



IN THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL

HELD AT JOHANNESBURG

In the arbitration between

JOSEPH SWARTZ

APPLICANT

\d

AND

STEEL PIPES (PTY) LTD

RESPONDENT

ARBITRATION AWARD

CASE NUMBER:	MEGA 50730
DATES OF HEARING	9 November 2017 & 18 MAY 2018
DATE OF AWARD	11 JUNE 2018
NAME OF COMMISSIONER	DAISY MANZANA

Centre for Dispute Resolution

Gauteng and North West	(011) 834 4660
Tshwane, Mpumalanga and Limpopo	(012) 320 2566
Free State and Northern Cape	(057) 352 4142
Western Cape	(021) 421 6140
KwaZulu Natal	(031) 305 4761
East London (Border Region)	(043) 743 7790
Port Elizabeth (Midlands)	(041) 586 1542

Details of hearing and representation

1. This matter was referred for arbitration to the Metal and Engineering Industries Bargaining Council in terms of section 191(5) of the Labour Relations Act 66 of 1995 (the LRA) and was heard at the offices of the Meibc in Johannesburg on 9 November 2017 and 18 May 2018. The closing arguments were submitted in writing on 30 May 2018.
2. Mr Joseph Swartz (hereinafter referred to as the applicant) appeared in person and Steel Pipes (Pty) Ltd (hereinafter referred to as the respondent) was represented by Mr Marco Entres an official from SAUEO.
3. The proceedings were electronically recorded.

Issue to be decided

4. I am required to decide whether the dismissal of the applicant for misconduct was procedurally and substantively fair.

Background

5. The applicant was employed by the respondent on 17 January 2006 and earned R16000.00 as a Sales Representative when he was dismissed for misconduct on 19 April 2017. The applicant had expired warnings for similar offences. The applicant referred a dispute to challenge the procedural and substantive fairness of the dismissal and seeks compensation.
6. The applicant was dismissed after he was found guilty of the following charges
 - Disorderly behaviour by Joseph Swartz ,aggressively assaulting a colleague Adrian Dirk in work premises
 - Bringing Company name in disrepute by lifting fists and hitting Adriaan Dirk in the face in front of Clients in public in the workplace+
7. The applicant pleaded guilty to the second charge i.e Bringing Company name in disrepute by lifting fists and hitting Adrian Dirk in the face in front of Clients in public in the workplace+

8. Procedural fairness is placed in dispute on the following grounds;
 - 8.1 the chairperson was biased
 - 8.2 the chairperson did not allow the applicant to take notes at the disciplinary hearing;
 - 8.3 the chairperson offered to put the applicant on one year probation at the commencement of the hearing;
 - 8.4 The chairperson sat with the Initiator and the Manager in the office before the hearing each time before the hearing commenced
 - 8.5 The applicants request for copies of the statements made by the respondents witnesses was initially declined and when the Chairperson changed his mind and allowed the applicant access to the statements his request for an adjournment was declined
 - 8.6 The applicant was declined an opportunity to get a representative of his choice as he was not allowed to enter the premises or talk to employees. And the respondent chose a representative for him
 - 8.7 The applicant was not informed when the date scheduled for polygraphs
 - 8.8 The applicant was invited to submit mitigating factors after he was dismissed
9. Substantive fairness is challenged on the ground of inconsistency in the application of rules and the sanction however the respondent was ordered to cover all the issues relating to procedural fairness .

Survey of evidence

The respondent's case

10. The respondent presented their case through the evidence of four witnesses and the essence of their evidence was as follows;
11. **Mr Chris Hendricks** a Former Sales Representative testified that he was present when the applicant assaulted Adrian on 18 March 2017. Adrian was doing a credit on a computer that he was working on when a customer that had bought steel from the applicant returned it and wanted something else. The applicant requested Adrian to do a credit for the customer and Adrian said the credit has to be done on the applicant's computer. The applicant told the customer that Adrian is lazy and does not want to help and in response Adrian told Joseph that he knows how the system operate as he has a long service period. The applicant grabbed a stapler and wanted to hit Adrian but Adrian raised his hand to protect his face. The applicant hit Adrian with his left hand on the face. He pushed Joseph away and told them to stop fighting.

No swearing or vulgar words were used in the process. The applicant is an aggressive and has had arguments with a number of employees.

12. Mr Chris Hendricks was presented with video footage and he identified the applicant, Adrian, Abbie Willemse and himself.
13. Mr Hendricks testified that he saw the applicant hitting Adrian and heard him telling Adrian that he will get him. He testified that the applicant had a history of assault in the company whilst assault is not allowed in the workplace.
14. Mr Hendricks testified under cross examination that he wrote his statement on Monday 20 March 2017. It is his evidence that the applicant then said to the applicant %ak sal jou bliksem+. Mr Hendricks testified that the applicant hit Adrian with a finger on the face i.e shoved him on the right side of the chin and he separated them and at that stage the applicant took off his spectacles and said %ou gaan ek jou bliksem+.
15. In response to the version that his statement is different from Adrian's version Mr Hendricks testified that he did not read Adrian's statement. He testified that he was a metre away when the applicant assaulted Adrian.
16. Mr Hendricks stated that wrote his statement before he watched the video footage. In response to the version that the video footage does not show the applicant hitting Adrian with a fist Mr Hendricks testified that he first thought the applicant hit Adrian with a fist but realised when he saw the video footage that it was not a fist and the applicant poked Adrian with his finger and referred to the video footage wherein the applicant was captured pocking Adrian with his left finger on the face
17. He testified that the space between the computer stations is about two metres apart.
18. **Mr Hendrick (Hennie) Van Graan** testified that he chaired the applicants disciplinary hearing over four days and considered all the evidence presented to him before he made a decision on the outcome. He advised the applicant at the commencement of the hearing to get a representative due to the seriousness of the charge and postponed the hearing. The applicant was represented by Mr Kuwe, a shop steward from a different branch when the hearing was rescheduled and was informed of all his rights at the hearing. The applicant pleaded guilty to the second charge and admitted that his behaviour was inappropriate but he was provoked. The applicant's defence on the first charge was based on provocation and conspiracy but he had never lodged a grievance.
19. The applicant had expired warnings for a similar offence and the last assault happened in the presence of a client.

20. Mr Van Graan testified under cross examination that he followed correct procedures throughout the process and considered all the evidence presented to him before he made a decision. It is his evidence that he took time before he made a decision as he had to investigate the possibility of provocation.
21. Mr Van Graan disputed the version that he told the applicant on 5 April 2017 that he would put him on probation for a year. He testified that he adjourned the hearing to get Chris Hendrickse to testify after he identified him on the video footage. He testified that he followed correct procedures and went an extra mile to ensure that he is presented with all the evidence hence he adjourned the hearing to get Chris Hendrickse to testify after he identified him on the video footage..
22. In response to the version that he denied the applicant the right to have a representative Mr Van Graan testified he told the applicant whilst on suspension that he is allowed entry to the premises with prior permission from Mr Andre Gouws and when the hearing commenced he advised the applicant him to get a representative due to the seriousness of the offence.
23. In response to the version that he did not afford the applicant an opportunity to cross examine on the evidence relating to the results of the polygraph Mr Van Graan stated that he informed parties that he will not accept new evidence and did not consider it. It is his evidence that he allowed the applicant to cross examine the respondents witnesses i.e Adrian, Dirk and Chris Hendrickse.
24. Mr Van Graan testified that the applicant became aggressive when he asked him the purpose of the question that he did not understand and had to be calmed down by his representative.
25. In response to the version that he contradicted himself as he claimed that the applicant was aggressive and showed no remorse but also said the applicant stated stated in mitigation that he is remorseful Mr Van Graan stated that the applicant the applicant failed to show remorse during the disciplinary hearing but claimed to be remorseful when he mitigated his case.
26. In response to the version that he allowed inadmissible evidence and hearsay evidence and results if the polygraph test Mr Graan testified that he did not accept the evidence and stated at the hearing that he will not accept such evidence . He testified that the applicant was afforded an opportunity to cross examine Adriian Dirk and Chris Hendricks and the applicant confirmed after cross examining each witness that he has no more questions
- Mr Van Graan disputed the version that he did not allow the applicant an opportunity to cross examine the respondents witness and testified that the applicant claimed conspiracy with no evidence to support his version, and stated that he stated in his

outcome that even if the applicant was provoked, the applicant's reaction was unacceptable as the applicant knew the grievance procedure and pleaded guilty to the second charge.

27. Mr Van Graan testified that he viewed the footage a number of times and his decision was based on the evidence presented to him at the disciplinary hearing and the video footage as the video footage had no sound. In response to the version that he ignored the evidence presented on the occurrence before the assault when Adrian provoked the applicant Mr Van Graan testified that the applicant's manner of retaliation was unacceptable. He testified that there was no proof or evidence of foul language used and the applicant ought to have followed the grievance procedure instead of retaliating in an unacceptable manner.
28. Mr Van Graan disputed the version that the decision to dismiss the applicant was influenced by the results of the polygraph and testified that he did not consider the results of the polygraphs and he adjourned the process to consider all the facts in detail before he made his recommendation. It is his evidence that no-one influenced his decision and he did not discuss the matter with anyone outside the hearing even though he went past Management's offices for tea before the hearing.
29. **Mr Adrian Dirk** testified that he was busy on Chris Hendricks's computer when the applicant requested him to do a credit cheque on his account for his client. He told the applicant he will do the credit after he completed what he was doing but the applicant told the Client that he does not want to assist. He told the applicant that he has been with the Company long enough to know that the credit has to be done on his computer. The applicant grabbed a stapler and angrily walked towards him, put the stapler down and hit him with his hand on the face. He pushed the applicant away and Chris Hendricks pulled the applicant from him. He did nothing wrong however the applicant has a history of anger and aggression. He submitted his statement in Afrikaans and the typed version is a true reflection of the statement he submitted in Afrikaans
30. Mr Dirk testified under cross examination that the applicant hit him on the face and a he initially thought the applicant hit him with a fist but realised when he viewed the video footage that it was a finger/ open hand. Assault is not allowed in the workplace however the applicant wanted to fight with a customer two weeks before the incident with him.

31. Mr Dirk disputed the version that he was disrespectful and waved his hand towards the applicant in the presence of a client and testified that he told the Client that the applicant is aware of the procedures as the applicant had said he does not want to assist him. It is his evidence that the applicant wanted to assault a client two weeks before the incident. He testified that the applicant poked him as shown in the footage.
32. Mr Dirk testified that he did not wave his hand towards the applicant however when the applicant told the Client that he did not want to help him he told the Customer that he is busy with a credit on a computer that belonged to Hendrickse. It is his evidence that he did not refer to the applicant as %his thing when he spoke to the customer+
33. Mr Dirk further testified that he was suspended and received a warning for putting the Company name in disrepute.
34. **Mr Dav Van der Westhuizen** testified that he had an altercation with the applicant and the applicant followed him thereafter and grabbed him by his neck outside the Yard. He worked with cash on deliveries for Soweto at the time.
35. Mr Van der Westhuizen testified under cross examination that the applicant grabbed him by the neck and received a warning for the incident.

The applicant's case

36. The applicant **Mr Joseph Swartz** testified that he was busy with a customer on 18 March 2017 when his customer returned an item to be exchanged. He requested Adrian Dirk to do a credit for the customer as he was chatting with Hendrickse. The customer returned and told him that Dirk said he is busy and he told the customer that they are lazy to do their work. Dirk heard him and commented that this thing has been with the company but does not know the procedure. He did not like the manner Dirk spoke to him and reminded him that he has warned him a number of times for being disrespectful. The customer was frustrated and told him to fix the problem as Dirk does not want to help. He pleaded with Dirk to assist the customer but Dirk told him the customer can wait. He put his finger on Dirks chin and Dirk pushed him with both hands. It is Dirks job to do credits him commented that he has been with the respondent long enough and know the procedure. He poked Dirk with his finger and Dirk retaliated by pushing him back. He assisted the customer thereafter and his money balanced when he cashed up to show that it was not necessary for Dirk to cash up on his computer.
37. The applicant testified under cross examination that Adrian and Chris were chatting when he asked Chris to do a credit. He confirmed that none of the respondents

witnesses testified that Dirk was busy with a credit card. He disputed the version that Dirk was standing away from each other and stated that they were standing together. The applicant disputed the version that Chris was working on a computer. The applicant confirmed that Chris testified that he was not talking to Adrian and testified that the two were talking to each other. It is his evidence Chris was not working on a computer at the time he requested him to make to do a credit for a customer.

38. The applicant testified that Dirk pointed at him and used vulgar language a number of times hence he stood up the second time. The applicant testified that he did not know why his version is not corroborated.

Analysis of evidence and argument

39. The onus is on the respondent to prove that the dismissal of the applicant was procedurally and substantively fair and the standard of proof is on a balance of probabilities.
40. Mr Van Graan testified that he chaired the applicant's disciplinary hearing and afforded him all his rights at the hearing. It is his undisputed evidence that he advised the applicant to get a representative from any branch and postponed the hearing thereafter. I noted that the applicant did not dispute the evidence that he was represented by a shop-steward when the hearing was rescheduled. The applicant also did not challenge the evidence that he pleaded guilty to the second charge and was afforded an opportunity to present his case and cross examine the respondent's witnesses.
41. The applicant challenged procedural fairness on the ground that the chairperson was biased and denied him the right to take notes and to adjourn the hearing in order for him to go through the statements of the witnesses and had tea with the Manager and Initiator whenever he attended the hearing.
42. Mr Van Graan confirmed that he had tea in the Manager's office before the hearing but did not discuss the disciplinary case. It is his evidence that his decision on the case was based on the evidence presented to him on the hearing

Procedural fairness

Item 4 of Schedule 8 of the Code of Good Practice on Dismissals provides as follows;

1. Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a

formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed an opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.+

43. Based on the evidence presented, I find no glaring defect in the procedure followed before the applicant was dismissed.

44. I therefore find the dismissal of the applicant procedurally fair on a balance of probabilities.

Substantive fairness

45. Schedule 8 of the Code of Good Practice on Dismissals provide guidelines in cases of dismissal for misconduct which are as follows;

Any person determining whether a dismissal for misconduct is unfair should consider .

(a) Whether or not the employee contravened a rule or standard regulating conduct in or of relevance to the workplace; and

(b) If the rule or standard was contravened, whether or not-

(i) The rule was a valid and reasonable rule or standard

(ii) The employee was aware or could reasonably be expected to have been aware of the rule or standard

(iii) The rule or standard has been consistently applied by the employer; and

(iv) Dismissal was an appropriate sanction for the contravention of the rule or standard

46. The following acts are common cause;

- The applicant poked Adrian with his finger on 18 March 2017 in the presence of a customer.
- The applicant pleaded guilty to the second charge i.e putting the Company name in disrepute
- The applicant had expired warnings and a valid warning for similar offences at the time of dismissal
- The applicant and Adrian Dirk were both charged and suspended for putting the company name in disrepute and the applicant was also charged with assault

47. It is common cause that the applicant poked Adrian Dirk with his finger on the face on 18 March 2017
48. Based on the common cause that the applicant commenced employment with the respondent in 2006 I find that the applicant knew or ought to have known that his actions are not tolerated in the workplace
49. I believe that the rule is fair and valid to promote good relations in the company
50. The applicant challenged the respondent's inconsistency in the application of rules on the ground that he was suspended on the same day with Adrian Dirk but Adrian was allowed to return to work whilst he was charged and dismissed. It is common cause that the applicant was charged and found guilty of two offences whilst Mr Adrian Dirk was charged with one offence i.e putting the company name in disrepute. Consistency means similar cases must be treated alike and the evidence presented indicate that the two cases are not similar as the applicant was found guilty of two offences whilst Adrian Dirk was charged with one allegation. The applicant alleged that the respondent is inconsistent but failed to prove the allegation.
51. Mr Van Graan testified that he found the sanction of dismissal appropriate as the applicant's record of expired warnings for similar offences proved that he does not repent despite being given an opportunity, his failure to show remorse at the hearing and the fact that he assaulted a fellow employee in the presence of a customer. These were treated as aggravating factors. It is his evidence that the applicant claimed provocation however the misconduct was unjustified as the applicant could have lodged a grievance.
52. Based on the evidence presented I find that on a balance of probabilities the respondent has proven that the sanction of dismissal was fair.
53. I accordingly find the dismissal of the applicant procedurally and substantively fair on a balance of probabilities.

Award

54. I find the dismissal of the applicant procedurally and substantively fair on a balance of probabilities.



Signature

DAISY C MANZANA