



ARBITRATION AWARD

Panelist: Mr. Khuduga Tlale
Case No.: GPBC1677/2018
Date of Award: 27 April 2021

In the ARBITRATION between:

PSA obo M Pholoana
(Union / Applicant)

And

Department of Employment & Labour
(Respondent)

Union/Applicant's representative: Mr. J Jack
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ARBITRATION AWARD

Details of hearing and representation

1. The arbitration hearing between PSA obo M Pholoana ("Applicant") and Department of Employment & Labour ("Respondent") was held on 03 March 2020 and concluded on 16 April 2021 at the Respondent's offices in Bloemfontein. The Applicant appeared in person and Mr. J Jack, union official, represented him, and Ms. N Ramulisa, Chief Personnel Officer represented the Respondent.
2. These proceedings were digitally recorded. The parties agreed to submit written argument on Friday, 23 April 2021. They both submitted.

Issue to be decided

3. The issue to be decided is whether the Applicant's dismissal was substantively fair.

Background to the issue

4. The Applicant was employed by the Respondent on 01 June 1997 as a Cleaner (salary level 3). The Applicant disclosed his alcohol problem during the disciplinary enquiry ("the enquiry") on 11 December 2015. The chairperson of the enquiry imposed the sanction of a final written warning and further stated that the Applicant must be referred to the Employee Health and Wellness Programme ("EHWP").
5. The Applicant was charged with two counts of misconduct relating to absenteeism and leaving the workplace without permission. He was notified about the allegations against him on 02 February 2016. The enquiry was held on 24 February 2016 and concluded on 14 March 2016. He pleaded guilty to the two counts of misconduct. The outcome of the enquiry was communicated to him and the sanction of a dismissal was imposed on him. He lodged an appeal and the sanction of a dismissal was confirmed on 15 July 2016. The dismissal was procedurally fair. At the time of his dismissal he earned R10 093, 50, per month, which was paid into his bank account.
6. The Applicant referred this alleged unfair dismissal dispute to the Council on 06 August 2018. The Council issued the certificate of non-resolution after thirty (30) days' period expired. This matter was

then referred for an arbitration. The parties submitted bundle of documents that were marked bundle "A", "B", "C" and "R". Both parties conducted the pre-arbitration meeting and they both signed the minutes.

Survey of Evidence

Respondent

First Witness: Ms. Jenny Harmse

7. The witness testified under oath that she was the Applicant's immediate supervisor. On 23 December 2015, the Applicant left the workplace without permission. The final written warning and referral to the EHWP was imposed to the Applicant during the enquiry held in November 2015. On 22 and 24 December 2015, the Applicant left the workplace without permission. He has a habit of disappearing from the workplace but he signed the attendance register. He failed to report for duty on 04 January 2016 and they went to his house but they could not find him. They wrote him several letters regarding his absenteeism.
8. On 27 January 2016, they went again to his house and they find his wife, who promised them that he would resume with his duties on 28 January 2016. He reported for duty as promised but he failed to explain his absenteeism. The same day on 28 January 2016 he left his workplace without permission and he failed to explain his conduct. She was the one who completed the EHWP form as per document "B1-B4". The purpose to complete the said form was to refer the Applicant to the EHWP relating to his absenteeism and leaving the workplace without permission. She discussed the Applicant's conduct with his wife but all went in vain.
9. The Applicant signed the EHWP form on 11 February 2016, the form was sent to the EHWP Practitioner on the same day and they got acknowledgement on 12 February 2016. The appointment with the Counsellor was made for him but he failed to attend the session. The second session was arranged and she personally took him to the Employee and Wellness Programme Practitioner ("EWP"). The Applicant only attended two sessions and she was not sure whether those sessions assisted him. She has done more than enough to assist the Applicant with his conduct.
10. Under cross-examination she stated that she involved the Applicant's union about his absenteeism and leaving the workplace without permission. Most of the time the Applicant would said he has a

personal problem and she would involve his wife. There was no justifiable reason for leaving the workplace without permission and been absent. The document at "A30" was her email to Themba Xulu, labour relations, regarding the Applicant conduct.

11. The Applicant did not inform her that he has an alcohol problem. His wife said he drink a lot during the weekend. The document at "A31-A32" was the referral EHWP form. She only mentioned that the Applicant has a drinking problem. If the employee has a drinking problem, they has to complete the EHWP form. The Applicant's leaving the workplace without permission and absenteeism affects the entire work. The Respondent did not send the Applicant to aurora rehabilitation centre. The employees with health problems including substance abuse, are treated differently from the rest of the employees. She maintained that the Applicant did not disclose his drinking problem to her, it was established by the EWP that he has a drinking problem.
12. Under re-examination she stated that the Applicant did not attend all the sessions. The Applicant must consent to be send to the EHWP. She was not a medical expert to diagnose the employee with a specific health problem. She referred the Applicant to the EHWP for leaving the workplace without permission and absenteeism. She does not know how to treat alcoholism. She was not aware of the report as per document "C1-C2". It was the responsibility of the EWP practitioner to send the employee to rehabilitation centre.

Second Witness: Ms. Boitumelo Agrineth Ncongwane

13. The witness testified under oath that she is a social worker and EWP practitioner at private practice. She is working hand in hand with the Respondent. They are dealing with alcohol problem, work and financial stress, family problem, etc. The Applicant was referred to him by the Respondent EHWP practitioner. Their first session was on 16 February 2016 but he did not attend it. The second session was on 19 February 2016 and he came with Ms. Harmse. The Applicant attended only two sessions and he failed to attend the third sessions onwards. The Respondent allowed the employee to attend maximum of fifth sessions and each session last for two hours. The Applicant problem was about alcohol and financial problems.
14. The document at "C1-C2" was the progress report of the Applicant. The Applicant's referral was about leaving the workplace without permission and absenteeism. The recommendation was made to the Applicant after the second session. Should the Applicant consider to be send to the rehabilitation, she would make a recommend to the Respondent after the completion of the sessions, to send him to the

rehabilitation. In this matter, the Applicant did not complete his sessions. The Respondent could not out of their own, sent the employee to the rehabilitation centre. She did not make any recommendation or submit final report to the Respondent to send the Applicant to the rehabilitation centre because he did not complete the sessions. The Respondent gave the Applicant support but he was not ready to be assisted. The Applicant signed the consent form for counselling as per document "B3".

15. Under cross-examination she stated that she is a private practitioner. The Respondent has no authority to diagnose the employee with substance abuse. The supervisor would observe the employee's conduct but not to confront the employee. They are the only one to make recommendation to the Respondent to send the employee to the rehabilitation centre. The Applicant dropped out of the counselling sessions. The substance abuse was a health problem. There was no recommendation from them to send the Applicant to the rehabilitation centre. The Applicant referral was about his leaving his workplace without permission and absenteeism not for substance abuse.
16. Under re-examination she stated that the referral has been made by the supervisor. She made the recommendation to the Applicant during the session. Every employee has his/her right to refer him/her to the counselling or rehabilitation. The Respondent was correct to refer the Applicant to them relating to socio related issues. During the first session, it was assessed that the Applicant has a financial and alcohol problems. She has a plan to assist him with alcohol problem.

Third Witness: Mr. Nicolas Casparus Matthews Botha

17. The witness testified under oath that he was the chairperson of the enquiry against the Applicant. The Applicant pleaded guilty to the counts of misconduct levelled against him. He submitted the outcome of the enquiry as per "R33-R38" and the Applicant was dismissed as per "R31". The Applicant was charged with misconduct not incapacity and he was having a final written warning. The sanction of a dismissal was fair.
18. Under cross-examination he stated that he considered the Applicant's alcohol problem. The Applicant was having a final written warning and he was referred to the EWP but he did not attend the sessions. The Applicant did not disclose during the enquiry that he has an alcohol problem. He was charged with misconduct for absenteeism and leaving the workplace without permission.
19. Under re-examination he stated that the Applicant was referred to the EWP but failed to attend the sessions.

Fourth Witness: Mr. Isaac Makala

20. The witness testified under oath that the Respondent employed him as a Deputy-Director: Employee Health & Wellness. The employee may approach EHWP for his/her problems or the supervisor/colleague may refer an employee. The form as per "B" was developed by his sub-directorate and it was used to refer the employee to EHWP. Psycho-social services would be dealt with personal issues that are affecting the employee's work.
21. The document "B" referred the Applicant for leaving the workplace and absenteeism to the psychological services and the Applicant signed it. This form was completed properly and the supervisor has no authority to diagnose the employee. Document "B3" was the consent form signed by the Applicant. The Applicant has the right to refuse assistance. The employee would be referred to rehabilitation after the assessment has been done. The assessment was done during the psycho-social services counselling. Document "C" was the Applicant progress report about the case they were dealing with and it was not a final report.
22. The report stated that the Applicant did not attend the follow up sessions without reasons. The report was not saying that the Applicant must be refer to aurora rehabilitation centre. The employee as per the Respondent policy must attend five EWP sessions and the Applicant sessions were not completed. The Respondent should provide transport to the employee to attend the sessions as per the Respondent policy. The Respondent has referred the Applicant to the counselling, treatment and rehabilitation. The intake practitioner has to do the assessment. Somebody must do problem undertake in order to determine whether or not the employee must be refer to the rehabilitation. The EWP practitioner would be the one who would refer the employee to the rehabilitation. The Respondent has done everything to assist the Applicant.
23. Under cross-examination he stated that wellness and substance are both psycho-social issues. Document "B" does not say that the Applicant has an alcohol problem. The form was reflecting the current problem and during the sessions an alcohol would be established. Present problem sometimes might not be the real problem. The Applicant did not complete the sessions as per "C". The final report from the service provider would decide whether or not the employee must be referred to the rehabilitation centre. The service provider identified the problem of the Applicant as an alcohol and financial challenges.

24. The supervisor could not send the employee to the rehabilitation, they only referred the employee to the EHWP. The substance abuse was not only about an alcohol. The treatment start with the counselling and there was no final recommendation from the service provider about the Applicant and document "C" was the progress report.
25. Under clarity questions he confirmed that the Applicant was referred to the EHWP as per "B". The Applicant first sessions were on 16 February 2016 and 19 February 2016 and the other one was on 26 February 2016. The wellness could not be used to hide disciplinary action.

Applicant

First Witness: Mr. Rakerileng Meshack Pholoana

26. The witness testified under oath that he was reporting to Ms. J Harmse as his supervisor. He was charged with misconduct relating to absenteeism and leaving the workplace without permission. He was served with the notice of the enquiry on 02 February 2016 and the enquiry to be held on 09 February 2016. Prior to this enquiry, he was charged with misconduct in November 2015 for the same offence. The sanction of a final written warning and referral to EHWP was imposed on him as per "A27".
27. He stated that from December 2015 to 09 February 2016, he did not receive any EHWP assistance from the Respondent. The referral form as per "A32" was signed on 21 December 2015 and agreed with the contents of the referral form. He signed the referral form on 11 February 2016 as per "B". The EWP practitioner, Ms. Ncongwane said to him that he must stop drinking alcohol. The EWP practitioner said that he has an alcohol problem and she wanted to be send him to aurora rehabilitation centre. He did not attend any EWP Sessions and he has a drinking problem. He admitted that he was guilty for leaving the workplace and been absent from work.
28. Under cross-examination he confirmed that he was subjected to an enquiries in the years 2015 and 2016. He confirmed that he pleaded guilty on two counts of misconduct as per "R1". He confirmed that the sanction of a final written warning and referral to EHWP was imposed on him in December 2015 as per "R8-A9" and he acknowledged receipt. On 21 December 2015, he was not aware that he was referred to the EHWP.

29. He did not disappear from the workplace on 21 December 2015 and he was working with Mpho, who has a weak vision. He denied the allegation to say that he absent from work from 22 December 2015 to 27 January 2016. He stated that he was reporting for duty and he signed the attendance register. Where he did not sign the attendance register, he was on leave. The abscondment letter was not delivered at his house as per "R15-R16" and its contents were not fair. Ms. Harmse did not treat him well and as the result of the unfair treatment, he would went outside to drink alcohol. Ms. Harmse would sent him to the shops and she would gave him the money to buy an alcohol.
30. He blamed Ms. Harmse for having a bad motive against him. Ms. Harmse would always said that he was absent or disappeared from work while present at work. When he requested Ms. Harmse to sign the attendance register, she would say that it was in the office and he would sign it later. He maintained that his dismissal hurt because Ms. Harmse did not treat him well. Ms. Harmse would sent him to various places to do her personal things and, on his return he would be told that he disappeared from the workplace. He was not aware that he was supposed to sign the EHWP referral form and he was only informed by Ms. Harmse to sign the referral form on 11 February 2016. The Respondent denied him an opportunity to be referred to the EHWP.
31. He went with Ms. Harmse to Ms. Ncongwane, EWP practitioner on 19 February 2016 and, she told him that he must stop drinking an alcohol. He was not aware that he must attend the EWP sessions on 16 February 2016 as per "C". He denied the allegation to say that he attended the EWP session on 26 February 2016 because he was not aware of it. He maintained that he only saw Ms. Ncongwane once. Ms. Ncongwane did not say anything about other sessions. He confirmed that the Respondent completed the referral form but he was not told about attending the EWP sessions. He denied the allegations to say that he dropped the sessions because he did not have transport money. He denied the allegation to say that Ms. Ncongwane contacted him on two occasions to attend the sessions. During the enquiry on 14 March 2016, he did not inform the chairperson that he attended the EWP sessions. He maintained that he did not get any assistance from the Respondent.
32. Under re-examination he confirmed that the first session was on 19 February 2016. The Respondent instituted disciplinary action against him prior to the 19 February 2016. The Respondent only sent him to the EHWP after instituting disciplinary action against him. The referral to EHWP was part of the sanction imposed on him, therefore, it was not his request to be referred.

Second Witness: Ms. Johanna Jacoba Wilhelmina Jacobs

33. The witness testified under oath that the Respondent employed her a Team Leader at Labour Centre in Bloemfontein. She knew the Applicant because he was the cleaner at their building. On the 15th of each month, he would requested the Applicant to go and pay her bills. Sometimes the Applicant would be under the influence of alcohol. She was not the only person who witnessed that the Applicant has an alcohol problem. She has no knowledge whether or not he got any assistance. She has no problem working with the Applicant.
34. Under cross-examination she stated that the Applicant was not her subordinate. The Applicant was a cleaner at their building and she requested him to do her personal things. She did not use him because of his personal circumstances. She knew about the Applicant's problem but do nothing. She did not see the Applicant drinking at the workplace. She has no knowledge of the processes to assist an employee who has an alcohol problem.

Survey of Arguments

Respondent

35. The Respondent representative submitted that the Applicant informed the Respondent about his alcohol problem during the enquiry in November 2015. The chairperson imposed the sanction of a final written warning and the referral to EHWP. The Applicant was given the support by the Respondent. The EHWP programme does not seek to circumvent the disciplinary process. The wellness intervention should not and are not meant to be used to harbor or prevent discipline. The Applicant was referred as per the processes and procedure of the Respondent. The Applicant was diagnosed and an alcohol problem and other financial and family issues were established.
36. There is a condition for referring an employee for rehabilitation which is subject to the recommendation of the private service provider. The Applicant contravened the code of conduct for the public service and he was aware of the rule. The Respondent has proven that the proper process was followed in referring the Applicant and thus he dropped out. The money used to assist the Applicant could have been used for service delivery. The Applicant testimony was irrelevant, misleading and contradictory, therefore, he was guilty as charged.

Applicant

37. The Applicant representative submitted that the Applicant contended in material time that the reason for his misconduct was caused by alcohol because he is an alcoholic and he disclosed that to the Respondent. The Applicant has developed a dependence on alcohol because he could not go without it in his system. This was clear on the Applicant's action of disappearing from workplace and absenteeism. In South African law, alcohol abuse is seen as illness, therefore, the law prohibits the employers' from disciplining employees' who are ill or disabled.
38. It was clear from the Respondent evidence that the Applicant did not receive assistance from the Respondent regarding his alcohol problem. The Respondent failed to treat the Applicant conduct as incapacity. The Applicant admitted his conduct but he was not assisted by the Respondent. The Respondent was obliged to send the Applicant to wellness or rehabilitation or deal with him in terms of Schedule 8 of the Labour Relations Act, 66 of 1996, as amended ("the Act"). The trust relationship between an employer-employee was not broken. The Applicant's dismissal was both procedurally and substantively unfair and he sought retrospective reinstatement.

Analysis of evidence and arguments

Introduction

39. It is worth noting that the evidence of Ms. Jacobs has little value to do with the issue in dispute. The issue to be decided is whether the Applicant's dismissal was substantively fair. 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 discharging the onus, the Respondent led the evidence of four (4) witnesses.

The following are brief reason for the award

Did the Respondent assisted the Applicant?

40. It is common cause that the Applicant was charged and found guilty on 27 November 2015 and the sanction of a final written warning and referral to EHWP was imposed on him. The Respondent instituted disciplinary action for the second time against the Applicant on 02 February 2016. The two counts of misconduct relating to absenteeism and leaving the workplace without permission was levelled against him. The enquiry was held on 24 February 2016 and concluded on 14 March 2016.

The Applicant pleaded guilty and he claimed serious personal and liquor problems. The Applicant requested to be refer to the EHWP. The chairperson imposed a sanction of a dismissal.

41. In the matter of **HOSPERSA obo TS Tshambi v Department of Health, KwaZulu Natal (DA1/2015) delivered on 24 March 2016**, the Labour Appeal Court dealt with issue of the correct categorization of the dispute. The Court stated that: "An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined..."The Constitutional Court disposed of this issue in **CUSA v Tao Ying Industries and Others (2008) 29 ILJ 2461 (CC) at para 66:**" A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration...The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in." The approach has been reaffirmed by this **Court in NUMSA (Sinuko) v Powertech Transformers (DPM) and Others (2014) 35 ILJ 954 (LAC) at [16] – [21] per Coppin JA.**"
42. It is clear that the real dispute is whether the Respondent referred the Applicant to the EHWP prior to the 2nd of February 2016. It is common cause that the Applicant acknowledge receipt of the sanction of the initial enquiry on 21 December 2016 as per "R8-R9". The Applicant lapsed again on several occasions during the period 23 December 2015 and from 04 January 2016 to 27 January 2016, for a total of nineteen (19) working days. The Respondent, despite knowing that the Applicant is supposed to be refer to the EHWP, did nothing. In **Transnet Freight Rail v Transnet Bargaining Council and others (2011) ZALCJHB 15** the Court drew the distinction between incapacity due to alcoholism and misconduct where alcoholism is not claimed. Alcoholism is seen as a disease and therefore a form of incapacity. The Employee was not an alcoholic, but simply came to work under the influence because of "problems". Personal problems are not necessarily considered a disease like alcoholism. So it does not relate to incapacity but rather misconduct. The Court drew upon item 10(3) of the Code of Good Practice: Dismissal, which specifically refers to an Employer's obligation to assist Employees suffering from alcoholism with counselling and support where possible. But where there is no alcoholism present, or if it is not claimed, then the Employee will be guilty of misconduct. In this matter, personal

and alcohol problems were claimed by the Applicant during the enquiry on 27 November 2015 and again on 14 March 2016.

43. It is the Respondent version that they were waiting for the Applicant to come back to work in order for him to sign the referral form to the EHWP as per "B". The supervisor signed the referral form to the EHWP on 21 December 2015 and the Applicant on 11 February 2016. It is important to note that the referral to the EHWP was not initiated by the Applicant or by the Respondent, it was part of the sanction. There was no evidentiary basis that the Applicant rejected the Respondent assistance to refer him to the EHWP regarding his personal problems. It is the evidence of Mr. Makala that the psycho-social services will deal with the personal issues that are affecting the employee's work. The psycho-social services counselling will determine the cause of the employee's conduct. The Respondent should have immediately after both parties signed and acknowledged the sanction letter referred the Applicant to the EHWP but failed to do so. I, therefore, conclude that the Applicant was not referred to EHWP prior to the 2nd of February 2016.

Whether disciplinary action should have been instituted against the Applicant?

44. It is the Applicant version that the Respondent should not have instituted disciplinary action against him because the Respondent failed to refer him to the EHWP. In **Black Mountain v CCMA and others (2005) 1 BLLR 1 (LC)** the dismissal of the employee for being under the influence of alcohol whilst driving a heavy vehicle was substantively unfair because the employer ignore standing procedure requiring suspension of disciplinary action while the employee undergoes voluntary rehabilitation. The Respondent ignore referring the Applicant to the EHWP and instituted disciplinary action against the Applicant on 02 February 2016.
45. I, therefore, conclude that the Respondent should not have instituted disciplinary action against the Applicant and the Applicant did not breach the Respondent rule.

Conclusion

46. 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 substantively unfair.

Remedy

47. 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."
48. The Applicant has requested retrospective reinstatement. No evidence was placed before me at arbitration to indicate that this will be intolerable or impractical. I will therefore order that the Applicant be reinstated. The Applicant was dismissed on 15 July 2016. I will order that he be reinstated with effect from 15 July 2016; that he must report for duty at the normal time on Monday, 17 May 2021. The Respondent must pay him the outstanding salary from 15 July 2016 to the date of reinstatement.
49. Based on the above, the Applicant must be paid the basic salaries from 16 July 2016 to 30 April 2021 in the amount of **R580 457, 26**:

(R10 093, 50, per month / 4.33 weeks = R2 331, 06, per week / 40 hours per week = R58, 27, per day.
8 hours per day x 11 days (16-31 July 2016) = 88 hours x R58, 27, per day = **R5 127, 76**.
(R10 093, 50, per month x 57 months (01 August 2016 to 30 April 2021) = **R575 329, 50**).

Award

50. The dismissal of the Applicant, Mr. Rakerileng Meshack Pholoana, is found to be substantively unfair.
51. The Applicant is reinstated with effect from 15 July 2016 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, 17 May 2021.

52. The Respondent, Department of Employment and Labour, is ordered to pay the Applicant the total amount of R580 457, 26, this being his salary for the period 16 July 2016 to 30 April 2021, and which must be paid into the Applicant's bank account, the details of which are known to the Respondent, by no later than 31 May 2021.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

Signature: _____

GPSSBC Panellist: Khuduga Tlale