

IN THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL

HELD AT JOHANNESBURG

In the arbitration between

DYPUSA OBO NIBION KHUMALO

APPLICANT

AND

TRANPACO FLEXIBLES (PTY) LTD

RESPONDENT

ARBITRATION AWARD

CASE NUMBER:

MEGA59837

DATE DOCUMENTS RECEIVED:

03 AUGUST 2023

DATE AWARD SUBMITTED:

14 AUGUST 2023

NAME OF COMMISSIONER

THANDIWE TSHAYANA

Centre for Dispute Resolution

Gauteng and North West

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Tshwane, Mpumalanga and Limpopo

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Details of hearing and representation

1. This matter was referred for arbitration to the MEIBC in terms of section 191(1)(a) of the Labour Relations Act 66 of 1995 (the LRA) and was heard at the offices of MEIBC in Johannesburg on 28 June and 27 July 2023
2. The parties agreed to submit written closing arguments by no later than 3 August 2023 and I have considered same in reaching my decision. The applicant was represented by Dick Mulaudzi (Union Official). The respondent was represented by O Malatse (HR Manager).
3. The respondent submitted a bundle of documentary evidence marked R+ and video footage.

Issue to be decided

4. I have to decide whether the dismissal of the applicant was substantively and procedurally fair or not.
5. If I find that the dismissal was unfair, I also have to determine the appropriate relief.

Background

6. The respondent is Transpaco Flexibles (Pty) Ltd.
7. The applicant, Nibion Khumalo commenced working for the respondent on 7 September 2010 as a supervisor. He was dismissed on 12 April 2023. He is challenging the substantive and procedural fairness of his dismissal. He is seeking retrospective reinstatement as a remedy. The applicant was earning R3251.60 per week at the time of his dismissal.

Survey of evidence

Respondent's case

8. Respondent's evidence was led by Caroline Kennel and Vinoghan Padayachee .

Caroline Kennel

9. She testified that she was brought to consult in commercial and operation of business. She chaired the applicant's disciplinary hearing. She referred to page 4 which is front page of the enquiry and page 7, checklist. Both parties were allowed representation in the hearing. The applicant brought his evidence and he was given a chance to ask questions. The respondent brought Johannes Mashabala as a witness and the applicant did not have questions for him. Video footage was also played.
10. During cross-examination Ms Kennel was asked to specify where the applicant was given opportunity to ask questions and she referred to pages 10 and 11 of the bundle, which is the outcome of the hearing. It was put to her that the applicant will dispute that he was told to ask questions and he would also dispute that he received the minutes of the disciplinary hearing. When it was also put to Ms Kennel that she was not objective when chairing the disciplinary hearing because the applicant was threatened with a knife by Mr Manjlia and they both were fighting, she said the applicant indicated that he lost his temper and grabbed Mr Manjlia, he lost his cool. She disagreed that she was not objective and the hearing was flawed.

Vinoghan Padayachee

11. He testified that he is the production manager at Wynberg. If the employee is involved in a fight he is suspended immediately. The notice to attend a disciplinary hearing and his rights were explained to the applicant. Before the hearing commenced his rights were again explained. In the hearing there was cross-examination from both parties.
12. He referred to the video footage and testified that there was no physical contact from Mr Manjlia. The applicant pushed Mr Manjlia and head butted him. Both employees had to be suspended and charged. Mr Manjlia was issued with a final written warning and the applicant was dismissed. The sanction for fighting in terms of the disciplinary code is dismissal. There were similar instances where an employee by the name of Boy slapped a fellow employee and he was dismissed.
13. During cross-examination Mr Padayachee confirmed that he charged both the applicant and Mr Manjlia for fighting. He confirmed that they were both fighting. When it was put to him that during the hearing the applicant was not given a chance to cross-examine the witness, Johannes by the chairperson he said that question must

be put to the chairperson, what he knows he was given a chance to state his case. It was put to him that the applicant previously reported Mr Manjlia to him, he said there was an incident that happened outside company premises and he separated them from the shift.

Applicant's case

14. The applicant's evidence was that on 27 March 2023 at 14h45 he was on duty and Mr Manjlia the person who fought with him arrived at 15h00. He started the fight with him. The applicant explained that his bag was in the locker when Mr Manjlia arrived. He took it out and threw it on the floor. He then also took out Mr Manjlia's bag from the locker and put it outside. They started arguing and Mr Manjlia pushed him and took out a knife he was using to cut plastics. They started to fight until they were stopped.
15. During the hearing the respondent called a witness by the name of Johannes Mashabala. He was not given a chance to ask him questions. He was only dismissed alone and Mr Manjlia was not dismissed even though they were both fighting.
16. During cross-examination the applicant was asked if he was aware if assault in the workplace is not acceptable and he said yes. He confirmed that he was in a senior position as a supervisor. He confirmed that Mr Manjlia was a subordinate to him but he liked starting a fight with him and he previously reported him. He stated that it was not the first time he pointed him with a knife. When he was asked if he is aware of the grievance procedure of the respondent, he said no. He stated that he reported Mr Manjlia to Vino on several occasions and nothing happened, he even wanted to resign. The applicant stated that it was not fair for Mr Manjlia to receive a final written warning and he was dismissed, when they were both fighting. He believes he would have been issued with final written warning as well. When he was asked why he apologised in the hearing he said he apologised for breaching company policy. He disputed that he was given a chance to cross-examine the witness Johannes during the disciplinary hearing.

Analysis of evidence and arguments

17. The applicant is challenging both the substantive and procedural fairness of his dismissal.

18. It is common cause that the applicant had a fight with Mr Manjlia at the workplace on 27 March 2023. It is also common cause that they were both charged with fighting but Manjlia was issued with a sanction of a final written warning and the applicant was dismissed even though the sanction for fighting is dismissal in terms of the respondent's disciplinary code. The only reason that the respondent gave why Mr Manjlia was issued with a final written warning was because the applicant started the fight. However, the respondent presented video footage which is not clear, as evidence. The only thing that is clear from the said video footage is that Mr Manjlia came to work and took out the applicant's bag from the locker, put it outside and put his own bag in the locker. The video footage also shows that there was a scuffle between the applicant and Mr Manjlia, which proves that the two were fighting. It is the applicant's undisputed version that bags were not supposed to be placed where Mr Manjlia put his bag and he in turn took out Mr Manjlia's bag and put it outside. It is therefore clear that Mr Manjlia provoked the applicant by taking his bag from the locker and placed it where it was not supposed to be placed.
19. The respondent failed to call Mr Manjlia as a witness at the arbitration hearing to explain why he placed the applicant's bag outside the locker. It also failed to call Johannes who separated both employees when they were fighting. The respondent therefore wanted me to rely on the evidence of people who were not present when the fight occurred. The applicant's undisputed version on the other hand is that Mr Manjlia had a sharp knife which he pointed at him. Surely, it was only fair for the applicant to protect himself from being stabbed with the knife. Respondent's representative wanted me to believe that the applicant would have reported Mr Manjlia as he was his subordinate. I am not sure when would the applicant get a chance to report Mr Manjlia in that heated moment. Furthermore, there is no justifiable reason why Mr Manjlia did not also report the applicant. I am not sure why this duty is only placed on the applicant.
20. It is also the applicant's undisputed version that it was not the first time and Mr Manjlia was always after him and he reported him to Mr Padayachee and the director was aware. The applicant's version is that he even wanted to resign from work because of the treatment he was receiving from Mr Manjlia. Mr Padayachee in his evidence also confirmed that the applicant reported Manjlia about the incident that occurred outside the workplace and he separated from shift. It is therefore clear that there was bad blood between the applicant and Mr Manjlia and the respondent failed to resolve the issue hence this led them to eventually fight.

21. The applicant agrees that it is not good to fight at the workplace but he feels aggrieved because the person he fought with was not dismissed instead he was issued with a final written warning. It is therefore clear that the respondent was not consistent in applying discipline as both the applicant and Mr Manjlia were supposed to be dismissed as per the respondent's disciplinary code. The respondent's representative is referring to assault which is an offence the applicant was not charged with.

42 In the above circumstances I find the dismissal of the applicant to be substantively unfair.

43 The applicant is also challenging the procedural fairness of his dismissal in that he was not given a chance to cross-examine the respondent's witness at the hearing. There is no record of the disciplinary hearing presented by the respondent. The chairperson only referred to her findings at page 11 to prove that the applicant did not cross-examine Johannes. On the other hand, when Mr Padayachee was asked if the applicant was given an opportunity to cross-examine the witness, he said that question must be put to the chairperson since, what he knows is that, the applicant was given a chance to state his case. In the circumstances, the respondent failed to provide any proof that the applicant was given an opportunity to cross-examine the witness Johannes during the disciplinary hearing. Even if the applicant's rights were explained before the hearing it was also the role of the chairperson during the hearing to give him an opportunity to cross-examine the witness. I therefore also find the dismissal of the applicant to be procedurally unfair.

Relief

44 The applicant is seeking retrospective reinstatement as a remedy for his dismissal. I am satisfied that this is the appropriate relief as the respondent was not consistent in applying discipline at the workplace. The applicant worked for the respondent for 13 years and there is no evidence to show that he was a problematic employee. However, I am not going to order the respondent to pay the applicant any back pay as the applicant is also not coming to the arbitration with clean hands.

Award

45 I find the dismissal of the applicant to be both substantively and procedurally unfair.

46 I order the respondent to retrospectively reinstate the applicant to the same position on the same conditions which were applicable before he was dismissed.

47 The applicant must report to work on 1 September 2023.

48 I do not order any back pay.

SIGNED AT Johannesburg ON THIS THE 13th DAY OF AUGUST 2023.

A handwritten signature in black ink, appearing to be 'Thandiwe Tshayana', written over a horizontal line.

Thandiwe Tshayana

Commissioner