

ARBITRATION AWARD

Panelist: RG Pieterse _____
Case No.: GPBC886/2019 _____
Date of Award: 25 April 2022 _____

In the ARBITRATION between:

PSA obo AR Maharaj _____
(Union obo Applicant)

and

Department of Independent Police Investigative Directorate _____
(Respondent)

Union/Applicant's representative: Tebogo Kekane _____
Union/Applicant's address: 567 Belvedere Street _____
Arcadia _____
0083 _____
Telephone: (011) 718 5400 _____
Telefax: _____
E-mail: tebogo.kekana@psa.co.za

Respondent's representative: Adv David Mtsweni _____
Respondent's address: Suite 208, Parklane West Building _____
194 Bancor Avenue _____
Waterkloof Glen, Ext 2 _____
Pretoria _____
Telephone: (012) 333 0727 _____
Telefax: _____
E-mail: mtsweni.david@gmail.com

DETAILS OF HEARING AND REPRESENTATION

- [1] This is the award in the arbitration between PSA obo AR Maharaj (hereinafter referred to as the Applicant) and Department of Independent Police Investigative Directorate, (hereinafter referred to as The Respondent) that was held on: 23/10/2020, 04/12/2020, 17/02/2021, 18/02/2021, 04/05/2021, 18/03/2021, 27/07/2021, 29/07/2021, 30/07/2021, 02/09/2021, 04/10/2021, 05/10/2021, 25/11/2021, 29/11/2021, 30/11/2021, 15/03/2022.
- [2] The arbitration was held under the auspices of the General Public Service Sectoral Bargaining Council (GPSSBC) in terms of section 191 of the Labour Relations Act 66 of 1995 as amended (LRA) and the award is issued in terms of section 138 (7) of the LRA.
- [3] This award is not intended to be a verbatim transcript of the evidence led at the arbitration but rather brief reasons for my decision in terms of section 138 (7) of the LRA.
- [4] Evidence relevant to the determination or to support any of the elements of fairness as required may be referred to. This however does not mean that I failed to consider other evidence or ignored such evidence in coming to my decision.
- [5] Both parties were present at the arbitration. The Applicant was represented respectively by Mr Ololo Shiburi and later by Mr Tebogo Kekana, both officials from the Public Servants Association (PSA) and The Respondent was represented by Adv David Mtsweni, instructed by the State Attorney.
- [6] The Applicant submitted their heads of argument on 25/03/2022 and The Respondent submitted their heads of argument on 08/04/2022.

ISSUE TO BE DECIDED

- [7] Whether the dismissal of The Applicant was substantively fair. If I find the dismissal to be unfair, I must then determine the appropriate relief. The Applicant seeks retrospective reinstatement.

BACKGROUND TO THE ISSUE

- [8] The matter concerns an alleged unfair dismissal related to misconduct.
- [9] The Applicant, Mr Amar Maharaj was employed by The Respondent since 09th September 2009 in the position of Head Ethics and Risk Management and at the time of his dismissal on the 2nd May 2019, he held the position of Ethics Manager.

[10] The Applicant was dismissed on the 2nd May 2019 for misconduct.

[11] The Applicant was charged with 5 charges of misconduct to wit:

CHARGE 1

CONTRAVENTION OF THE CODE OF CONDUCT FOR THE PUBLIC SERVICE

It is alleged that you are guilty of gross misconduct in that on or about the 16 August 2017, you without authority and or approval of the Executive Director or his delegate, testified and submitted information relating to the Departments investigations to the Moearane Commission in your capacity as the IPID's Ethics Manager.

CHARGE 2

CONTRAVENTION OF THE IPID'S MEDIA POLICY

It is alleged that you are guilty of misconduct in that on or about the 16 August 2017, you, without the authority of the Executive Director and/or the National Spokesperson, shared information relating to IPID with the Media through your testimony at the Moerane Commission in contravention of clause 9.1 of the IPID's Media Policy of 2014.

CHARGE 3

GROSS DISHONESTY

It is alleged that you are guilty of gross dishonesty in that on or about the 16 August 2017, you intentionally, willingly and with malice provided incorrect and misleading information about the completion and closure of investigations concluded by IPID at the KwaZulu Natal Provincial Office.

CHARGE 4

CONTRAVENTION OF THE PUBLIC DISCLOSURES ACT, 2004

It is alleged that you are guilty of misconduct in that on or about 16 August 2017 whilst testifying at the Moerane Commission you, in contravention of the Protected Disclosure Act, 2004 willingly disclosed the name of an alleged whistleblower to whom you had offered protection in terms of the said Act.

CHARGE 5

BRINGING THE NAME OF THE DEPARTMENT INTO DISREPUTE

It is alleged that you are guilty of misconduct in that on or about the 16 August 2017, in your capacity as the IPID's Ethics Manager and therefor and overseer of the IPID's Ethics Policy, you intentionally and willingly provided incorrect damning information about the Department in relation

to Isipingo CAS 129/0/2014, Umlazi CAS 398/03/2014 and Umlazi CAS 565/07/2015 at the Moerane Commission on or about 16 August 2017. An information with (which) created or had the potential to create wrong perception about the IPID to the Media and the South African public in general.

[12] The Applicant was found guilty on charges 1,3,4 and 5 and subsequently dismissed.

[13] The Applicant unsuccessfully appealed the sanction.

[14] The Applicant alleges that the dismissal was substantively unfair.

[15] The Respondent submitted that the dismissal was substantively fair.

[16] The Respondent called two (2) witnesses to wit Ms. Rosina Mabuse, Acting Director and Mr Matthews Sesoko, Head of Investigations. The Applicant testified in his own case.

SURVEY OF EVIDENCE AND ARGUMENT

RESPONDENT'S CASE

[17] The Applicant received an e-mail from Adv Manyathi, the evidence leader of the Moerane Commission to give evidence at the Moerane Commission.

[18] The Applicant addressed an e-mail to the then ED, Mr McBride informing him that he received an invite from Adv Manyathi to testify before the Moerane Commission in his capacity as Ethics Manager and that he accepted the invitation.

[19] On the 4th August 20217, Ms. Mabuse, who was the Acting Director at the time, addressed an e-mail to The Applicant wherein she asked him where did he receive the authority to meet with the Moerane Commission and whether he approached the ED regarding the matter.

[20] In a subsequent e-mail, The Applicant replied back and sated that he did not require any authority to meet with the Moerane Commission, that he did not approach the ED in the matter and that he will be testifying as per the request from the Moerane Commission.

[21] On the 16th August 2017, The Applicant gave evidence before the Moerane Commission in his capacity as the Ethics Manager of IPID.

[22] The 1st witness of The Respondent was Mrs Rosina Mabuse. She testified that she is employed by The Respondent in the position of Acting Director, and that The Applicant reported to her.

- [23] She testified that when she became aware that The Applicant would be testifying at the Moerane Commission, she engaged with him to get permission from the Executive Director. She further testified that she engaged with The Applicant on the nature of his testimony at the Moerane Commission. She indicated to The Applicant that there was already a person appointed to testify at the commission but despite this, The Applicant went to testify.
- [24] She testified that The Applicant did not get approval to testify at the Moerane Commission. She further testified in respect of charge 1, that she did not know which section or clause of the Code of Conduct for the Public Service was contravened.
- [25] She testified that The Applicant did inform the Executive Director of the invite from the Moerane Commission, but the Executive Director never replied.
- [26] She testified that she approved leave for The Applicant, including the day that The Applicant went to testify, as there were no issues in not granting the leave, that further the Executive Director's office was informed about the leave.
- [27] She testified that whistleblowers reported their complaints to The Applicant and that the identity of the whistleblowers should not be disclosed. She stated that The Applicant disclosed the name of a whistleblower. She conceded that the whistleblower disclosed his name to several other people in an email dated 16 January 2017.
- [28] She testified that the Protected Disclosure Act protected the identity of whistleblowers but could not stipulate which section of the act provides for that.
- [29] She testified that she asked The Applicant whether he had obtained the approval of the Executive Director to which The Applicant responded that he did not trust the Executive Director to handle matters reported to him.
- [30] She further testified that she asked The Applicant to send an email to the Executive Director setting out his intention to testify before the Moerane Commission, as he cannot appear at the Moerane Commission without the knowledge and approval of the Executive Director.
- [31] The 2nd witness of The Respondent was Mrs Matthews Sesoko, National Head of Investigations. Mr Sesoko testified that he was aware that The Applicant did report to The Respondent regarding irregular closure and completion of cases since 2014.

- [32] He testified that The Applicant presented evidence on the completion and closure of cases at the Moerane Commission and focused on the reasons for the 90 days closure.
- [33] He testified that there may have been staff members who provided The Applicant with the information which he used to testify on at the Moerane Commission and that the information could be correct as it came from the Provincial offices.
- [34] He testified that there were cases that were completed or closed prematurely to create the impression of good performance and agreed there was an investigation conducted where it was revealed that investigators and managers were completing cases without proper investigation.
- [35] It is the case of The Respondent that The Applicant was enjoined to consult with Mr Sesoko, who was the Head of Investigations to ensure that the information he was going to testify on at the Commission, was accurate and correct, which The Applicant did not do.
- [36] Mr Sesoko testified that the information presented to the Commission by The Applicant was incorrect in that; the allegations made by The Applicant to the Public Protector about the dysfunctionality of the KZN office of IPID is incorrect and unjustifiable.
- [37] In respect of the Fica case, a complaint was received on 14th March 2014, and the case docket was allocated to Ms. Kirsten. Dr Mbhele attended to the scene in order to establish the time of death. Dr Mbhele could not establish the cause of the death and the family requested a 2nd opinion from Prof Naidoo who conducted the post-mortem on the 27th March 2014. The report of the post-mortem was received by IPID on the 27th July 2015 and the inquest was forwarded to the DPP for a decision on the 5th October 2015.
- [38] In relation to the Yena case, the case docket was sent to the SPP for decision on the 10th August 2017 and the decision of non-prosecution was received on the 17th August 2017.
- [39] In relation to the Nzama case, the case docket was submitted to the SPP on the 17th August 2017 for a decision which decision is still awaited.
- [40] In relation to the premature closure and completion of cases, IPID has a responsibility and mandate to complete investigations within 90 days and if not, reasons must be provided as to why the investigation was not complete within the required 90-day period. The witness testified that the last column where it says "reasons" are in fact the reasons for not meeting the 90-day deadline.

[41] The nature of the misleading evidence brought in question the ability of IPID to fulfill its mandate.

[42] The very nature of the incorrect information given to the Commission by The Applicant, brought the image of the Department into disrepute as the (incorrect) information created or had the potential to create a wrong perception of IPID in the South African public as well as the media. The Applicant contended that he merely stated what was given to him by the whistle blowers within IPID and that it did not create a wrong perception about IPID.

[43] The Respondent submitted that IPID plays an important role in society and serves as an entity to which members of the public may resort in instances where the SAPS are involved in acts of misconduct.

APPLICANT'S CASE

[44] The Applicant submitted that the Moerane Commission was properly constituted and he received an invite from Adv. Manyathi through an e-mail. It would not be proper to ignore an invite from a Commission properly constituted by a parliamentary directive.

[45] He testified that he informed his line manager and showed her the information relating to improper completion and closure of cases in the KZN Provincial office.

[46] He testified that he informed the ED (Executive Director) of the invite and his acceptance of the invite, but the ED never responded to his e-mail.

[47] The Applicant testified that he did not require the permission / approval of the ED especially under circumstances where there is unlawful conduct by the employer.

[48] The Applicant took approved leave for the 15th and 16th August 2017 to go and testify at the Moerane Commission.

[49] The Applicant testified that he was not dishonest in his presentation regarding the completion and closure of investigations and, that cases were closed without proper investigation and for the manipulation of statistics. The information was received from whistle blowers who were IPID officials and the information was sourced from the case management system.

[50] The Applicant submitted that he provided the Commission with a comprehensive list of closed and completed cases by the KZN Provincial Office and the information was extracted from the case management system.

- [51] The Applicant testified that the cases completed (Fica and Yena) were completed and closed prematurely by die KZN Provincial Office.
- [52] The testified that his testimony at the Moerane Commission and the evidence presented there was in no way dishonest, and he maintained that the information was correct.
- [53] The Applicant vehemently denied that he provided incorrect information about the cases of Fica, Yena and Nzama which could have created a wrong perception of IPID.
- [54] In relation to the Fica case, he testified that the information was correct and verified by colleagues. It was contended that Mr Sesoko could not rebut the contents of paragraph 2.1 on page 156 of The Applicant's bundle.
- [55] In relation to the Yena case, he testified that he received the information from IPID officials and used the Public Protector's report as a reference. He stated that the information on page 156 paragraph 1(b) and 2.2 (Applicant's bundle) were correct.
- [56] In relation to the Nzama case, he testified that paragraph 3 on page 159 (Applicant's bundle) denotes that he could not find any information on the case management system and that this could not and should not be seen that he gave incorrect information on the matter as he simply could not find any information.
- [57] The Applicant testified that he did not contravene any provision of the Protected Disclosure Act. He testified that the whistle blower made reports of improper completion of cases relating to the KZN Provincial Office and based on that information, he gave the whistle blower protection in terms of the Protected Disclosure Act. He testified that the whistle blower never requested to be anonymous and furthermore that the Protected Disclosure Act do not impose a duty on anonymity. The Applicant rejected the testimony of Mrs Mabuse that the whistleblower was in danger because of his name being disclosed.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [58] First and foremost, it needs to be said that The Respondent (in its heads of argument) abandoned charge 4 due to lack of evidence. The only remaining charges now are charge 1,3 and 5.
- [59] In charge 1, The Respondent made it very clear that the employee contravened the Code of Conduct for the Public Service. However, during cross-examination the 1st witness, Ms. Mabuse could not indicate which part of the Code of Conduct for the Public Service the

applicant contravened. I have noticed in The Applicant's bundle of documents (The findings of the Chairman) that she was also confronted with the same or similar question in the disciplinary hearing and she could also not indicate which section or part of the Code the applicant contravened. She testified in the disciplinary hearing that she is not aware of any policy which indicates that The Applicant was supposed to obtain authorisation before testifying at the Moerane Commission. After she failed (both in the disciplinary hearing and the arbitration) to indicate which section or part of the Code of Conduct for the Public Service the applicant contravened; she then shifted the goal post to say "But it is a rule that any official must receive authorisation" and "there is a practice in the workplace" that authorisation must be obtained. She was asked if everyone in the Department knows about this rule and she replied that she does not know if everyone is aware of the rule. On a question from the representative as to how does she knows about this rule, she replied that she learned about the rule from this case.

[60] The Applicant notified Mrs Mabuse that he has received an invitation to testify at the Moerane Commission. She asked him whether he obtained the approval of the ED to which he responded in the negative. She then asked him to send an e-mail to the ED setting out his intention of testifying at the Moerane Commission which The Applicant did and no reply was forthcoming from the ED. There was e-mail correspondence back and forth between the applicant and Mrs Mabuse and nowhere did she inform him of the "practice in the workplace" to get authorisation from the ED before he can go and testify at the Moerane Commission. One would have expected the Supervisor of The Applicant to inform him about this practice, but she did not, however she testified about this rule and practice in the disciplinary hearing and the arbitration. Needless to say, The Applicant is not aware of such a rule or practice in the workplace. If there is anyone to know about this rule or practice, then it would be the Ethics Manager (Mr Maharaj), because he (Mr Maharaj) was also responsible for conducting ethics training to staff where staff were provided awareness on the IPID values, Public Service Code of Conduct and the Protected Disclosures Act and encouraged staff to disclose information about unlawful and irregular conduct by their employer or other employees in the employ of their employer.

[61] The essence of charge 1 is that The Applicant should have obtained the authority and or approval of the Executive Director or his delegate before testifying at the Moerane Commission. That, so The Respondent argues, is a contravention of the Code of Conduct of the Public Service. In substantiating their argument, they submitted in their heads of argument that The Applicant contravened section 11(a), 11(b) and 11(c) of the Code of Conduct for the Public Service. Having considered section 11(a), 11(b) and 11(c) of the Code of Conduct of the Public Service, there is no mention that The Applicant must obtain approval or authority to

testify at the Moerane Commission. That, in my view explains the inability of the witness (Mrs Mabuse) to refer to a specific section or part of the Code that The Applicant allegedly contravened and then started to refer to a “practice” in the workplace.

[62] The Applicant did send an e-mail to the ED informing him of the invite he received from the Moerane Commission to testify before the Commission in his capacity as Ethics Manager of IPID and that he accepted the invite. The ED (for reasons unknown) did not reply to the e-mail of The Applicant and it is my view, that, had the ED not been in agreement with The Applicant to go and testify before the Commission, he *could and in fact should have* replied to the e-mail to express his disagreement, but he did not. It is my view that, by not doing so, he consented by implication.

[63] I am not convinced that The Applicant contravened any part of the Code of Conduct, neither am I convinced that a practice (as the witness referred to it) exists in the workplace. I am also not convinced that The Applicant was given any instruction to obtain permission from the ED. The Respondent had to proof the existence of a rule or practice and not merely stating that same exists. The scale did not tip in favor of The Respondent.

[64] In respect of charge 3, The Applicant was charged with gross dishonesty in that on or about the 16th of August 2017, he intentionally, willingly and with malice provided incorrect and misleading information about completion and closure of investigations conducted by IPID at its KZN Office.

[65] It needs to be said that The Respondent (during the arbitration proceedings and in the heads of argument) put a lot of emphasis on the issue that The Applicant was enjoined to consult with Mr Sesoko to verify the information and to make sure that the information he is going to present at the Commission is correct. There was however no instruction issued to The Applicant to consult with Mr Sesoko, neither were there any obligation on him to do so.

[66] But what is more important regarding charge 3 is the intention requirement. What was imperative in this charge is for The Respondent to proof (on a balance of the probabilities) that The Applicant had the necessary “intention” to provide incorrect and misleading information. Even if The Applicant provided incorrect and misleading information; did he do that with intention? Did he do that with malice? It is my view that The Applicant did not do it with intention and malice as alleged by the respondent.

[67] The Respondent did not even touch the element of intention in their evidence or heads of argument. In his book titled Dismissal, Grogan defines dishonesty as follows: “This may

include withholding information from the employer of *making a false statement or misrepresentations with the intention of deceiving the employer*” In this instance it cannot be said that The Applicant had the intention to deceive the employer (or the Moerane Commission). In dishonesty charges, there needs to be some intent to deceive or mislead.

[68] It is my view that The Applicant did not have the intention to provide incorrect and misleading information and that he cannot be guilty of charge 3, since The Respondent dismally failed to proof all the elements of the charge.

[69] In respect of charge 5, The Applicant was charged with bringing the name of the Department into disrepute in that he intentionally and willingly provided incorrect damning information about the Department in relation to Isipingo CAS 129/0/2014, Umlazi CAS 398/03/2014 and Umlazi CAS 565/07/2015 at the Moerane Commission on or about 16 August 2017. Information which created or had the potential to create a wrong perception about the IPID to the Media and the South African public in general.

[70] The crux and essence of The Applicant’s testimony at the Moerane Commission was about the completion and closure of cases without proper investigation and the point of reference was the Public Protector’s report which contains information provided to the PP by IPID.

[71] I refer to The Applicant’s bundle of documents page 163. This is a report from The Applicant to the ED, Mr McBride dated 17th October 2014. The purposes of this report were to provide the ED with a written report about the findings of the Ethics Climate Survey conducted on 6th October 2014 in Durban and at Empangeni on the 8th October 2014. In Paragraph 1 it stated that investigators reported that they are placed in an ethical dilemma when they have to complete cases without proper investigation to achieve targets. The (closed) file is then set aside whilst they start to complete new cases. Investigators reported that the integrity of investigations are compromised when cases, including cases of murder, torture and assault are “completed” without proper investigation for the purpose of achieving targets. Investigators also reported that often the Post Mortem reports were not even collected. An investigator reported that they were asked to take the files to the DPP to get a signature and the file was then completed. The ED, was already aware of this conduct as early as 17 October 2014 (Before his suspension). Mr Sesoko conceded that the information in the bundle is coming from the Provincial, he stated that “It is obvious that it comes from the Provincial Offices”. He further conceded that the information given is correct. He conceded that there were instances where IPID’s investigating officers and Managers closed and completed cases without proper investigation. Mr Sesoko further conceded that there were investigations that were not concluded properly and he made mention to 2 ladies who reported 4 such cases at the

KZN Office and they also testified about the Moerane Commission. Mr Sesoko also agreed that the information The Applicant testified on came from whistleblowers and he confirmed that the information came from the KZN Office. Mr Sesoko was referred to the applicant's 2nd bundle, page 41 paragraph 4 where it states: "IPID has received a qualified audit for 2016/17. The first time since its inception. Whilst there are objective factors that mitigate this poor performance, the situation is worsened by the 17% overall achievements of targets for program 2. Much of this can be attributed to the setting of unrealistic targets and the false sense of performance created by the premature and fraudulent "special closures" of 2015/16".

This was an internal memorandum from ED, Mr McBride to all staff of IPID.

[72] I refer to The Applicant's 2nd bundle, page 120 paragraph 79 - This is the testimony of Mr McBride before the Zondo Commission which states as follows: "Upon my return from my suspension on 19 October 2019, I was alerted to irregularities on how investigations had been conducted during the time I was suspension. There were allegations that certain cases that were being investigated by the IPID that had been prematurely closed without carrying out proper investigation process as contained in the Standard Operating Procedures. This was done in certain instances to manipulate the statistics upwards and other acts that amounted to defeating the ends of justice. These cases were termed "special closures". This was intended to give an impression that performance had been better under Kgmanyane. I instructed our Integrity Strengthening Unit to investigate these allegations. The Auditor General also flagged some of these cases. One employee has already been dismissed as a result of this investigation. Another senior employee, Dan Morema, resigned when he was approached to make a statement"

[73] I also want to refer to The Applicant's 2nd bundle, page 143, which is the statement of Mr Cedrick Nkibande. I quote paragraph 4 and 8 thereof: "Most of the cases in KZN are being completed or closed without investigation being finalized during financial year 2015/2016 and 2016/2017. Members were instructed to bring files for completion as decision ready even technical reports are still outstanding so that the stats will look good. As a result, over 900 cases were completed and closed under special closure of which the majority of those cases were not supposed to be completed or closed." "The manipulation of stats is a serious offence which amounts to defeating the ends of justice that needs to be investigated while the community is suffering out there.

[74] From the above, it is abundantly clear that there were irregularities in IPID in respect of the completion and closure of cases without proper investigation, which was the very essence of the testimony of the applicant at the Moerane Commission.

[75] The Respondent tried to convince me that The Applicant gave incorrect information at the Moerane Commission and referred to issues such as (only one example) the Nzama case that was under investigation according to the testimony of The Applicant, but in fact the case was submitted to the SPP for decision. He stated that, at the time the information was given to the PP by IPID, it was correct, but when The Applicant testified about it at the Moerane Commission it was not correct anymore, but when Mr Sesoko was referred to The Respondent's bundle, page 228, he changed his version and conceded that the Nzama case was still under investigation on the 17th August 2017 (the day after Mr Maharaj testified at the Moerane Commission). But previously Mr Sesoko was adamant that the information about the Nzama case was incorrect and he stood and fall with that evidence. Furthermore, Mr Sesoko was confronted with page 159 paragraph 3 of The Applicant's bundle. Paragraph 3 states that: "The IPID CCN No could not be on the data provided to the Ethics Manager". Mr Sesoko was asked what was misleading in the paragraph and he stated that the case was registered and the Applicant gave the impression that the case was not registered. I disagree with Mr Sesoko, the wording of paragraph 3 is abundantly clear and it does not even remotely suggest that the case was not registered; it merely says, in no uncertain terms, that the IPID CCN No could not be found.

[76] Another example is on page 157 of The Applicant's bundle and page 223 of The Respondent's Bundle, when referred to these pages, Mr Sesoko conceded that The Applicant was not giving misleading information.

[77] Another example is the Yena case. The Yena case was completed on 23/05/2014 and Mr Sesoko testified that the Yena case was closed around 05/10/2015, but when asked to explain the discrepancy, he conceded and said "It was not completed. It would seem that 23/05/2014 is a premature completion".

[78] It is my view that the overall evidence of The Applicant at the Moerane Commission was in essence correct and that the slight differences there might be, cannot be said to be misleading the Commission, neither can it be said to be information that created (or had the potential to create) a wrong impression about IPID to the general public and the media.

[79] If there is (or was) a wrong impression of IPID in the media or the general public, then it would be for reasons as set out above to wit irregularities in respect of completion and closure of cases without proper investigation and definitely not as a result of the evidence of the applicant at the Moerane Commission.

[80] I must determine whether or not The Applicant contravened a rule as laid out in Charge 1, Charge 3 and Charge 5. For my reasons as set out above, I am of the view that The Respondent failed to prove on a balance of the probabilities that The Applicant contravened any of the rules in respect of Charge 1, 3 and 5.

[81] Before I address the remedy, I want to deal with the issue of trust first. Mr Sesoko testified that the trust relationship was damaged because The Applicant disregarded his supervisor and seniors and he willingly disclosed wrong information to the Commission and there is no trust. During cross-examination he was asked whether the trust relationship was broken and he answered that "trust is broken when an employee is asked to engaged with managers and refuse to do so and causing harm and embarrassment to the Department". The Applicant testified that he cannot trust the ED (Mr Robert McBride) to deal with cases reported to him. It needs to be said, the very same person that The Applicant could not trust, Mr McBride, is no longer working for IPID, so that argument of The Respondent subsequently falls away. I do not believe that The Applicant cannot trust his former employer to wit IPID and there was no evidence to that effect. Mr Sesoko merely submitted that The Applicant cannot be trusted and that submission was not substantiated in my view. Further to that, Mr Sesoko is not the direct Supervisor of The Applicant and the Supervisor (at the time of the incident), Mr Mabuso, did not lead any evidence concerning the trust relationship between her and The Applicant. I am not convinced that the trust relationship between The Applicant and The Respondent was damaged to such an extent that a continuation of the employment relationship would be intolerable and/or unbearable. I am of the view that the issue of trust came as an afterthought, because during the disciplinary hearing, not even one of the four witnesses (Mrs Rosina Mabuse, Mr Pule Maoka, Mrs Matthews Sesoko and Mr Moses Dlamini) testified on the issue of trust. If there was a genuine trust issue, one would have expected the Respondent to lead evidence on that, not only in the arbitration, but also in the disciplinary hearing and to substantiate and prove the submission. If there is any damage in the relationship between Mr Maharaj and Mr Sesoko, such relationship can undoubtedly easily be restored.

REMEDY

[82] The Applicant sought retrospective reinstatement as a relief. The Respondent argued that it is not practicable to reinstate The Applicant, but did not lead any evidence to that effect. There was no evidence led about the practicability of a possible reinstatement of The Applicant. No evidence to suggest that the position is not available or that someone else has been appointed in that position that would make reinstatement impracticable. There is no evidence to suggest that there might be tensions between Mr Maharaj and Mr Sesoko or any other employees of IPID that would make future employment intolerable. I can therefore not find any reason why The Applicant cannot be reinstated.

[83] In terms of section 193 (1)(a) of the LRA, I am empowered to order the reinstatement as a primary relief.

[84] I cannot find any reason why The Applicant should not be retrospectively reinstated.

AWARD

In the premises I make and deliver the following award:

[85] The dismissal of The Applicant was substantively unfair.

[86] The Respondent, the Department of Independent Police Investigative Directorate is ordered to reinstate The Applicant, Mr AR Maharaj retrospectively to the date of dismissal to wit 02 May 2019 with full back pay in the same or similar position he occupied prior to his dismissal and on terms and conditions of employment no less favourable than those applicable at the time of his dismissal and without any loss of benefits.

[87] The reinstatement of The Applicant in the preceding paragraph is effective 03 May 2022.

[88] The Applicant is directed to report at the office of The Respondent and tender his service on Tuesday, 03 May 2022.

[89] The back pay referred to in paragraph 86, is calculated as follows: R54939.78 x 36 months = R1 977 832.08 (One million nine hundred seventy seven thousand eight hundred thirty-two rands and eight cents) subject to statutory deductions.

[90] The Respondent is ordered to pay the amount referred to in paragraph 89 above not later than 31st May 2022.

[91] In respect of costs, the PSA is ordered to pay the wasted costs of the Council for the postponement granted on 18 June 2021.



Panelist: RG Pieterse