



IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in BLOEMFONTEIN

Commissioner: Dr PHOLO, GMP (PhD)

Case No.: GPBC1236/2020

Date of Award: 14th May 2021

In the Dispute between:

PSA obo MALI

(Union/Applicant)

and

DEPARTMENT of EMPLOYMENT & LABOUR

(Respondent)

Applicant's Representative: Mr Thabo Papo

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PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. This is an arbitration award in the matter between Ms Mali (applicant) and the Department of Employment and Labour (respondent). The matter was set down for an arbitration in terms of section 186(2)(b) of the Labour Relations Act, 66 of 1995. The arbitration was held on the 5th March 2021 (Labour Centre) and on 22 - 23 April 2021 (Provincial Office) in Bloemfontein (Free State). The arbitration proceedings were electronically recorded and the recordings are filed with the Bargaining Council (GPSSBC).
2. The applicant was represented by Mr Thabo Papo (PSA - Union Official) and the respondent was represented by Mr Martin Matshika (Official - Department of Employment and Labour).
3. The parties submitted their respective set of documents. The applicant's document was termed bundle "A", on the other hand, the respondent's documents were termed bundle "B" and "C".
4. The parties requested to submit their written closing arguments by the 14th April 2021.

THE ISSUE IN DISPUTE

5. I was called upon to determine the unfair labour practice in relations to:
 - 5.1. the written warning issued to the applicant on the 2nd July 2020 was fair or not
 - 5.2. the written warning was issued in line with "Resolution" (1 of 2003)

BACKGROUND TO THE DISPUTE

6. The applicant was employed as the Labour Inspector and was based at Bloemfontein in the Free State Province
7. On the 10th April 2019 whilst on duty, the applicant was involved in a car accident at Harrismith.
8. The applicant was not suspended nor the disciplinary inquiry held for the incident. The respondent issued applicant with the "written warning".
9. The applicant was not satisfied with the issued written warning and she appealed the sanction. However, the Appeal Authority (AA) upheld the decision of the "written warning".
10. As the result, the applicant referred the matter before the Council (GPSSBC) for conciliation and arbitration.
11. At commencement of the arbitration process, the respondent opted to bear the duty to begin.

SUMMARY OF EVIDENCE AND ARGUMENT



The applicants' evidence

Mr Mali testified under oath that:

12. Her full names are Siphosethu Portia Mali and that she is employed as the "**Labour Inspector**" by the Department of Labour (Bloemfontein) in the Free State. Her responsibility includes performing the "employer audit services". She started working for the Department since 1st August 2016.
13. She was on an official trip to Harrismith driving the official vehicle to conduct the audit service and she got involved in an accident. She immediately reported the incident to the transport officer (Mr Mokoena).
14. The driver of the other vehicle called his friends who came in a bakkie and those who came with the bakkie started to intimidate her. She reported the intimidation to Mr Mokoena who in return arranged with Mr Tshabalala from Harrismith branch (DoL) to join her at the scene.
15. At the later stage, the police arrived and took statements from both of them. They also validated her driver's licence. At the end, the police gave her the reference number (case number).
16. The car was driveable she continued to perform her duties. However, because she was under the great shock, the car was removed and driven from the scene to town by Mr Tshabalala.
17. The following day Mr Mokoena arrived and asked me to show him where the accident happened. They went to the scene of accident and she showed him where and how the accident occurred. They then went to the police station to collect the statement of the accident report. When she got to work on Thursday, she completed the Z181 form and sent it to her manager (Mr Cornelissen) who signed it off and sent it to Mr Mokoena.
18. Everything became quite until in her last week in office when she was handed with the letter which gave her the indication of the intended written warning (page 9-10, bundle A). This letter was followed by the written warning itself (page 1-2, bundle A) from the Assistant Manager (supervisor).
19. She went to the office of the supervisor to sign for the document. There was no discussion about incident and the discipline. She was not given an opportunity to present her case at the disciplinary inquiry. She did not receive nor the investigation report. She only received the Z181 form as well as the appeal outcomes.
20. Upon the receipt of the written warning, she approached her Union for the assistance and the appeal was filed
21. She took photos of the cars after the arrival of the Mr Tshabalala and provided the photos of the accident (annexure C) to the employer.



22. There is no way that she could have driven with high speed because she had just moved from the stop in less than 100 metres. There is no possibility of speeding at close range. The driver of the car in front of her made a sudden turn to the right without indicating his intention to do so and further made a sudden stop. She averted the major impact but she only bumped its left rear corner. If she was speeding the damage could have been severe.
23. She do not agree with the outcome of the hearing in that she was speeding at 72 km/h, because her driving speed at that time was not exceeding 60 km/h, the speed should have been 0-10 km/h.
24. She was made aware of the costs of the damage as illustrated in "annexure D". The driver of the other vehicle must in fact pay the Department because if he had not change the lane the accident would have not happened. She is not responsible for the costs incurred (R25 925,24).

The respondent's evidence

Mr Mokoena testified under oath that:

25. His full names are Rantsho Mokoena and he is employed as the "**Senior Technician: Loss Control**" (Bloemfontein) in the Free State. Her job profile includes investigating items of accident loss to determine the costs. He was appointed to this position in February 2018.
26. The report on an accident form (page 1-4, bundle B) was completed by the applicant who was driving the government vehicle under registration number: **FTB 192 FS**
27. The report written by the applicant mentioned that the driver on the other vehicle (front) indicated his intention to turn to right.
28. If the applicant was in doubt that the other driver was under the influence of any intoxicating substance, she should have insisted that the driver be tested.
29. Ms Mali was responsible to complete the particulars of the other driver on the form (report on an accident). If she does not have such information, she should have requested the information from the investigating officer (SAPS). Sometimes, it is difficult to source the information of the other driver because they are not comfortable to supply their details to the people unknown to them.
30. Ms Mali was at fault because she did not apply the 2-3 seconds rule. The distance between her and the car in front of her was very short. If the 2-3 seconds rule was applied, the accident could have been avoided and she could have anticipated the danger.
31. He went to the accident scene the following day and the scene was cleared but his own observation taught him that:



- 31.1. Ms Mali was in good view to anticipate the danger
- 31.2. Ms Mali had the lapse of concentration
- 31.3. Ms Mali was going straight and the car in front of her was turning to the right
- 31.4. Ms Mali's following distance was shorter than the 2-3 seconds rule
- 32. He attends the "Provincial Transport Advisor Committee" (PTAC). This committee investigates all the transport related accidents and further determines the nature and liability of an accident.
- 33. It was the responsibility of Ms Mali to ensure that the "Accident Report Form" is completed in full and the accident is reported to the "Transport Officer" within two (2) hours. Furthermore, it remains the responsibility of Ms Mali to report the accident to the SAPS within 24 hours. On the 15th April 2019, he went with Ms Mali to the SAPS to collect the "accident report form". However, he does not remember whether Ms Mali took the form or the form remained with him. Ms Mali complied with the Departmental policy. At the time of Ms Mali's accident, he was new into the position.
- 34. He conceded under cross-examination that he was not at the scene when the accident occurred, therefore, his evidence is a mere observation of what might have transpired.

Ms Tokwe testified under oath that:

- 35. Her full names are Nolusindiswa Tokwe and she is employed as the "Deputy Director: Finance, SCM, IT Office, Fleet Management and Security Management" (Bloemfontein) in Free State. She started working for the Department since 2010.
- 36. She is the member of the Provincial Transport Advisor Committee (PTAC). The purpose of this committee is to (a) monitor the utilisation of the vehicles of the Department, (b) to determine the need analysis for the possible replacement, (c) to determine the irregularities in case of the accident, and (d) to guide the users in relations to the fleet management policy.
- 37. The written warning (page 7, bundle A) was the result of the deliberation of the PTAC in that the progressive discipline be taken against Ms Mali for the violation of the speed. The C-track report showed the "harsh brakes" were applied. Therefore, there was a high speed involved and the speed violation led to the decision of the committee. The decisions of the PTAC are informed by the "Fleet Management Policy".
- 38. She is aware of the invoice of R25 925,94 because the Department made the payment, and Ms Mali was made aware. If the official refuse to reimburse the Department, then the matter jumps outside the jurisdiction of PTAC and gets referred to the State Attorney.



39. The negligence was determined by the report of the Mr Mokoena, and she did not know who conducted the investigation on the matter. She do not know whether the accident was caused by the speed. The photos in “annexure C” were submitted by the investigating officer.

CLOSING ARGUMENTS

The applicant presented that:

40. The applicant was never given an opportunity to present her case.
41. The applicant could not have foreseen and/or predict that the other driver would change lane (no indicator) and apply an abrupt brakes.
42. The applicant tried to apply precautions by avoiding the accident.
43. It is not possible that the applicant was travelling with the indicated speed (72 km/h) and that the speed is the cause of an accident but the recklessness of the other driver.
44. None of the witnesses of the respondent were at the scene at the time of the accident and they had no proof to indicate the travelling speed.
45. The applicant complied with the Treasury Regulations.
46. The applicant proved on the balance of probabilities that there was no act of negligence on her part, and therefore, the applicant is not guilty of the offence.

The respondent presented that:

47. The applicant is highly educated.
48. The applicant was at fault and tried to pass the buck to the other driver.
49. The applicant failed to bring any witness to substantiate her case that the other driver was at fault.
50. The applicant breached the rule.
51. The respondent has proved its case on the balance of probabilities.

ANALYSIS OF EVIDENCE AND ARGUMENTS

52. Accordingly, the “Resolution” (1 of 2003) makes a distinction between formal and informal disciplinary inquiry, although it is not that distinctive. The thorough analysis of the “Resolution”



projects item 5 as the informal inquiry and item 6 as formal inquiry. This argument is confirmed by item 5.5 (Resolution, 1 of 2003), it read thus “for less serious forms of misconduct, no formal inquiry shall be held”.

53. Given the above, it has always been the respondent’s case that the applicant drove with (a) high speed, i.e. 72 km/h in a 60 km/h zone, (b) the Department incurred fruitless and wasteful expenditure, and (c) the negligence driving caused the damage of R25 925,24. These three (3) factors to me indicates serious transgressions and not less serious misconduct. The high speed driving constitutes negligence and recklessness, the fruitless and wasteful expenditure is the audit query and the costs is also exorbitant. Therefore, if the truth is to be told, those allegations are serious and thus needed treated as such. Hence, the formal disciplinary inquiry ought to have been held to establish true facts as well as to give the applicant the opportunity to present her story.
54. On the other hand, the applicant self is dissatisfied in that she was not given the opportunity to present her side of the story. In terms of applying the informal disciplinary inquiry, the alleged transgressor (applicant) must consent to the informal process, and in this case, the applicant consistently argued against the informal inquiry because it denied her the opportunity to present her story. She further indicated that she did not sign for the sanction in terms of item 5.4(b) of the Resolution (1 of 2003), this evidence by the applicant was not contradicted at all. Therefore, the process was not consistent with the Resolution (1 of 2003) and as the result, the “written warning” issued against the applicant was unfair.
55. This dispute is referred in terms of section 186(2)(b) of the Labour Relations Act (66 of 1995). As the result, the investigation was conducted both internally and criminally but still the respondent failed to prove their allegations against the applicant -
 - 55.1. **Driving with high speed (72 km/h against the limit of 60 km/h):** there was no prove presented to the arbitration that the applicant drove with high speed (72 km/h in the 60 km/h zone) except the mere mentioning of the tracker clocking 72 km/h but the tracker was not presented to substantiate the same arguments.
 - 55.2. **Negligence and reckless driving:** there is no proper investigation conducted except for the partial analysis of the pictures submitted by the applicant. I find it strange that the investigation solely relied on the pictures and completely ignored the police report on the matter. In the absence of the police report, the presence of the other driver could have provided a better picture.
 - 55.3. Given paragraph 54.2 above, the distance between the past stop and the robot ahead does not provide enough space to engage the high speed up particularly if there is another car in



front. I therefore, have no reason to doubt the version of the applicant in this regard that she was driving with less than 60 km/h.

55.4. **Fruitless and wasteful expenditure:** there was also no evidence led on this allegation nor at least presentation of the audit by the Auditor - General (AG). Therefore, these allegations has no leg to stand on and thus falls off.

56. The applicant deliberately opted the short cut of imposing a sanction of guilt to the applicant to qualify for the "recovery of fruitless and wasteful expenditure" in terms of the Treasury Regulations. The statement is clearly spelt out in paragraph three (3) of the "**written warning**", it reads "**recovery for fruitless and wasteful expenditure to an amount of R25 925,24 against you will be implemented in terms of Treasury Regulations, paragraphs 12.7.1 and 12.7.2 which allows for recovery once the official is found liable in law**" (page 1 & 10, bundle A). Accordingly, there is no guilt proven against the applicant in this regard, and therefore, the sanction of "**written warning**" was unfair.

57. It will be unfair to apply the recovery of the expenses from the applicant in terms of the treasury regulations if the there is no proof of guilt against the applicant and/or if the respondent imposed the sanction unfairly. However, this is not an indication that the applicant was served with the recovery of the expenses, item 2.4 (respondent's closing arguments) is explicit that the tax invoice was not brought to the attention of the applicant.

58. The fact that the applicant did not call the other driver and/or the police official who investigated the matter is immaterial, it was the responsibility of the respondent to prove that their action taken is justifiable and does not equate to unfair labour practice. Therefore, the respondent was more in need of the services of those witnesses than the applicant.

AWARD

In light of the above, I accordingly, order that:

59. The sanction of written warning against the applicant was unfair and thus withdrawn

60. The accident was not caused by the negligence of the applicant, and

61. The issued written warning was not effected in line with the Resolution (1of 2003),

Dr PHOLO, GMP (PhD)
GPSSBC Commissioner



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