ARBITRATION AWARD

Dispute Resolution Centre
NORTHERN REGION

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Arbitrator: Annemarie Breedt
Case Number: MIPT 32551
Date: 6 NOVEMBER 2021

In the matter between:

FMU obo MR SILIAS MOEKETSANE **Applicant/Union/Employee**

And

MSSL GLOBAL RSA MODULE ENGINEERING LTD. **Respondent/Employer**

Applicant/Employee's representative:	MR. LUCKY MASHIGO (FMU)
Applicant/Employee's address:	32 NELSON MANDELA FRANS VOS SENTRUM BUILDING RUSTENBURG 0300
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Employer's representative:	MR. MARCO ENTRES (SAUEO)
Employer's address:	PLOT DIA Automotive Supplier Park 30 Hellium Road Rosslyn EXT 2 0200
Telephone:	012 564 3628; 012 564 3628; 067 9123950
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E-mail:	I.Netshivangani@msslRSA.mothers

DETAILS OF THE HEARING AND REPRESENTATION

1.1 The applicant referred this matter to the DRC; a division of the Motor Industry Bargaining Council, in terms of section 191(5)(a)(iii) of the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA"). The applicant, Mr. Silas Moeketsane alleged that he was unfairly dismissed by MSSL Global RSA Module Engineering Ltd. (Hereinafter referred to as the respondent).

1.2 The arbitration was scheduled at the offices of the DRC, Northern Region, 1119 Burnett Street, Hatfield, 0028, on 2 August 2021 and 4 November 2021.

1.3 Applicant was represented by Mr. Lucky Mashigo, official of Federated Mining and Allied Industries Workers Union (FMU). Upon the respondent's first witness completing his evidence in chief, the applicant stated that he would personally be doing the cross examination. The respondent was represented by Mr. Marco Entres, SAUEO. On the 11 November 2021, Mr. Mashigo did not attend the proceedings. The case manager contacted Mr, Mashigo who advised her that he did not receive the e-mail notice of set down, however, he confirmed that he did receive the sms reminder of arbitration proceedings. The applicant indicated that he was ready to represent himself.

1.4 It was not necessary to interpret proceedings which were electronically and manually recorded.

ISSUES TO BE DECIDED

2.1 The issues to be decided are whether the dismissal was substantively unfair.

- It is the applicant's case that charge 1 was incorrectly formulated. It needs to be determined whether the charge was in accordance with the respondent's Industrial Relations Policy.
- In respect of charge 2 the issue is whether the applicant supplied false information.
- The applicant waived his claim in respect of procedural unfairness.

2.2 Applicant seeks retrospective reinstatement.

BACKGROUND TO THE DISPUTE

3.1 The applicant was employed as a Shift-in-Charge (supervisor) and commenced his duties with respondent during August 2014. He earned R17 700,00 per month at the time of his dismissal. Applicant was employed in terms of an indefinite contract of employment. He was dismissed on 18 January 2021.

3.2 Respondent conducts the business of manufacturing vehicle parts.

3.3The applicant was charged on two counts of misconduct. Charge 1 was for failure to obey a lawful, reasonable, and operational instruction, in that during the shift of 25/26 November 2020, applicant's senior, Mr. Davids the Production Manager, instructed him to run urgent parts before close of business as these parts needed to be sent to Ford SA, who is the respondent's biggest client. He failed to execute this instruction. The second charge was for submitting false information, in that on 26 November 2020, the applicant was instructed twice, to request his shift to work overtime on 27 November 2020. The applicant informed Mr Davids that staff were not willing to come to work. Respondent discovered that this statement was false. There was a list of employees who confirmed in writing that they were prepared to work on 27 November 2020.

3.4 Respondent has its own disciplinary code in the workplace and discipline is applied in terms of the LRA: Code of Good Conduct. A disciplinary hearing took place on 13 January 2021.

3.5 The respondent's bundle of documents are marked Exhibit 1. The applicant's bundle of documents is marked Exhibit 2. No pre-arbitration meeting was conducted.

SURVEY OF EVIDENCE AND ARGUMENT

4.1 Mr. Mogamatfahiem Davids, production manager, testified that work performed on Fridays and Saturdays are categorised as "overtime"-days in the respondent's business. Friday and Saturday work are planned in advance. On a Monday, staff are requested to fill in and sign an Overtime Authorisation Form Management, confirming their availability to work on that coming Friday or Saturday. There are 6 team leaders who work with the applicant. Each of them approaches their staff to have the form completed and it is the applicant's duty to look at this completed form.

4.2 The applicant informed Mr. Davids telephonically that "the guys are not available to come to work on Friday." On Thursday, 26 November, Mr. Davids phoned the applicant to reconsider the situation, and to enquire whether staff were not willing to come and assist on the Friday. Applicant undertook to phone him back but failed to do so. Mr. Davids then called applicant for a second time on Thursday night. Applicant was adamant that he did not have a full shift, and that the guys did not want to work on Friday 27 November 2020. Mr. Davids testified that he even offered to personally phone the guys whereupon the applicant said: "No, don't worry". Applicant came back and confirmed their unavailability. Mr. Davids in response phoned the plant manager to cancel the Friday schedule because there were not enough staff to run a shift. The plant manager also tried to phone the applicant. It became an operational nightmare.

4.3 On Friday 27 November 2021, the Overtime Manpower list came to the attention of Mr. Davids. Thirty-one staff members indicated their willingness to work on Friday, 27 November 2021. The applicant's name did not appear on the list. As a supervisor, one would reasonably expect that his name would appear right on top. Had Mr. Davids been aware thereof that 31 people were willing to work, he would never have cancelled production. If the applicant had looked at the list reflected on Annexure 1, p41, p42, and p43 which was part of his duties, he would have known that there were sufficient staff to run 5 to 6 critical machines. An average of 25 000 – 30 000 parts are produced in a single day. The result of the shift cancellation was that respondent had trouble to deliver ordered parts to Ford SA and BMW. Respondent was placed under pressure for a period of 2 weeks to reach their targets.

4.4 Applicant was aware of the importance to run a line. He was dishonest and showed no remorse.

4.5 The applicant did not have a clean disciplinary record. The respondent has applied corrective discipline in the past; however, applicant does not take cognisance. The applicant's disciplinary record shows a pattern of behaviour. Despite most of these warnings having lapsed, one does not expect this type of behaviour from a senior staff member. His record reflects the following:

31 August 2020: written warning for absence after confirming he would be present at work.

29 January 2019: final written warning for being under the influence of alcohol.

30 October 2018: final written warning for absence.

9 August 2018: final written warning for absence without leave after signing overtime authorisation confirming that he would be at work.

18 October 2017: final written warning for failing to observe company rules.

4.6 Mr. Isaac Netshivhangani acted as chairperson of the disciplinary hearing. He confirmed that applicant was afforded all his procedural rights and referred to the Minutes of the disciplinary hearing as contained in the bundle. During the proceedings, the applicant withdrew his claim that the disciplinary process was unfair in as far as it related to his disciplinary rights.

4.7 Mr. Netshivhangani testified that the charges were of serious nature. The applicant breached the trust relationship by giving false information. He lied to his superior by stating that there was no manpower for production duties. Ford SA is the respondent's biggest client. Should respondent not reach its target, there is a risk that this international company could remove their business from the respondent company. This could result in the respondent business closing down. Failing to produce, causes a chain reaction e.g. Ford SA arrange for their staff to work on a Saturday. If the respondent cannot deliver parts, Ford SA staff cannot perform their duties which ultimately result in Ford SA not being in a position to fulfil its undertaking to service delivery towards their customer.

4.8 During cross examination it was put to Mr. Netshivhangani that the charges were incorrectly formulated because in terms of the disciplinary code, the offence is stated to be "refusal" to obey a lawful and reasonable instruction, whereas he was charged for "failure" to obey a lawful and reasonable instruction. The applicant put it to Mr. Netshivhangani that the respondent deviated from its own Disciplinary Code as they also added the word "operational" which does not appear in the list of offences. Mr. Netshivhangani replied that the disciplinary code was intended to serve as a guideline to management.

4.9 The applicant put it to Netshivhangani that the incident occurred on 25 November 2020, whereas he was only charged during January 2021. This delay was unfair and not in accordance with the respondent's Industrial Relations Policy. Mr. Netshivhangani submitted that the 24-hour notification of the misconduct referred to 24 hours after receiving the investigation report, and not 24 hours after the actual misconduct. Notification also did not mean to be charged. The matter needed to first be investigated. The respondent business went into early shut down during December 2020.

4.10 The applicant testified that p41-42 does not contain his signature. He did not place these documents on Mr. David's table and therefore, it cannot be held that he supplied false information.

4.11 Applicant testified that on 25 November 2020 he was working night shift. When he received the hand over, he was told that there was a tool going to machine 1600. The setters came in to set the machine, however, they experienced difficulty in setting this machine for the particular tool from 16:00 until approximately 22:00. On the night of 26 August 2020, they ran this tool until the next morning.

4.12 He stated that when there is a request for overtime, it is the responsibility of the team leaders to enquire from operators whether they were prepared to work overtime. Between the evening of 26-27 August 2020, he realised that team leaders do not want to work. He phoned his manager Mr. Davids to inform him that operators were pulling out because it was month end and they needed to do shopping and washing. The shift was accordingly cancelled. He confirmed that overtime was pre-approved by top management. The applicant was vague when he was asked to pertinently state whether he was personally informed by employees that they did not want to work, and if so, what the names of these employees were. He provided the names of two employees. During cross examination the applicant denied that he ever said that employees did not want to work overtime. The applicant testified that if 29 employees indicate that they are willing to work overtime, and later request that their names be scratched from the list, then there was nothing that he could do as overtime was voluntary.

4.13 The applicant denied that Mr. Davids gave him an instruction to run urgent parts.

4.14 The applicant testified that there was an undue delay between the date of the incident and the date of him being charged. The applicant submitted that respondent breached the industrial relations policy in that they failed to inform him of their investigation.

4.15 The respondent argued that rules must be adhered to. The respondent was consistent in applying discipline. The applicant showed a pattern of not adhering to company policy, rules and instructions. His long disciplinary record speaks for itself. The applicant was a shift leader and further corrective discipline will have no force and effect. By supplying false information, the applicant caused a loss of production and income. This behaviour cannot be tolerated. He showed no remorse. Continued employment has become intolerable. The delay in instituting disciplinary action was due to a proper investigation first being conducted, and thereafter, the closure of the company for the Christmas recess. The applicant failed to call any witnesses to substantiate his defence. The respondent argued that the applicant's evidence at the disciplinary hearing was contradictory to that given at arbitration. He also contradicted his own evidence during arbitration.

4.16 The applicant argued that he cannot be charged on the false and devious documents contained in Exhibit 1, p41-43 as his signature is not reflected thereon. Only the plant manager signed same. The charges against him were incorrect as it is not contained in the Disciplinary Code. The respondent chose a charge where the penalty is dismissal in a first instance, whereas they could have chosen a different charge warranting a warning. They failed to follow their own industrial relations policy in charging him.

ANALYSIS OF EVIDENCE AND ARGUMENT

5.1 The onus in dismissal disputes is governed by section 192(1) and (2) of the LRA. An employee who alleges an unfair dismissal is obliged to prove that there has been a dismissal in terms of section 186(1)(a) – (f). Once the existence of a dismissal is established, the onus is on the employer to prove that the dismissal was fair.

5.2 In terms of section 188(1) of the LRA a dismissal is unfair, if the employer fails to prove –

That the reason for dismissal is a fair reason, related to the employee's conduct or based on the employer's operational requirements and that the dismissal was affected in accordance with a fair procedure.

5.3 I conclude that the respondent on a balance of probabilities proved that the dismissal was substantively fair for the reasons set out below.

5.4 The Court considered the case of *Palluci Home Depot (Pty) Ltd v Herskowitz and Others (2015) 5 BLLR 484 (LAC) CA 21/13,* where the LAC held that the offence of insubordination in the workplace has been described as a willful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (willful) and serious challenge to the employer's authority. The Court held that it is not essential for an instruction to be given or disobeyed to be found a challenge to the employer's authority. The test is whether the employee's conduct demonstrated an intention to challenge the employer's authority. The applicant failed to adhere to the instruction to run urgent parts before the close of business on 25 November 2020. The applicant denied that he was given an instruction by Mr. Davids to run an urgent part. This challenge was never put to Mr. Davids during the arbitration.

5.5 In *Nedcor Bank Ltd v Frank (2002)23 ILJ 1243(LAC),* it was held that dishonesty entails a lack of integrity or straightforwardness and in particular, a willingness to steal, cheat, lie or act fraudulently. This implies an intention to act dishonestly on the part of an employee.

5.6 The respondent proved that there were 31 employees who, in writing, indicated their willingness to work overtime. The number of employees who were prepared to work were sufficient to run a shift. It was expected of the applicant to have had knowledge of this list (Overtime Authorisation Form Management) as it was part of his duties. The most probable inference to be made is that applicant never looked at this list before informing Mr. Davids that staff were not willing to work. The evidence of Mr. Davids, namely, that the applicant's name was supposed to be the first name to appear on the list, was never challenged. The fact that Mr. Davids requested the applicant to convince the employees to reconsider their unwillingness to work, (when he called applicant for the second time) is an aggravating fact. Had applicant checked the list, or discussed the situation with his 4 subordinate team leaders, he would have noticed that 31 employees were available to work overtime. The applicant could only provide the names of two employees who were allegedly not prepared to work. Had it not been or the applicant's false and incorrect advices to Mr. Davids, Mr. Davids would not have cancelled the shift, which cancellation jeopardised the contract with Ford. The most probable inference to be made, is that the applicant personally did not want to work on that month-end weekend. I find that applicant intentionally mislead Mr. Davids by supplying false information. This offence in itself, justifies dismissal.

5.7 The formulation of disciplinary charges was dealt with by the Labour Appeal Court in *Woolworths (Pty) Ltd v CCMA & Others* (unreported JA30/10 26 May 2011). The Court found that the misconduct for which the applicant was arraigned *did not necessarily have to be strictly framed. It was sufficient that*

the wording of the misconduct alleged in the charge sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. I did not find the charges to be vague. The applicant ,being a senior employee on management level, was on a balance of probabilities duly aware that he neglected his duties and that he supplied false or incorrect information. In *Hulamin Limited vd Metal and Engineering Industries Bargaining Council, Reportable case D772/10* delivered 28 March 2014, the Labour Court held that: ''…in order to determine the fairness of the sanction, an arbitrator had to consider and determine what misconduct the employee had been convicted of, and once that had been established, the arbitrator is required to assess the blameworthiness of that misconduct for the purposes of determining whether the sanction of the dismissal was fair."

5.8 The applicant waived his claim in respect of procedural unfairness. It was therefore not necessary to determine procedural fairness. The respondent has different categories of offences. The applicant was charged under the category of "Work Output offences and Poor Performance" – see disciplinary code Exhibit 3 p 5. Dismissal is the penalty for refusal to obey a lawful and reasonable instruction in a first instance. This charge was clear and understood by the applicant.

5.9 The respondent's industrial relations policy stipulates under clause 5.4 ix that written notification should be given to an employee within 24 hours of receiving a report of misconduct, informing an employee of an alleged misconduct and that it is under investigation. The respondent failed to notify the applicant that an alleged misconduct was being investigated. The respondent contravened its own industrial relations policy; however, I find that the applicant was not significantly prejudiced by this failure. This failure *per se* does not render the process to be *nul and void* or unfair. The applicant was suspended and granted all his procedural rights at the disciplinary hearing. I find the delay in instituting disciplinary charges to be reasonable, considering that the offence took place on 25/26 November 2020 whilst respondent's business shut down early December 2020 for the Christmas recess.

AWARD

6.1 The dismissal of applicant, Mr.Silas Monukitsi Moeketsane is found to be substantively fair.

6.3 The applicant is not entitled to any relief. His dismissal is confirmed.

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AA Breedt: PANELLIST