respondent has failed to prove that there was a fair reason to dismiss the applicant.
- 39) Schedule 8 of the LRA suggests that any person who is determining whether a dismissal for misconduct is unfair should consider:
 - 40) Whether or not an employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
 - 41) If a rule or standard was contravened, whether or not the rule was a valid or reasonable rule or standard
 - 42) Whether or not the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - 43) Whether or not the rule or standard has been consistently applied by the employer; and whether or not dismissal was an appropriate sanction for the contravention of the rule or standard.
- 44) The respondent's witness was the chairperson of the disciplinary hearing, he was a credible witness however he did not know the answers to some questions that were pertinent to the case because he is not Mr Martin Smith as he correctly indicated and not privy to the events. He had initially assumed that the date of the incident that led to the disciplinary hearing was 13 March 2024, but changed during cross examination to say he does not know definitely when the incident occurred, yet he made a decision to dismiss the applicant on an unidentified incident and date his evidence was based on hearsay. I therefore

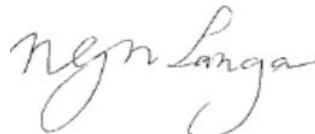
find that through him the respondent failed to prove on a balance of probabilities that the dismissal was substantively fair.

- 45) The Respondent erroneously used a disciplinary process to dismiss the applicant for poor work performance whereas item 9 of schedule 8 clearly outlines the guidelines to be followed in cases of poor work performance.
- 46) The applicant sought the relief of retrospective reinstatement, I have no reason to deny the applicant this relief as his dismissal was substantively unfair. The applicant is hereby reinstated to the position that he held prior to the dismissal dated 20 March 2024. He must resume his duties on 19 August 2024. Due to the retrospective effect of the reinstatement the respondent must pay the applicant R24 822 as backpay,

AWARD

- 47) The dismissal of the applicant, Sekgopotse Makgeru by the respondent SG Convenience was substantively unfair.
- 48) The respondent, SG Convenience is hereby ordered to reinstate the applicant, Mr Sekgoposte Makgeru to its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to the dismissal.
- 49) The reinstatement is effective from 19 August 2024.
- 50) Due to the retrospective effect of the reinstatement the respondent must pay the applicant R24 822 as backpay. This amount must be paid to the applicant's bank account as recorded in the payroll by no later than 19 August 2024.
- 51) Mr Sekgopotso Makgeru is ordered to tender his services to the respondent by no later than 19 August 2024.

APPROVED



Signature: _____

Commissioner: *Nokuthula Langa*

Sector: *Business/Professional services*