



GENERAL PUBLIC SERVICE
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ARBITRATION AWARD

Panelist: Mr. Khuduga Tlale
Case No.: GPBC552/2020
Date of Award: 12 August 2022

In the ARBITRATION between:

PSA obo L Ward
(Union / Applicant)

And

Department of Justice and Constitutional Development
(Respondent)

Union/Applicant's representative: Mr. Jantjie Jack
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Respondent's representative: Mr. S Masuku
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ARBITRATION AWARD

Details of hearing and representation

1. The arbitration hearing between PSA obo L Ward ("the Applicant") and Department of Justice & Constitutional Development ("the Respondent") was held on 10 March 2022 and concluded on 10 August 2022 at the Respondent offices in Bloemfontein. The Applicant appeared in person and Mr. J Jack, union official, represented him and, Mr. S Masuku, Labour Relations Officer, represented the Respondent.
2. These proceedings were conducted in English and were manually and digitally recorded. The parties agreed to submit the heads of argument in writing on Thursday, 11 August 2022. They both submitted.

Issue to be decided

3. The issue to be decided is whether the Applicant dismissal was both procedurally and substantively fair.

Background to the dispute

4. The Applicant was employed by the Respondent on 01 October 1996 as an Administration Officer (salary level 8) at Bloemfontein Magistrate Court. He was charged with six (6) counts of misconduct relating to gross negligence. The Respondent withdrew charge 1 against the Applicant. The Respondent again withdrew charge 6 relating to fraud at arbitration proceedings despite the fact that the Applicant was found guilty in this charge at the disciplinary enquiry ("the enquiry"). The allegations against the Applicant was for the period 01 July 2011, August 2011, October 2011 and November 2011. He was served with the notice to attend the enquiry on 26 February 2016, for the enquiry to be held on 15 to 16 March 2016. He was served with the amended charge sheet on 02 October 2018.
5. The Applicant pleaded not guilty to the allegations levelled against him. He was found guilty and a sanction of a dismissal was imposed on him. He lodged an appeal and the dismissal was confirmed on 28 May 2020. He received the outcome of the appeal on 01 June 2020, therefore, he was dismissed on 01 June 2020. At the time of his dismissal he earned R29 299, 50, per month, which was paid into his bank account. The Applicant was alleging that the Respondent delayed to institute

disciplinary action against him and the presiding officer proceeded with the enquiry in his absence. The Applicant was disputing both procedural and substantive fairness of his dismissal.

6. The Applicant referred this alleged unfair dismissal dispute to the Council. The certificate of non-resolution was issued and the dispute was referred for an arbitration. The parties submitted common bundle of document which was marked as bundle "A, pages 1-1055". Both parties conducted a pre-arbitration meeting and they both signed the minutes.

Survey of Evidence

Respondent

First Witness: Mr. Thuso Manuel

7. The witness testified under oath that he is employed by the Respondent as a Chief Accounting Clerk stationed at North West Regional Office. He stated that the court is having a cash hall supervisor, main cashier and two counter clerks. The duty of the cash hall supervisor was to check all the daily transactions, money received and money paid out. The cash hall supervisor must draw daily audit trail from the JDAS system. The main cashier was responsible for keeping the safe key and to give the two counter clerks the money for the payout. The court clerks would divide their work as follows; other clerk would do payouts and the other one would receive money from the civilian. At the end of the day, the court clerks would report their transactions to the main cashier both manually and on the system. The main cashier would count the money manually and digitally. Once the main cashier was satisfied with reconciliation of the day's cash, the court clerk and the main cashier would sign. The main cashier would perform a cash-up.
8. The main cashier would prepare a deposit on the system. The main cashier would indicate how much he/she was depositing, deposit slip number and physical cash would be countered and the money would be put into the safe to the bank. The main cashier and the cash hall supervisor would count the money and the cash deposited. Once the money gone to the bank, cash transit would collect the money and the deposited amount would reflect on the Respondent bank account the following day. The cash hall supervisor would request all supporting documents for the day. The cash hall supervisor would check the supporting documents manually daily and check the reconciliation compiled by the cashier and daily reconciliation would be filed for an audit purposes. If there are any discrepancies, the

cash hall supervisor together with the court manager would report the discrepancies to legal section by completing annexure K.

9. He was requested to check whether the transactions of Bloemfontein Magistrate Court was correct. During his investigation he used the bank statements, JDAS and, audit trail. He could not find other manual daily trails. Document "A14" was the audit daily trail for July 2011 and this audit was system generated program. Document "A153" showed the main username. From 01 to 07 July 2011, Ms. Jooma was the main username and she was the main cashier. On 08 July 2011, the Applicant took over from Ms. Jooma and he performed cash-up. There was no hand over certificate from Ms. Jooma to the Applicant. He could not tell how much was handed over to the Applicant. The Applicant gave the counter clerks payouts. Ms. Jooma performed the duty of the main cashier from 11 to 29 July 2011 as per "A159". Again there was no hand over certificate from the Applicant to Ms. Jooma.
10. During the month of July 2011, there was a withdrawal of the amount of 2.7 million and R680 089, 20 received from the civilians. Therefore, the total amount of R3 380 089, 20 was received by the Applicant's office. The total amount of R3 176 683, 14 was paid out to the civilians and the court was left with R203 406, 06. The total amount of R203 906, 06 was deposited into the Respondent bank account, therefore, there was a shortage of R500, 00.
11. Document "A150" was unclassified suspense report. This R500, 00 was received from Moekoa on 07 July 2011 with reference number CAN meaning cancelled. Document "A152" was the R500, 00 paid out to Moekoa and again said cancelled. This discrepancy was caused by the cancelled R500, 00. The Applicant was the main cashier on 08 July 2011 that was the reason he was linked with this transaction.
12. Documents "A396-A401" was the transactions for the period 01 to 31 August 2011 and the main cashier was Ms. Jooma. On 31 August 2011 the Applicant performed the duty of the main cashier as per "A401". There was no hand over certificate from Ms. Jooma to the Applicant. During the month of August 2011, there was a withdrawal of the amount of 3.6 million and R1 079 148, 74 received from the civilians. Therefore, the total amount of R4 479 148, 74 was received by the Applicant's office. The total amount of R3 779 045, 19 was paid out to the civilians and the court was left with R700 103, 55. The total amount of R699 353, 55 was deposited into the Respondent bank account, therefore, there was a shortage of R750, 00.

13. Document "A393" showed amount of R100, 00 received from Baartman and again Baartman showed R100, 00 cancelled. This amount could not be added as receipt. Amount of R400, 00 against Mohase was cancelled and could not be included as payment. The system was saying the total amount of R750, 00 could not be accounted for as per "A395". The Respondent expected the total amount of R700 103, 55 to be deposited during the month of August 2011.
14. Documents "A631-A672" was the bank statements for the period 01 to 31 October. During the month of October 2011, there was a withdrawal of the amount of 2.7 million and R635 422, 00 received from the civilians. Therefore, the total amount of R3 335 422, 00 was received by the Applicant's office. The total amount of R3 169 089, 85 was paid out to the civilians and the court was left with R166 332, 15. The total amount of R161 132, 05 was deposited into the Respondent bank account, therefore, there was a shortage of R5 200, 00.
15. Documents "A856-A936" was the bank statements for the period 01 to 30 November 2011. During the month of November 2011, there was a withdrawal of the amount of 2.7 million and R673 347, 00 received from the civilians. Therefore, the total amount of R3 373 347, 00 was received by the Applicant's office. The total amount of R3 281 251, 42 was paid out to the civilians and the court was left with R92 095, 58. The total amount of R91 895, 58 was deposited into the Respondent bank account, therefore, there was a shortage of R200, 00. The Applicant was the main cashier that was the reason he was linked with this transaction. These shortages were created by the system and the usernames were Matthews and MModisadihe.
16. Under cross-examination he stated that the shortages generated by the system. If official received R500, 00 and paid out R400, 00, the system would generate shortage of R100, 00. The officials are the ones who are providing the system with the information. He confirmed that charge 5 as per "A10" was the reconciliation made by both parties. He confirmed that the withdrawals, deposits, subtotal, cash payouts are common cause. He maintained that there was a shortage of R200, 00 in November 200. The shortage was not in the safe and it was not banked, therefore, it was stolen.
17. He confirmed that the Applicant was the main cashier for the period 01 to 04 November 2011. There was no handover certificate and he further said maybe the shortage emanated from that period. The court manager and cash hall supervisor must report shortages to the regional office by completing annexure K. He confirmed that the Applicant was not the main cashier for the period 16 and 24 November 2011 as per "A1014". They are not sure exactly where the shortages comes from.

18. The Applicant and Ms. Jooma must explain what had happened with the total amount of R200, 00. He maintained that the Applicant was responsible for the shortage. The Applicant name appeared as per "A1051-A1055". He confirmed that the Applicant was charged and dismissed for the financial loss to the amount of R25 149, 90 in November 2011, as per charge 5. The Applicant issued the cheque to the same office and according to his view the money get lost.
19. He stated that in terms of charge 2, there was a shortage of R500, 00, in July 2011. He later said that there was no shortage in July 2011. He confirmed that the Applicant was charged and dismissed for shortage of the amount of R192 300, 00, in August 2011, in terms of charge 3. They conducted the reconciliation after the Applicant was dismissed and found that the shortage was not R192 300, 00 but R750, 00. He later said that the shortage was not R750, 00 but R300, 00. He stated that in terms of charge 4, there was a shortage of R6100, 00.

Second Witness: Ms. Nonhlanhla Zikalala

20. The witness testified under oath that the Respondent employed him as the Deputy-Director: Third Party Funds. She was responsible for the third party funds in the Free State Region. She stated that the cash hall supervisor was responsible to report the shortages by completing annexure K. If the shortage was not reported, the Respondent would suffer financial loss and beneficiaries would not receive their monies. She further stated that the Respondent might get audit finding.
21. Under cross-examination she stated that she was not in the position to say whether or not Bloemfontein Magistrate Court was audited in the year 2011 because she was not employed in the Free State. She had no knowledge about the allegations levelled against the Applicant. She came to the proceedings to testify about the implications of not reporting the shortages.

Applicant

22. The Applicant representative stated that they are not going to led evidence. The Applicant party was warned about their decision and its implication but they maintained that they are not going to lead any evidence.

Survey of Arguments

Respondent

23. The Respondent representative stated that the Applicant as the cash hall supervisor was accountable for the State money in terms of the Public Financial Management Act. The Applicant failed to detect the monies loss of the State and also did not report such losses as expected from him. The Applicant was responsible to safeguard the State money but he failed to do so. The Applicant failed to fulfill his primary duty in the cash hall. If an employee failed to comply with the performance standard or prescripts, despite the fact that he was able to do so, it would amount to negligence.
24. The Respondent representative in his argument referred me to the case of **Transnet Freight Rail v Transnet Bargaining Council and others (2001) BLLR 6 (LC)**, and argued that this was his authority in view that negligence could be defined as a failure to comply with the standard care that would be exercised in the circumstances by a reasonable person. The Respondent proved on balance of probabilities that the Applicant had committed a gross negligence because he made the Respondent to suffer a financial loss. The trust had been destroyed and could be repaired. The Applicant dismissal was substantively fair.

Applicant

25. The Applicant representative stated that the Respondent changed the reasons for the Applicant dismissal at arbitration proceedings and they also withdrew charge 6 that related to fraud despite the fact that the Applicant was found guilty for fraud during the enquiry. The evidence of the Respondent witness, Mr. Manuel differed substantially from the one he gave during the enquiry. Mr. Manuel failed to show the proceedings the total amounts he claimed the Respondent suffered. It was evident from the onset of the proceeding that Mr. Manuel was not a credible witness at all, as he was changing his testimony, especially, the shortages from time to time.
26. The Respondent witness, Mr. Manuel confirmed during his cross-examination that his calculations were not accurate. He testified that there were no shortages in charge 2 and again he said the shortage in terms of charge 3, was not R750, 00, anymore but R300, 00. Mr. Manuel failed to prove during the proceedings where the shortages comes from. The testimony of the second witness of the Respondent was not relevant to the issues in dispute. The Respondent was required to prove that the Applicant was guilty of the charges levelled against him. In this matter, the Respondent failed to lead sufficient evidence that the Applicant dismissal was fair. The Applicant dismissal should be found to be substantively not fair. The Applicant sought retrospective reinstatement.

Analysis of Evidence and Arguments

Introduction

27. In every alleged unfair dismissal dispute, the Applicant party is required to establish the existence of the dismissal. Once that is done, then the evidentiary burden of proof shifts to the Respondent party who is required to prove the alleged dismissal was fair. In this matter, it is a common cause that the Applicant was dismissed and his dismissal was due to misconduct, therefore, the Applicant established the existence of his dismissal. In discharging the onus, the Respondent led the evidence of two (2) witnesses.
28. It is important to note that the evidence of the Respondent second witness, Ms. Zikalala, was not relevant to the issues in dispute. The Applicant was not charged and dismissed for not reporting the Respondent cash shortages, therefore, her evidence will not be considered.

The following are brief reasons for the award:

Procedural fairness

29. No evidence was led during the proceedings in relations to the procedural issues even though the parties said I must determine whether the Applicant dismissal was procedurally fair. It is common cause that the enquiry was held against the Applicant. The Applicant was found guilty of misconduct and he was dismissed on 01 June 2020.
30. According to schedule 8, item 4(1) of the Act, the employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee.
31. The Applicant was notified about the allegations against him as per "A2-A7". The Applicant attended the enquiry and he was given an opportunity to state his side of the story. I find the Respondent complied with a fair procedure before dismissing the Applicant; therefore, the Applicant's dismissal was procedurally fair.

Substantive fairness

32. In **Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and others (2008) 3 BLLR 197 (LAC)**, it was held that fairness is determined mostly on the basis of the reason for the dismissal which the employer had given at the time of the dismissal. In terms of Schedule 8 item 2(1) of the Labour Relations Act, as amended ("the Act") a dismissal is unfair if it is not effected for a fair reason. The allegations levelled against the Applicant are as follows;

Charge 1

33. He was charged with misconduct of gross negligence in that during the period between 01-29 July 2011, he in his capacity as a main cashier and cash hall supervisor, he failed to ensure that proper checking of daily financial transactions was done. As a result of his failure the department suffered a financial loss to the amount of R2200, 00.

Charge 2

34. He was charged with misconduct of gross negligence in that during the period between 08-31 August 2011, he in his capacity as a main cashier and cash hall supervisor, he failed to ensure that proper checking of daily financial transactions was done between himself and other main cashier, Ms. Jooma. As a result of his failure the department suffered a financial loss to the amount of R192 300, 00.

Charge 3

35. He was charged with misconduct of gross negligence in that during the period between 20-28 October 2011, he in his capacity as a main cashier and or cash hall supervisor, he failed to ensure that proper checking of daily financial transactions was done between himself and other main cashier, Ms. Jooma. As a result of his failure the department suffered a financial loss to the amount of R4800, 00.

Charge 4

36. He was charged with misconduct of gross negligence in that during the period between 01-30 November 2011, he in his capacity as a main cashier and or cash hall supervisor, he failed to ensure that proper checking of daily financial transactions was done between himself and other main cashier,

Ms. Jooma. As a result of his failure the department suffered a financial loss to the amount of R25 149, 90.

37. The Applicant denied the allegations levelled against him. The standard of proof was that of a balance of probabilities. Proof that the employee actually committed the offence charged presupposes a proper investigation of the allegation against the employee, and the presentation of evidence that links the employee with the offence. Proof on a balance of probabilities means that the evidence points more probably to the conclusion that the employee committed the alleged misconduct, than to his innocence. However, a mere suspicion of guilt does not satisfy the test of proof on a balance of probabilities.
38. Reading of these allegations levelled against the Applicant, the Respondent is alleging that they suffered a financial loss due to the Applicant's conduct. The Respondent had to adduce evidence to prove that the Applicant made them to suffer financial losses to the amounts of R2200, 00; R192 300, 00; R4800, 00 and R25 149, 90. The question that need to be ask is whether the Respondent produced evidence to support the charges of misconduct for which the Applicant was dismissed.
39. The Respondent witness, Mr. Manuel during his evidence-in-chief testified that the Respondent suffered a financial losses as follows; R500, 00 in July 2011; R750, 00 in August 2011; R5200, 00 in October 2011 and R200, 00 in November 2011. During his cross-examination he testified that there was no financial loss in July 2011. There was a financial loss in August 2011 amounting to R300, 00 not R750, 00 as testified in his evidence-in-chief. There was a financial losses to the amount of R6100, 00 and R200, 00, in October 2011 and November 2011.
40. Mr. Manuel conceded that the Applicant was charged and dismissed for the financial losses as per paragraphs 33, 34, 35 and 36. It was not reasonable or fair to expect the Applicant to answer to additional financial losses, for which he was not charged. The alleged financial losses testified by Mr. Manuel differed from the losses on the charge sheet. In the event that an employee is dismissed for reasons related to misconduct, the employer is bound by the election it has made, as was confirmed in **Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and others** as per paragraph 32.
41. There was no evidence adduced to support the Respondent's case that, at the time of the Applicant's dismissal, the reason for his dismissal was financial losses that did not appear in the charge sheet. The presiding officer of the enquiry was not called as a witness, nor was the charge sheet ever

amended. It is not open for me as the commissioner to formulate a charge, different to the charge the Applicant had faced during the enquiry and to find that the newly formulated charge constitutes a dismissible offence. The Respondent cannot escape the consequences of the way it decided to word the charge sheet and the charge on which it proceeded to discipline and dismiss the Applicant.

42. Although the Respondent made an allegations against the Applicant as per "A2-A6", there was no evidence presented during the proceedings to support these allegations. It is important to note that the testimony of Mr. Manuel said nothing about the allegations that made the Respondent to discipline and dismiss the Applicant on 01 June 2020. Mr. Manuel's evidence was not consistent, not reliable and he fabricated his version to suit him. The Applicant did not breach any Respondent rule.

Conclusion

43. The Respondent failed to prove fairness in this dismissal and the evidence presented by the Respondent cannot sway my mind in a different direction. In the circumstances, I find the Applicant dismissal to be procedurally fair but substantively unfair.

Remedy

44. In terms of Section 193(1) of the Act, a commissioner has a wide-ranging powers should he/she find that a dismissal is unfair. Nevertheless, the primary remedy for an unfair dismissal in terms of the Act is reinstatement or re-employment. In **Nel v Oudtshoorn Municipality & another (2013) 34 ILJ 1737 (SCA)**, the meaning of reinstatement was explained by reference to a Constitutional Court's finding in **Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration** that reinstatement meant "To put the employee back into the same job or position he occupied before the dismissal on the same terms and conditions. Reinstatement is the primary remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he would have been before the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal... and do not conclude an employment contract afresh... The employer merely restores the position to what it was before the dismissal."
45. The Applicant relief sought was retrospective reinstatement. No evidence was placed before me at arbitration proceedings to indicate that this will be intolerable or impractical. I will therefore order that the Applicant be reinstated. The Applicant was dismissed on 01 June 2020. I will order that he be

reinstated with effect from 01 June 2020; that he must report for duty at the normal time on Monday, 22 August 2022. The Respondent must pay him the outstanding salary from 01 June 2020 to the date of reinstatement.

46. Based on the above, the Applicant must be paid the basic salaries from 01 June 2020 to 31 July 2022 in the amount of **R761 787, 00**:

(R29 299, 50, per month x 26 months (01 June 2020 to 31 July 2022) = **R761 787, 00**).

This total amount exclude the salary adjustment for the period 01 June 2020 to 31 July 2022.

Award

47. The dismissal of the Applicant, Mr. L Ward, is found to be procedurally fair but substantively unfair.
48. The Applicant is reinstated with effect from 01 June 2022 on terms no less beneficial than those that applied prior to his dismissal. The Applicant will resume with his duties at the normal time on Monday, 22 August 2022.
49. The Respondent, Department of Justice and Constitutional Development, is ordered to pay the Applicant the total amount of R761 787, 00, this being his salary for the period 01 June 2020 to 31 July 2022, and which must be paid into the Applicant's bank account, the details of which are known to the Respondent, by no later than 30 September 2022.



Signature: _____

Commissioner: Khuduga Tlale

Sector: Public Service