

Arbitration Award Rendered

Case Number: GAJB3677-12
 Commissioner: Bongani Khumalo
 Date of Award: 1-Aug-2012

In the **ARBITRATION** between

Ishmael Seleke
 (Union/Applicant)

and

Concor
 (Respondent)

Union/Employee's representative: _____
 Union/Applicant's address: 512 Thola Section
Mokwalo
Vredefort
9595
 Telephone: _____
 Telefax: 086 247-8689
 E-mail: _____

Employer's representative: _____
 Respondent's address: No 20 Van der Bijl Street
Westonaria
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 Telephone: 011 753 2223
 Telefax: 086 528 3227 / 086 719 2358
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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing took place on 17 July 2012 at the CCMA offices, 127 Fox Street, Johannesburg. The Applicant was represented by Mr. M. Mgudlwa, the NUM official whilst the Respondent was represented by Mr. N. Maseko, NELA employer organization official. The arbitration process was manually and digitally recorded. Both parties submitted their written arguments on 24 July 2012.

ISSUES TO BE DECIDED

2. The issue to be decided is whether the dismissal of the Applicant was substantively unfair.
3. The Applicant seeks reinstatement.

THE BACKGROUND TO THE DISPUTE

4. Mr. Seleke was employed from 24 February 2010 as a Crane Rigger and earned R5203, 00 per month.
5. A disciplinary hearing was held on 26 and 30 January 2012 against the Applicant and at the conclusion of it the Applicant was dismissed.
6. The Applicant was charged with two counts of misconduct but was found guilty and dismissed for gross insubordination only.
7. It is common cause that the Applicant refused to obey a lawful and reasonable instruction pertaining to him undergoing a polygraph test.
8. On 6 February 2012 Mr. Seleke referred an alleged unfair dismissal dispute to the CCMA.
9. A conciliation meeting was held on 1 March 2012 but the dispute remained unresolved and a certificate to such effect was issued.
10. On 25 April 2012 Mr. Seleke requested that his dispute be resolved through arbitration.

SURVEY OF EVIDENCE AND ARGUMENT RESPONDENT'S VERSION FIRST WITNESS: MR. ROBERT TOOP

11. Mr. Toop was tasked to investigate missing steel plates at the respondent's premises. The deceased security guard, Sebeto, made a statement that he saw two employees loading steel plates onto a vehicle. Sebeto stated that the Applicant was one of the employees who removed the steel plates and he was assisted by an unknown person. When the Applicant was asked to undergo a polygraph test, he stated that he was not guilty and would not take the test. Mr. Toop stated that he wanted the Applicant to prove his innocence through a polygraph test. The respondent's policy provided that an employee should assist the company to investigate allegations by any means necessary. Mr. Toop consulted with the

Legal Department and he was told that there was nothing illegal about a polygraph test. The applicant slept on the company property, he abused his trust, he removed the steel plates and by refusing to take a test he was hiding something. The deceased Security guard took a test and he was cleared from any wrongdoing. The murder of the Security guard was aimed at silencing any whistleblowers.

SECOND WITNESS: MR. BRUCE EGERTON BEAUMONT

12. Mr. Beaumont chaired the applicant's disciplinary enquiry. The Applicant was not found guilty on the alleged misappropriation of company property because of inconclusive evidence. The witness who was to prove this charge was not on-site and he could not remember the date of the incident. The Applicant was given an instruction to take a polygraph test but he refused to do so. Such an instruction was reasonable and lawful as, amongst others, the company assets worth more than R100 000, 00 were missing. The applicant's dismissal was an appropriate sanction because (a) he refused to obey a lawful and reasonable instruction (b) the value of the goods lost was substantial and (c) he breached the trust relationship.

APPLICANT'S VERSION

13. The Applicant testified in person as follows: He did not refuse to obey the instruction given to him. He attended the polygraph test induction conducted by Mr. Oosthuizen wherein he was told that he was not forced to be tested. As a result he decided not to take the polygraph test. If he was sent for testing without having attended an induction he would not have refused to be tested because the company policy requires him to assist with the investigation. His contract of employment does not require him to be tested.

ANALYSIS OF EVIDENCE AND ARGUMENT

14. The facts and circumstances giving rise to the charges for which the applicant was dismissed are generally common cause. They pertained to steel plates of high value which were removed from the respondent's premises. The Applicant conceded during the pre-arbitration conference that (a) he was expected to assist the employer to investigate any incident of misconduct (b) he refused to undergo a polygraph testing (c) he was required to obey and to comply with a lawful and reasonable instructions from his superiors (d) the company's security regulations must be observed at all times, and may in the company's sole discretion, be varied from time to time (e) gross discourtesy/insubordination or insolence is a dismissible offence and (f) that disobeying or blatant refusal to comply with instructions is a dismissible offence. The sole defense of the Applicant was that (i) he cooperated with the instruction on polygraph testing and (ii) when he was told that he was not forced to take a polygraph test, he decided to refuse to take it.


15. It is trite law that polygraph testing is not illicit per se but is permitted to be used as a tool to investigate allegations of misconduct. It is, however, inconclusive evidence on its own to determine the guilt of the alleged offender. In the present case it is common cause that the applicant was contractually bound to assist the employer with its investigation of allegations by any means necessary. On that basis I find that the respondent was correct in interpreting the refusal of the Applicant to take a polygraph test against this well known and

documented rule as a breach of this rule but, more importantly, as a blatant refusal to carry out a lawful and reasonable instruction. The fact that the Applicant was allegedly told that he was not forced, as an individual, to take the polygraph test cannot supersede a collective and contractual undertaking to assist the employer with the investigation of the counts of misconduct by any lawful and reasonable means the employer had elected to implement. As there is reason to suspect that the Applicant might have been aware or might even have taken part in the illicit activities, it was indeed reasonable for the Applicant to have taken the test to prove his innocence. It is trite law that the employee has, on one hand, a positive duty to further the employer's business interests and, on the other hand, to be respectful and obedient.

16. Uncontroverted evidence was led by the respondent's witnesses that the applicant's insubordination in the Instant case was serious, persistent and deliberate. The fact that the Applicant initially co-operated with the induction process but refused to complete the entire polygraph testing does not assist his case. Although the evidence did not conclusively show that the Applicant intended to challenge the employer's authority, his actions had a propensity to make a mockery of the employer's disciplinary procedure. All things being equal, I find that it would have been better for the Applicant to have taken the polygraph test and to lodge a grievance after that if he felt strongly that his rights were somewhat violated. I find that the offence before me is serious enough to warrant dismissal and that there is no basis for me to interfere with the sanction of the respondent. Also the applicant would be entitled, at the internal hearing, to challenge the authenticity and or admissibility of the polygraph test and to rebut in evidence any incriminating findings based on the outcome of this test.
17. The Applicant did not fare too well, in my opinion, on the question of his refusal to take the test. He conceded in cross-examination that (a) when he was asked about the missing steel plate that was part of an investigation (b) he was told that he was one of the suspects (c) he was prepared to assist with the investigation of the missing steel plates (d) he told the company that he did not know anything about the missing steel plates yet he did not agree to take the test and (e) that the instruction given to him was reasonable and lawful. The testimony of the respondent's witnesses was honest and credible. Weighing all considerations in the balance, I find that the Applicant's evidence itself cumulatively supports the inference that the Applicant breached the rule as charged.

AWARD

1. I find that the dismissal of the Applicant was substantively fair.
2. The dismissal is confirmed.
3. I make no order as to costs.



BONGANI KHUMALO
CCMA PT SENIOR COMMISSIONER