

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D197/04

DATE: 14 MAY 2008

Not reportable

In the matter between

UNITRANS FUEL AND CHEMICAL (PTY) LTD

APPLICANT

and

10 N N NAIDOO

FIRST RESPONDENT

R NAIDOO

SECOND RESPONDENT

THE NATIONAL BARGAINING COUNCIL

FOR THE ROAD FREIGHT INDUSTRY

THIRD RESPONDENT

15

JUDGMENT

14 May 2008

PILLAY D, J This is an application to review and set aside the award of the second respondent Commissioner. The record in the review is deficient in several respects. However, the Arbitrator has recorded the material evidence sufficiently to enable the Court to come to a final decision. Furthermore, the ground of review is limited to the sanction imposed on the first respondent employee.

The issue before the Commissioner was whether the employee was under the influence of alcohol and whether his blood alcohol count had exceeded the legal limit. The Commissioner found that the employee was

not under the influence of alcohol. In coming to that conclusion the Commissioner took into account all the material evidence before him, including reports of the employee's conduct and demeanour at the time when he was tested¹.

5 Although his breath had a distinct smell of alcohol his eyes were watery, his speech normal, his stance steady and his gait sure. He appeared confused, frightened, but polite and co-operative. He submitted willingly to the test. The Commissioner also found that the employee had a blood alcohol level of 0,55, which an hour later fell to 0,45.

10 The applicant alleges that the Commissioner failed to take into account that a blood alcohol level of 0.55 or 0.45 impaired a driver's reaction time, even though it did not appear that he was under the influence of alcohol. That is the evidence the applicant alleges the Commissioner ignored. Consequently he had failed to apply his mind to the evidence when
15 imposing a sanction of a warning, valid for six months.

 That a driver's reaction times might be impaired was not the only consideration in all the circumstances of this case. The other circumstances which the Commissioner took into account include those set out at paragraph 8 of the award. They are the personal circumstances of the employee, his
20 omission to appreciate that he was consuming alcohol (he believed that he was taking medication) and that he was remorseful when he tested positive for the alcohol.

 The Commissioner also took into account the circumstances in which the offence was committed, and these circumstances are enumerated at
25 paragraph 8.3 of the award. A particular fact that influenced the

¹ Page 63 of the Pleadings Bundle

Commissioner was that the employee was not provided with comfortable sleeping facilities; that he consumed what he believed was medication to enable him to sleep; that the bottle containing the substance consumed did not reflect that it had alcohol, and the supervisor allowed the employee to
5 drive the vehicle back to Durban after testing. That suggested that the relationship had not broken down.

The applicant is not correct in its submission that the Commissioner did not take into account the evidence of the so-called expert on alcohol testing. It is manifest from the award that the Commissioner did take into
10 account all the material facts, including the evidence of Mr Hayes. That he drew a different conclusion or different inferences than those sought by the applicant does not render this award reviewable.

In the circumstances the application for review is dismissed with costs.

15

20 Pillay D, J

Date: 8 October 2008

25 APPEARANCES

ON BEHALF OF APPLICANT : ADV R SEGGIE instructed by
Tomlinson Mnguni James

30

ON BEHALF OF RESPONDENTS : MR B PURDON- Brett Purdon
Attorneys

