

**ARBITRATION HELD AT SA ROAD PASSENGER BARGAINING COUNCIL
HELD AT INTERSTATE BUS LINES (PTY) LTD: BLOEMFONTEIN**

IN THE MATTER BETWEEN

TAWUSA obo MOTEMA

APPLICANT

AND

INTERSTATE BUS LINES (PTY) LTD

RESPONDENT

ARBITRATION AWARD

CASE NUMBER: RPNT 817
DATE/S OF HEARING: 20 JULY 2011
DATE AWARD SUBMITTED: 20 JULY 2011
NAME OF PANELLIST: PM VENTER

DETAILS OF APPLICANT: MR MOTEMA
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DETAILS OF RESPONDENT: MS VOS
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DETAILS OF HEARING:

1. An arbitration hearing took place on **28 June 2011** and **20 July 2011** at the premises of the Respondent in Bloemfontein.
2. The Applicant initially was represented by a union official from TAWUSA, whilst the Respondent was represented by Ms Vos, an IR consultant from the Respondent. On the second day of the proceedings the Applicant handled his own matter.
3. The matter was mechanically recorded and Mr Moleleki acted as interpreter.
4. There were no points *in limine* but the Applicant requested postponement on 20 July 2011.

APPLICATION FOR POSTPONEMENT:

- 5 On 28 June 2011, I postponed the arbitration proceedings on request of the Applicant's representatives. I subsequently issued a ruling in this regard.
- 6 The union withdrew from the matter and filed a notice in this regard on 19 July 2011. They informed Council and the Respondent that the Applicant wished to be represented by an attorney.
- 7 On 20 July 2011 the Applicant's attorney was absent. The Applicant was unable to provide a name of an attorney and had no idea where his attorney was. He phoned the attorney in our presence and I personally spoke to a Mr Hector Mthembu from FNB. The latter informed me that they would not act on behalf of the Applicant and the Applicant was made aware of this well in advance. He was not prepared to discuss the matter any further. I then gave the Applicant 45 minutes grace to phone and to provide some clarity.
- 8 The Applicant was unable to provide more details and requested postponement of the matter. The Respondent objected and raised issues pertaining to the previous postponement and the fact that the Applicant was not able to provide a name of his attorney.

9 I turned down the application as the matter was previously postponed under very suspicious conditions and the Applicant was unable to provide details of an attorney. There was also no formal (or informal) application made by any attorney and I was not convinced that there was even an attorney involved in the matter. The Applicant was also not prepared to tender costs for the postponement.

BACKGROUND TO THE DISPUTE:

10 The Respondent is a company registered with the Bargaining Council and as such responsible for the transport of passengers. The Applicant was in their employ as a bus driver until his dismissal on 22 November 2010. The Applicant was dismissed for alleged misconduct and it is this dismissal that gave rise to this dispute.

11 At the commencement of the proceedings I was provided with one bundle of documents, from the Respondent, which I have marked as **Exhibit "A"**. There were no objections from the Applicant and no document submitted by the Applicant.

12 At the commencement of the proceedings, I narrowed issues in dispute and it was agreed that the following issues could be regarded as common cause/facts between the parties:

- a. The Applicant was appointed on 21 January 2002 and worked as a bus driver. He earned a weekly salary of R1 499-23.
- b. The Applicant was dismissed on 22 November 2010.
- c. As far as substantive fairness was concerned, the charge against the Applicant was contained on page 8 of Exhibit "A". The Applicant admitted that a passenger was found on his bus without a ticket on 21 October 2010 and that he did not issue a ticket to the passenger. He stated that this was simply a mistake and he had no intention of contravening the disciplinary code.
- d. There was a workplace rule in place, the Applicant was aware of the rule and the rule is fair.

- e. The Applicant stated that he was dismissed unfairly as he committed no misconduct and the procedure was also unfair. He argued that the chairperson oppressed him and he was unable to provide a version of events.

SURVEY OF EVIDENCE AND ARGUMENTS:

CASE OF THE RESPONDENT:

Ms Stephni Chantelle Vos testified under oath and her evidence was, in essence, as follows:

- 13 She acted as Chairperson during the disciplinary enquiry and came to a conclusion that the Applicant was guilty of misconduct. She gave parties ample opportunity to present his case and to call witnesses. The Applicant attended the hearing on the first day and provided an explanation.
- 14 The witness testified that the Applicant was supposed to attend a second meeting 22 November 2010 at 09h00 (continuation of hearing). The Applicant signed a notice to attend but he willingly absented himself. His representative showed up and informed her that the Applicant's shift is only scheduled for 13h00 and therefore he would not attend at 09h00. The representative then decided not to take part in the proceedings and walked out. The matter was subsequently finalized in the Applicant's absence.
- 15 She also explained that the Respondent held a "road show" and all role players were informed that, amongst others, charged employees must attend hearings at the scheduled times and not the time that their shifts started.

Ms Martha Longfoot testified under oath and her evidence was, in essence, as follows:

- 16 She is employed as an Inspector and two Inspectors boarded the Applicant's bus on 21 October 2010 and demanded tickets from the passengers. One passenger could not produce a ticket and the bus driver (the Applicant) issued a replacement ticket.
- 17 The witness testified that the Applicant left Central Park earlier the morning and the last passenger who boarded the bus did so at 07h33. No other passenger boarded until the two Inspectors got on the bus near Oranje Meisie School.

- 18 The Applicant initially informed her that he experienced problems with the tagging machine but the passenger told her, in the presence of the Applicant, that he paid in cash. He later said that the passenger possibly boarded the bus without his knowledge when other passengers boarded.
- 19 The witness also testified that the disciplinary code contains a rule against the failure to issue a ticket when a passenger boards a bus and that the disciplinary code prescribes dismissal and that it was a driver's duty to ensure that all passengers pays.

CASE OF THE APPLICANT:

Mr Nataniel Motema testified under oath and his evidence was, in essence, as follows:

- 20 He is the Applicant in this matter and was on duty on 21 October 2010. He left Central Park and at his first stop passengers got off from the bus. At his second stop passengers got off the bus and some boarded the bus.
- 21 He was unaware of the fact that the passenger boarded the bus without a ticket. He explained that the passenger was deceitful and boarded without paying. He also explained that it was only a mistake and he had no intention of being dishonest.
- 22 The Applicant denied that he blamed the tagging machine or that the passenger told the Inspector that the payment was made in cash.
- 23 The Applicant testified that he was oppressed during the disciplinary hearing and he could not speak freely. He was not present on the second day of the hearing as his union informed him that hearings are only held at the time when a shift is suppose to start (13h00 instead of 09h00).

Mr Molefi Nkoame testified under oath and his evidence was, in essence, as follows:

- 24 The witness is a shopsteward and was present during the disciplinary hearing. He acted as Interpreter.

- 25 The practice at the workplace was that hearings would only be held on the time that an employee was supposed to start with a shift. Should this not be the case, matters were dismissed. A Road Show was held and parties were informed about scheduled times but the union did not agree with the new arrangement.
- 26 The witness explained that the Applicant was not oppressed and that he was given ample opportunity to present his case on the first day of the inquiry.

ANALYSIS OF EVIDENCE AND ARGUMENTS:

- 27 In terms of Schedule 8 of the Code of Good Practise of the LRA, it would normally not be appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its own merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault to the employer or fellow employer, client or customer or gross insubordination.
- 28 When deciding whether or not to impose the penalty of the dismissal, the employer should in addition to the gravity of the misconduct, consider factors such as the employee's circumstances, the nature of the job and the circumstances of the infringement itself. It is furthermore trite Law that a Commissioner should not interfere likely with the decision of an employer. The parties are referred to **Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 578 (LC)** as well as **Toyota Motors v Radebe (2000) 21 ILJ 340 (LC)**.
- 29 The Applicant admitted that he took no money from the passenger. This aspect was not in dispute but he presented an excuse and argued that the passenger was deceitful. He also explained that it was simply a mistake.
- 30 The Applicant was warned on two previous occasions about the exact same type of conduct. He chose, at his own peril, to ignore the previous warnings and conceded that he should have accepted payment from the passenger. The Respondent went the extra mile in warning employees and went to the extent of conducting a road show. The disciplinary code is clear in this regard and states that this type of offence is sufficient grounds to be dismissed.

31 Ms Longfoot struck me as a very reliable witness. She had absolutely no reason to present false evidence and the Applicant was unable to provide any reason why she would lie.

32 The Applicant was a poor and unreliable witness. He contradicted himself and it was clear that he was dishonest and deceitful. I wish to highlight some crucial contradictions:

a) The Applicant initially denied that a passenger was on the bus without a ticket. He changed his version only when he was confronted with the signed minutes of the inquiry (where this aspect was admitted) and conceded that the passenger had no ticket.

b) He explained that some passengers pushed to board the bus and the passenger must have boarded then. He was later confronted with the passenger print out. The print out reflected that no passenger boarded the bus from 07h33. His version was quickly adjusted and he explained that some passengers got off the bus and on again. This simply made no sense.

c) He also informed the Inspector that he had problems with the tagging machine. He later denied telling her anything about the machine.

d) He was even dishonest about his attorney. He told me that his attorney should be there but the attorney (if it was an attorney) told me that the Applicant was told that he would not be represented.

33 The Applicant's conduct was tantamount to dishonesty, he received two previous warnings and admitted that he made a mistake. The offence was of serious nature and evidence was led that the trust relationship has become intolerable. I was not convinced that any reason exists to warrant my interference with the Respondent's decision. I was therefore satisfied that the dismissal was substantively fair.

34 As far as procedures were concerned, I was also satisfied that the dismissal was fair. The Applicant was aware of the second day of the inquiry and his union was informed during the "road show" about times for hearings. The fact that the union disagreed with the instruction seem to be irrelevant. The Applicant chose not to attend the

second sitting and did so at his own peril. His own witness also testified that he was not oppressed during the hearing and could speak freely.

COSTS:

- 35 The Respondent prayed for a costs order against the Applicant and stated that his matter was frivolous and vexatious. They also requested costs for witnesses' travelling costs and her hourly costs. The Applicant failed to present any argument.
- 36 The Applicant was grossly dishonest and he was deceitful since the first appearance when he was apparently told by his union to present a medical certificate. His matter had no merit and was clearly vexatious and frivolous.
- 37 There is no reason why the Applicant should not be held liable for the Council's costs of 20 July 2011.
- 38 I am not awarding the Respondent's additional costs as no legal representative was involved. The additional request was also not quantified.

AWARD:

- 39.1 The dismissal of the Applicant was substantively and procedurally fair and the application is dismissed.
- 39.2 The Applicant is ordered to pay the Respondent's costs towards Council for 20 July 2011.



**PANELLIST: ADV PM VENTER
BLOEMFONTEIN**