Food and Allied Workers Union obo Julies / Unitrans Supply Chain Solutions (Pty) Ltd

(2023) 32 NBCRFLI 8.37.8

Reported in (Butterworths)	[2023] 4 BALR 334 (NBCRFLI)
Case No.	RFBC66947
Award Date	01/02/2023
Jurisdiction	National Bargaining Council for the Road Freight and Logistics Industry
Arbitrator	D du Plessis
Subject	Substantive fairness in dismissal Misconduct Alcohol

Keywords

Dismissal - Substantive fairness - Misconduct - Alcohol - Employee dismissed after testing positive with breathalyser but no proof that his faculties were impaired - Dismissal unfair.

Mini Summary:

The applicant employee was dismissed after testing positive for alcohol. He claimed that he had consumed "a few beers" over the previous weekend and denied that he was under the influence of alcohol when he reported and that he had been tested. The respondent claimed that apart from the test result, the employee was "reeking of alcohol" and that it had a zero-tolerance policy when it came to reporting for duty under the influence of alcohol.

The Commissioner found some of the evidence led by the respondent unsatisfactory. However, the applicant was also not an impressive witness. His version of the number of beers he had consumed had changed over time. However, numerous authorities had held that employers are not permitted to rely on zero-tolerance policies without proof that the employee was intoxicated and that dismissal was an appropriate penalty for a particular case. In this case, there was no proof that the employee's faculties were in any sense impaired. Since the respondent had also failed to prove that a restoration of the employment relationship would be intolerable, there was no reason not to reinstate the employee.

The employee was reinstated with nine months' back pay.

Award

Details of hearing and representation

[1] The matter was referred to the NBCRFLI for arbitration in terms of section 191(5)(a)(i) of the Labour Relations Act 66 of 1995 as amended (the "LRA"). Mr Mandla Mngqikana, a FAWU official, appeared for Mr Warren Julies, the applicant. The applicant confirmed that he was no longer represented by Solidarity. Mr Harold Segole appeared for Unitrans Supply Chain Solutions (Pty) Ltd, the respondent. He is the Human Resources Manager.

[2] The arbitration hearing was held on 2 December 2022 and 30 January 2023 at the NBCRFLI's offices in Parow. I recorded the hearing and kept notes. Evidence was presented under oath. Bundles of documents were handed up.

[3] At commencement of the proceedings on 2 December 2022, an *in limine* issue related to a previous removal from the roll and consequent re-enrolment was raised. I held that this was done in compliance with the relevant section of the LRA and the relevant Rule. An application for postponement was not granted. The matter proceeded and the evidence of the first witness for the respondent was presented.

Issue in dispute

[4] I must decide whether the applicant was dismissed for a fair reason. If not, then whether to order his retrospective reinstatement.

Background of the dispute

[5] On 31 March 2022, following the applicant's dismissal on 1 March 2022, the matter was referred to the NBCRFLI. A conciliation meeting was scheduled for 5 May 2022. The respondent did not attend the meeting. On the strength of the Certificate of Outcome declaring the matter to remain unresolved, arbitration was requested. The matter was scheduled for arbitration on 30 August 2022. The applicant did not attend the hearing and the presiding Commissioner issued a ruling to remove the matter from the roll. On 21 September 2022, the applicant requested that the matter be re-enrolled. This was granted on 17 October 2022.

[6] The respondent is part of the KAP group of companies. It provides warehousing, transportation and supply chain-based services to various clients. The client in this matter is Epol in Worcester, a manufacturer of various animal feeds.

[7] The applicant started to work for the respondent on 1 July 2018 as a general worker in Worcester at the Epol

plant. At date of dismissal, his monthly salary amounted to R7 281,63.

[8] The applicant was dismissed for having been found to have reported for duty on 30 January 2022 whilst allegedly being under the influence of alcohol. A disciplinary process then followed. Procedural fairness is not in dispute. The existence and reasonableness or necessity of the applicable rules, policies and expected standard of conduct is also not in dispute. Neither is it in dispute that the applicant knew these rules and policies. It is denied that the applicant was under the influence of alcohol at the Epol plant on 30 January 2022.

[9] The reliability or correctness of the testing equipment, a breathalyser machine, is also in dispute. It is further in dispute that a physical assessment was done by Mr Wasief Adams, the Contract Manager. It was not in dispute that Mr Adams was called to the Epol plant shortly after 6pm on 30 January 2022 and that by 7pm Mr Adams had sent the applicant home after having interacted with him. The applicant disputes that he is the author of a written statement as per the respondent's bundle and attributed to him.

[10] The Epol plant runs on two 12-hour shifts and operates seven days a week. The applicant was scheduled for the shift starting at 6pm on Sunday 30 January 2022, ending at 6am on Monday 31 January 2022. It was common cause that the respondent consistently dismisses employees who are found to have reported for duty whilst under the influence of alcohol. At the time of his dismissal, the applicant had a clean disciplinary record.

Survey of arguments and evidence

[11] Mr Wasief Adams is the Contract Manager. He testified that he has been with the respondent for 14.5 years. He was at home on 30 January 2022 when Riaan Haas, the Supervisor, called him to go to the workplace. On arrival there, Mr Haas and the applicant entered his office. Mr Haas told him that he suspected the applicant to be under the influence of alcohol. He then completed the intoxication checklist. On questioning the applicant, the applicant told Mr Adams that he had been drinking most of the Saturday night. They had a braai the Sunday morning, when he had a couple of beers. He stopped drinking after lunch. The applicant reeked of alcohol and his eyes were bloodshot. He did a test on the applicant. When Mr Haas asked the applicant whether he had been drinking, the applicant became aggressive. He then told the applicant to leave the site.

[12] He referred to the checklist that he had completed. A breathalyser test was not done due to Covid. People are normally sent to Pathcare for blood tests. However, at that time Pathcare was already closed. They could not send the applicant to the Worcester hospital because the hospital would not allow them in. Therefore, only the checklist was done.

[13] There is heavy machinery on the site with rotating screws that could cause an amputation. Workers also climb on and off the trucks that transport the animal feed. He confirmed that there is a zero-tolerance policy towards reporting for duty under the influence of alcohol.

[14] While he was interviewing the applicant in his office, he took notes. The notes confirm that the applicant told him that they braaied the whole of the Saturday. He had an argument, with his brother-in law who was disrespectful towards his mother. He also noted that the taxi that picked the applicant up for work, found him sleeping outside the house. The applicant has not indicated that he has an alcohol related problem.

[15] He confirmed during cross-examination that he interviewed the applicant once. His contemporaneous notes confirm what was said. During the interview, the applicant told him that he stopped drinking the Saturday evening. At the disciplinary hearing, the applicant said that he had two beers the Sunday morning during that braai. He then conceded that he was unsure when exactly the applicant said that he stopped drinking. He reiterated that the applicant told him that he stopped drinking the Saturday and at the hearing, he said the Sunday. He conceded again that his statements seem to be contradictory.

[16] He was referred to the "Checklist for Assessing Intoxication". He completed it at 6:35pm on 30 January 2022. He completed the checklist by talking to the applicant, checking the responses and evaluating his movement. The applicant knew that he was doing the checklist. He cannot do the checklist on his own, there must be a witness. It was put to him that he had not done the checklist in the applicant's presence. He responded that his name was on the bottom of the page. The applicant denied that he was under the influence of alcohol and said that he was tired. He told the applicant to stand back because he could smell the alcohol on his breath. He is a non-drinker. He did not feel like writing that in his statement. He denied that he completed the checklist in the applicant's absence but with the witness. There is no other proof that the applicant was under the influence of alcohol. The only proof he has is the checklist coupled with his training. He disagreed that there was no proof that the applicant was under the influence of alcohol.

[17] He denied that the applicant was sent to his office, told to leave and then called back. He denied that he told the applicant not to worry. He could not say whether the minutes of the disciplinary hearing were read to the applicant.

[18] The witness was seated and the applicant stood in front of the desk. He did not ask the applicant to write anything, nor did he ask him to perform any of the actions as per the "Physical Tests" section of the checklist. He still completed the document. During re-examination he stated that he performed the tests.

[19] The matter of Brandon Damons is the same. He was found sleeping in his truck and admitted to being under the influence of alcohol. He was dismissed.

[20] Mr Riaan Haas is a Dispatch Supervisor in the respondent's employ. The applicant reported to him. When the applicant arrived at work on 30 January 2022, he smelled alcohol on him and phoned Mr Adams to come to the

office. On his arrival, he called him and the applicant into his office. He explained what was going to happen and explained about the intoxication checklist. While Mr Adams spoke to the applicant, he completed the checklist. He also did tests, such as letting the applicant stand on one leg. The applicant struggled to do that. The applicant was himself. He was not aggressive.

[21] During cross-examination, he said that he was present when Mr Adams did the intoxication check. He could not say why Mr Adams noted that the applicant was slightly aggressive, in light of his version that he was not aggressive. He also insisted that all the physical checks were done. The applicant did the handwriting test on a piece of scrap paper at the table. He did not know why Mr Adams testified that he had not done the tests. He insisted that the checklist was reliable. He was present and signed as the witness. No other witness was called in. One should have been called in to verify what happened. The breathalyser test could not be done due to Covid restrictions. The applicant was not given the option of medical testing.

[22] He denied that the applicant was taken twice to Mr Adams' office. He conceded that many products contain alcohol. Beer, wine and spirits have a different smell than other products. The applicant was under the influence of alcohol. He phoned Mr Adams because he had the suspicion that the applicant might be drunk. He conceded, that apart of the smell of alcohol, the applicant was his normal self. He denied that the applicant and others entered the premises as a group. He made the applicant sit in the back and denied that he approached the applicant while he was warming up his food at the microwave oven.

[23] Mr Warren Julies, the applicant, testified that on 30 January 2022, the taxi fetched him from home. He was waiting outside for the taxi. On arriving at work, all the people in the taxi went into the workplace as a group. In the canteen he warmed up his food. Riaan Haas stood behind him, shook his head and walked away. He phoned Mr Adams who then came to the workplace. He was called into Mr Adams' office where Messrs Haas and Adams accused him of being under the influence of alcohol. They told him to leave the office. He then finished his food. Riaan Haas called him again to go to Mr Adams. This time it was only him and Mr Adams. He was busy completing the intoxication sheet. He told the applicant not to worry, to go home and to return the following day as they suspected him of being under the influence of alcohol.

[24] He stopped drinking the previous evening. He was not aggressive at work. No medical tests or any other tests were done. He was aware the Brandon Damons was dismissed. He was found asleep in his truck.

[25] During cross-examination he said that when they arrive early at work they can eat. The lunch break is after four hours. It is standard procedure to take the meal break only then. The previous Saturday night they were a group of about six men at the house. Between them they finished 12 beers, thus two each, starting at about 5pm and finishing between 10pm to 11pm. He did not drink the Sunday morning. His wife and the others drank. He was attending to the braai. He disputed the correctness of the minutes of the disciplinary hearing to the effect that at the disciplinary hearing, he said that he drank into the early hours of Sunday morning and Sunday morning he had two beers before lunch. He explained that the chairperson might have misheard him. He denied that there was a difference in the smell of beer, brandy or wine and other products containing alcohol. He conceded then that they stopped drinking in the early hours of Sunday morning.

[26] He knows that the respondent has a zero-tolerance policy towards alcohol at the workplace. He disagreed with Mr Haas's evidence that they had a good relationship as they had an on and off relationship. He could not say why either Mr Haas or Mr Adams would lie about the matter. He stood by the version that he was called twice into Mr Adams' office and that when he entered the office the second time, Mr Adams was completing the checklist. He denied that he had been coached. He conceded that the respondent consistently dismisses workers who are found to have been under the influence of alcohol at work.

Summary of the arguments

[27] Mr Segole submitted that the dismissal was both substantively and procedurally fair. The applicant was under a common law duty to behave in compliance with workplace rules. There is no reason why either Mr Adams or Mr Haas would lie about the smell of alcohol. The applicant conceded that he drank till late. It was submitted that the applicant was coached, hence the contradictions in his version. The applicant was not an honest witness. The employment relationship has been irreparably damaged by what the applicant had done.

[28] Mr Mngqikana submitted that the respondent is a huge enterprise that employs many people. The expectation is that things would be done above board. The intoxication checklist should be disregarded as unreliable. The two witnesses for the respondent contradicted each other and their versions should be disregarded. The applicant was charged on the suspicion that he was under the influence of alcohol. There is no reliable evidence that he was under the influence of alcohol. Suspicions cannot damage the employment relationship; there must be proper findings in that regard. The applicant should be retrospectively reinstated.

Analysis of arguments and evidence

[29] As procedural fairness was not in dispute, I must determine whether the dismissal was for a fair reason and if not, whether to order the applicant's retrospective reinstatement. The applicant denied that he was under the influence of alcohol, the respondent's case is founded on this. The relevant rules, policies and standard of conduct are also not in dispute. The applicant, on his version, is very aware of these rules, policies and standard of conduct. He also knows that employees who are found to be under the influence of alcohol are consistently dismissed.

[30] Both the representatives made submissions about the unreliability of evidence and witnesses called by the other. Messrs Adams and Haas, the two witnesses for the respondent, contradicted each other, particularly about the Intoxication Checklist. Mr Adams, for instance, testified that he had not done all the physical tests

on the applicant, but nevertheless completed the form as if the applicant was not able to perform the necessary activity. Mr Haas insisted that the tests were done. This was from the beginning of the arbitration in dispute. Mr Haas also insisted that the applicant's handwriting was tested by letting him write on a piece of scrap paper. Mr Adams denied that this was done. Mr Adams testified that the applicant stood at first close to the desk. He then asked the applicant to move back as he did not like the smell of alcohol. On Mr Haas's version, the applicant was seated at the desk. The more probable version is that the applicant was not asked to write anything. If he had, the piece of paper would have been kept. Another contradiction was that Mr Haas testified that the applicant was not aggressive, whereas Mr Adams' version is that the applicant was "slightly aggressive" towards Mr Haas. Neither witness testified that the applicant acted abnormally.

[31] Mr Adams kept his cryptic contemporaneous note and would have kept any note written by the applicant. I also do not accept that the applicant was asked to stand on one leg. Mr Haas said that he would be required to do so for one to two minutes. That might well be a difficult thing to do for many sober people.

[32] The checklist was also not properly completed, as was pointed out by Mr Mngqikana. The issue of an independent witness was taken up. Mr Haas conceded that in other cases, there would be a third person, an independent witness. There was no such witness. During re-examination he confirmed on the leading question posed to him, that he was the witness. He may well have witnessed what happened, but his version about what happened in Mr Adams's office is not reliable.

[33] I do agree with the two witnesses for the respondent that the applicant did smell of alcohol. He did not deny it. Mr Haas probably smelled this when he stood behind the applicant at the microwave oven in the canteen while the applicant was warming up his food. The applicant testified that Mr Haas shook his head, left and called Mr Adams. Mr Adams' version that he smelled the alcohol on the applicant and asked him to stand back as he is not a drinker, was not disputed. The applicant's denial that he smelled of alcohol is the submission that many things contain alcohol and there is no distinction in the scent. The respondent's version that beer, wine and brandy for instances smell different from products like sanitiser that contains alcohol is the more probable and is accepted. I though cannot find that the Checklist for Assessing Intoxication is reliable to determine whether the applicant was intoxicated/under the influence of alcohol/ drunk as was alleged. When Mr Haas was asked whether the applicant was under influence of alcohol, he at first evaded the question. The third time he was asked, he responded in the affirmative. He then said that he called Mr Adams because he suspected that the applicant might be drunk.

[34] The applicant was also not an impressive witness. There was the impression that his version was tailored. The minutes of the disciplinary hearing were not challenged for correctness. He was given a copy of the document and never informed anyone that he did not agree with the chairperson's recordal of the evidence. I accept the document as a correct recordal of what transpired and what was said at the disciplinary hearing. The applicant's version thus changed over time. At arbitration he wanted everyone to believe that he and some five other men had a braai or party the Saturday night, that they started at about 5pm and were finished by the latest 11pm. They each had only two beers. He did not drink the Sunday morning. His previous evidence was that he drank into the early hours of the morning and Sunday morning, before lunch he had two beers. It is unlikely that the whole Saturday evening they each nursed two beers. The more probable version is that the applicant drank, and by this is meant he drank more than two beers, into the early hours of the morning and that Sunday morning he had two more beers. When he got to work, he was still smelling of alcohol. The evidence about whether the taxi that picked the applicant up from home found him sleeping, is hearsay evidence and is not accepted.

[35] The applicant did not dispute that it is a dangerous workplace. When he arrived at work, he was smelling of alcohol. This is enough to raise the suspicion that he might have been under the influence of alcohol. I was not given a definition of what "under the influence" means for the respondent. The checklist that was done, does not confirm that the applicant was under the influence of alcohol. No breathalyser test was done. The reason was given as due to Covid. It is unclear how this could be the reason as there are various breathalyser tests and all the equipment must be properly cleaned after use or even discarded. I accept that Pathcare was closed. Hospitals still operated their emergency sections and there was no reason for not taking the applicant to the hospital or another medical practitioner for blood tests.

[36] The applicant though smelled of alcohol and on his version, he drank alcohol at least until lunch on the Sunday. That would mean he stopped drinking about 5 or 6 hours before reporting for duty. Given the zero-tolerance policy towards alcohol and the fact that employees are consistently dismissed for having been found to be under the influence of alcohol, was it fair to dismiss the applicant? In order to answer this, I shall do a short survey of the courts' guidance.

[37] Until the Labour Appeal Court decided in *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and others* [2015] 9 BLLR 887 (LAC) that employers are not permitted to rely inflexibly on a "zero tolerance" approach to certain offences, arbitrators and judges accepted that it would be fair for an employee to be dismissed without further enquiry, if there was evidence to support a finding that the zero tolerance approach was justified. In this case the Labour Appeal Court set aside a CCMA award accepting the employer's reliance on a zero tolerance policy regarding the removal of company stock without having regard to the circumstances of the infraction. The court ruled that employers are not permitted to rely inflexibly on a zero-tolerance approach to certain offences and to dismiss employees regardless of the circumstances. The LAC considered that even in light of a zero-tolerance policy, a CCMA Commissioner or other arbitrator "is the initial and primary judge of whether a decision is fair" and that "Commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees." The LAC in Shoprite Checkers clearly pointed out that each case had to be considered on its own merits.

[38] Even before this judgment, in *Taxi-Trucks Parcel Express (Pty) Ltd v NBCRFI* (2012) 33 ILJ 2985 (LC) [also

reported at [2012] 12 BLLR 1301 (LC) - Ed] the application of a zero-tolerance policy against being under the influence of alcohol was found to be unfair as the employee in question was a general worker, and not a driver.

[39] In the more recent matter of *Air Products South Africa* (*Pty*) *Ltd v Matee and others* [2021] JOL 53666 (LC), in paragraph 41 the court held that the issue before the arbitrator was whether the first respondent transgressed the applicant's zero-tolerance policy on alcohol. To do that, he was required to assess whether the applicant's circumstances necessitated the adoption of a zero-tolerance policy and whether the dismissal was appropriate and proportional to the offence.

[40] In *Enever v Barloworld Equipment, a division of Barloworld South Africa* (*Pty*) *Ltd* [2022] JOL 54835 (LC) [also reported at [2022] 10 BLLR 962 (LC) - Ed] the applicant was dismissed on account of repetitively testing positive for the cannabis drug and accordingly in breach of the respondent's Alcohol and Substance Abuse Policy. The principles would be equally applicable in the case of alcohol. This policy was one which the applicant was at all material times aware of. It was consistently applied to all the respondent's employees. The fact that the use of cannabis did not occur at the workplace or during working hours was said not to assist the applicant where the respondent had a zero-tolerance policy. The sanction meted out to the applicant by the respondent was held to be rational and served a legitimate purpose.

[41] In *Route Management* (*Pty*) *Ltd v Goldschmidt NO and others* [2022] JOL 54281 (LC), the employee, a shop steward, failed a breathalyser test on 29 January 2018. His dismissal was upheld at arbitration and by the Labour Court.

[42] And in the matter of *Jet Demolition* (*Pty*) *Ltd v AMCU obo Sehoshe and others* (JR1261/19) [2022] ZALCJHB 55 [reported at [2022] JOL 52942 (LC) - Ed], a driver was driving people whilst under influence against a zero tolerance policy A Commissioner's award that the dismissal was unfair was set aside. The Labour Court held in paragraph 37:

> "In reaching this conclusion it would seem that the Commissioner did not take into account that it was Charge 1 which deals with the Policy and that Charge 2 is dealt with in the disciplinary code and procedure for "driving under the influence". It is clear that by applying section 3.1.2 of the Policy, which only applies when an employee attempts to enter the site, the Commissioner failed to take into account that the Employee herein was employed as a driver, tasked with transporting employees to and from sites and that his duties, therefore, commenced the moment he stepped into the Applicant's vehicle and turned on the ignition."

In terms of the employer's policy, if an employee suspected they might be under influence on reporting for duty, they could request to do a self-sobriety test. If alcohol is shown, they would then not be allowed to work and would be charged with absenteeism.

[43] Thus, the employer may not rely inflexibly on the zero-tolerance policy, where the alcohol or drug was consumed is not of importance, the duties of the person must be considered, whether the employer's circumstances necessitated the adoption of a zero-tolerance policy must be considered and also whether the dismissal was appropriate and proportional to the offence.

[44] It is not in dispute that the operational environment of the respondent necessitates a zero-tolerance approach. The applicant was employed as a general worker and he consumed the alcohol before reporting for duty. Although the applicant smelled of alcohol, I cannot conclude that he was under the influence of alcohol as he was charged with. There is no reliable evidence to show that he was under the influence of alcohol. I have above, referred to the evidence in this regard. There is no evidence at all that he was not able to move properly nor that his faculties had somehow been impaired.

[45] Furthermore, neither witness testified that the trust relationship had broken down or that the employment relationship had broken down. In *Edcon Ltd v Pillemer NO and another* [2010] 1 BLLR 1 (SCA), it was held that the breakdown of the trust relationship will not be assumed by the presiding official even if dishonesty has been proven. Specific evidence to this effect will need to be presented by the employer at any legal proceeding following a dismissal. If the employer wishes to show the fairness of the sanction of dismissal, then evidence of the breakdown of the trust relationship must be led. The same principle is to be applied in the case of alcohol consumption or a zero-tolerance policy.

[46] I hold that the dismissal was not for a fair reason.

[47] The applicant requested retrospective reinstatement. There is no evidence that reinstatement would be intolerable for the respondent or somehow impractical. The impression is that the respondent failed to prove the commission of the misconduct. The ultimate finding, in giving the applicant the benefit of the doubt is not because he did nothing wrong. There is a suspicion, however the suspicion that he reported for duty whilst under the influence of alcohol is not supported by reliable evidence. The applicant should therefore cherish the fact that he is given this chance.

[48] In granting retrospective reinstatement, I shall not order full retrospective backpay. It would be unfair to order full backpay, given that the respondent cannot be blamed for the delay of almost three months in finalising the matter. Backpay will therefore be limited to nine months' wages. This amounts to R65 534,67, calculated as R7 281,63 x 9.

Award

[49] The dismissal of the applicant, Warren Julies, by the respondent, Unitrans Supply Chain Solutions (Pty) Ltd was unfair for lack of a fair reason.

[50] Unitrans Supply Chain Solutions (Pty) Ltd is ordered to reinstate Warren Julies on the same terms and conditions of employment which governed the employment relationship prior to the dismissal dated 1 March 2022.

[51] The reinstatement is to operate retrospectively with effect from 13 May 2022.

[52] Unitrans Supply Chain Solutions (Pty) Ltd is ordered to pay Warren Julies remuneration due to him in the amount of R65 534,67 (sixty five thousand five hundred and thirty four Rand and sixty seven cents) by 13 February 2023.

[53] Warren Julies must report for duty at the Epol plant in Worcester on Monday 13 February 2023.