

**Daniel #7**

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER,

and

EMPLOYEE

ARBITRATOR: WILLIAM P. DANIEL

**FACTS**

Upon being employed, the claimant became subject to a just cause employment contract and "The Termination Appeal Procedure" (TAP) which provided the method by which a terminated employee could challenge that action up to and including hearing before a neutral arbitrator. The employee handbook contained specific reference to the employer's just cause termination policy and eligibility to use the TAP. It stated that the procedure was "intended to be an exclusive, final and binding method to resolve all claims arising out of termination from employment". It was pointed out that failure to follow the procedure might preclude an employee from pursuing any legal rights in a court or other forum. The claimant signed an agreement to abide by the company's policies and procedures.

On October 22, 1992 he was apprehended by store security, found to be in possession of unauthorized merchandise and caused to be arrested with charges filed against him. On December 4, 1992, the employer terminated his employment.

The County A Prosecutor brought theft charges against the grievant. A jury trial was held on June 8, 1993 and he was acquitted. On August 11, 1993, by his attorney, the claimant wrote the employer demanding payment of benefits, lost wages and other financial compensation. As of this point, the claimant had filed no appeal under the TAP.

The employer's response was that there was a different burden of proof in the criminal case versus a civil dispute and that the company still considered that there was just cause for his termination. It also contended that he was barred from pursuing any claims related to the termination of his employment because he had failed to exhaust his remedies under the TAP.

On November 24, 1993, the claimant filed a complaint against the employer in the County A Circuit Court alleging wrongful discharge/breach of contract and other tort claims in connection with his termination. That court found, as a matter of law "that the Termination Appeal Procedure does not comport with elementary fairness". The employer's motion for summary disposition asserted that the failure of the claimant to file under the appeal procedures foreclosed any claims raised in the lawsuit.

On May 21, 1996, the Court of Appeals ruled on the employer's motion reversing the trial court's order denying summary disposition. That court reversed and held:

Liberally construing the arbitration clause to which each party was bound and resolving doubts in favor of arbitration, Plaintiff's contract and tort claims were subject to the arbitration procedure at issue. Indeed, Plaintiff's contract and tort claims arise from and relate to the allegations of theft and embezzlement that provide the basis for Plaintiff's termination from employment. Further, the arbitration procedure expressly requires an impartial arbiter and is not inherently unfair. Therefore, the trial court's speculative assessment regarding the potential partiality of the arbiters was premature. . . . Finally, the criminal action that the state commenced against Plaintiff was not inconsistent with defendants' right to arbitrate this matter. Accordingly, the circuit court erred in denying defendants' motion for summary disposition.

Reversed. Pursuant to MCR 7.216(7) and (9), we hereby order that this matter be submitted to arbitration in accordance with the arbitration procedure at issue. (All citations omitted).

Applications for review by the Michigan Supreme Court were denied July 15, 1997 and October 21, 1997.

On August 6, 1997, the claimant notified the employer that he was demanding arbitration of "all employment-related issues pursuant to the directive of the Court of Appeals". Contacts between the parties ensued as to the process and a copy of the TAP and forms for filing a claim were sent to the claimant's attorney, June 3, 1998 and an appeal was filed on August 4, 1998.

This appeal was denied on October 16, 1998 on the basis that the company had just cause for discharge and that the submission was untimely. The claimant then, on October 27, 1998, notified the employer of its election to arbitrate. Thereafter the parties selected an arbitrator in accordance with the procedures and subsequently agreed to submit the question of timeliness to the arbitrator for decision prior to any hearing on the merits.

## **TERMINATION APPEAL PROCEDURES**

### **A. PURPOSE AND SCOPE**

This procedure has been established to provide an exclusive, final and binding method for the company and any eligible associate to resolve all claims, controversies, disputes or complaints arising out of or relating to the associate's termination based on federal, state or local law.

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### **E. REQUEST FOR REVIEW**

An eligible associate who has been terminated from employment, and who desires to challenge the termination, must first submit a request for review of the termination to the Associate Services Department by fully completing and signing Part 1 of the company's Termination Appeal Form (PL 169).

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The Termination Appeal Form must be delivered to the Associate Services Department or must be postmarked within fourteen (14) calendar days of the date of termination, unless an extension has been requested by the associate and granted in writing by the company.

\* \* \*

### **G. ELECTION TO ARBITRATE**

If the associate is not satisfied with the answer of the Associate Services Department and desires to arbitrate his or her claims, the associate must elect arbitration in accordance with the procedures below.

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#### L. ARBITRATOR'S AUTHORITY

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the associates termination from employment.

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In reaching a decision, the arbitrator shall interpret, apply, and be bound by any applicable company handbooks, rules, policies and procedures and applicable federal, state and local law.

\* \* \*

#### M. RELIEF

If the arbitrator finds that the associate was unlawfully or unjustly terminated, the arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant.

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#### N. ARBITRATOR'S AWARD

\* \* \*

The arbitrator's award shall be final and binding and a judgment may be entered on the award by any circuit court or other court of competent jurisdiction.

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#### Q. TIME LIMITS

The time limits contained in this procedure may be extended only by the mutual written agreement of the parties. Failure of the associate to meet the time limits, or agreed upon extensions, for filing a request for review, electing arbitration or meeting to choose an arbitrator shall be deemed to be a binding agreement by the associate to settle all of the associate's claims in accordance with the latest decision of the company regarding the termination and shall constitute a failure to exhaust this procedure.

### **ISSUE**

Is the claimant barred from an arbitration hearing on the merits of his claim because of untimely filing of an appeal of his termination?

## **DISCUSSION**

It is well recognized by the courts that an employer and employee may enter into a contract of employment providing certain terms and conditions and a method of resolving disputes, particularly in regard to termination, by means of arbitration. The procedure in this case has been recognized by the Court of Appeals as being such a contract.

The arbitrator is a creature of that contract and has only the authority and jurisdiction granted him by the parties. Where the terms of the appeal procedure are clear and unambiguous, then it is the arbitrator's obligation to apply and enforce those terms.

The long running dispute between the parties commencing shortly after the claimant's termination and ending with the Court of Appeals determination was whether he was bound to arbitrate because of the nature of his complaint. That claim was laid to rest by the Court of Appeals' decision which saw the issue as whether the claimant was barred from pursuing his claims in court because he failed to exhaust his remedies under the grievance and arbitration procedure. The court stated "we hold that Plaintiff is so barred". That seems to be quite a clear statement which is binding upon this arbitrator. It also was found that contract and tort claims were subject to the arbitration procedure. The court's final order that the matter be "submitted to arbitration in accordance with the arbitration procedure at issue" is simply a resolution of the issue of substantive arbitrability. The claimant had contended that certain legal claims were not included within ambit of the procedure while the employer contended that they were. This decision of the Court of Appeals resolved that issue in favor of the company. It meant that all other issues were to be submitted to arbitration, including any procedural issues which might be raised. Numerous decisions of the courts, both state and federal, have upheld the right of the

arbitrator to determine issues of procedural arbitrability. The Court of Appeals' decision recognized and preserved that right of the arbitrator.

The indisputable fact is that the claimant did not file an appeal within the fourteen day period set by contract. There was offered no explanation or mitigating circumstances that excused that failure other than that the claimant believed that he had the right to pursue a cause of action in the courts. Perhaps, he could have filed under the appeal procedure under protest and at that same time request that it be held in abeyance pending the outcome of the criminal trial. He might also have requested that it be held in abeyance until he concluded his pursuit of remedy in the courts. He did neither of these, and the time period elapsed.

The arbitrator has no authority to substitute his opinion of what is fair and proper for that which is contained in the contract. He has only the jurisdiction to enforce the terms and conditions. Under the terms of the procedure, the failure to meet the time limits constitutes a binding agreement to settle all claims in accordance with the decision of the company. The company's decision as communicated to the claimant was that he was guilty of misconduct and subject to termination. That determination now has become final and binding upon the claimant.

## **AWARD**

It is found that the claimant failed to comply with the procedures under the TAP and his appeal is untimely and dismissed. This final and binding resolution may be entered as a judgment on the award by any circuit court or other court of competent jurisdiction as may be necessary.

WILLIAM P. DANIEL

ARBITRATOR