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ARBITRATION AWARD

Panelist/s: SILAS RAMUSHOWANA
Case No.: GPBC 146/2020
Date of Award: 10 OCTOBER 2020

In the ARBITRATION between:

PSA obo EWC BANGER

(Union / Applicant)

and

DEPARTMENT OF WATER AND SANITATION

(Respondent)

Union/Applicant's representative:	Ms Z Graaff-an official from PSA
Union/Applicant's address:	P O Box 2480
	Mafikeng
	2745
Telephone:	018 381 9600
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Respondent's representative:	Mr D Mitileni-Labour Relations
Respondent's address:	Private Bag x 313
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

[1] This is the award in the arbitration between Mr EWC Banger (the Applicant) and Department of Water and Sanitation (the Respondent).

[2] The arbitration was held under the auspices of the GPSSBC in terms of section 191 (1) [191(5)(a)] of the Labour Relations Act 66 of 1995, as amended (the Act), and the award is issued in terms of section 138 (7) of the Act, and GPSSBC.

[3] The arbitration hearing was heard on various dates and was concluded on the 4th of September 2020, at the departmental offices in Hartbeespoort.

[4] The Applicant appeared in person and was represented by Ms Z Graaf, an official from PSA whilst Mr Mitileni from Labour Relations represented the Respondent. Parties agreed that most of the issues which are covered at the disciplinary hearing are common cause and therefore there was not need to tender oral evidence as they will argue legal/ technical issues as below. After the applicant stated his case, parties agreed to submit heads of arguments to the council 17th of September 2020 and if there will be a need for further reply thus would be extended the party concerned.

ISSUE TO BE DECIDED:

[5] I am required to determine whether or not the Applicant's dismissal was substantively (appropriateness of the sanction) and procedurally fair in the circumstances if I find that it was unfair, I must determine and grant appropriate relief in terms of section 193 of the Act.

BACKGROUND TO THE MATTER:

[6] It is common cause that the Applicant was an employee of the Respondent, as a Chief Artisan since 10 October 2007 until his dismissal for alleged misconducts on the 21st of January 2020. He was charged with 2 charges and pleaded not guilty on charges 1 and 2 The issue to be decided is whether the dismissal of was substantively fair or not based on the appropriateness of the sanction. The applicant further argued that external chairperson and initiator were not the right people to run the hearing as it was not in terms of the provisions of the Council's resolutions.

[7] The Respondent's case is that the Applicant breached serious rules as charged and dismissal is an appropriate sanction for the transgressions; I should uphold the decision of the disciplinary inquiry to dismiss the Applicant for the transgressions.

[8] It is therefore upon the Respondent to prove, on the balance of probabilities, that the dismissal as a sanction was appropriate.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence and Arguments

The Respondent's Version:

[9] Mr D Mitileni made submissions on behalf of the respondent in that the applicant does not dispute that he had committed misconduct as per the charges on the charge sheet, the applicant is admitting to racism and intimidation in the workplace. With such admission

by the applicant the issue of substantive unfairness automatically falls away because he is not disputing the substance of his dismissal. It is argued that there is no need for the rule to be existing in all circumstance but there are common law misconducts which are dismissible. Furthermore, it should be noted that Resolution 1 of 2003 which the applicant is charged in terms of stated that "Employee conduct that may warrant a disciplinary hearing action is listed in Annexure A. The list is not exhaustive. Management may discipline an employee in respect of other conduct, if the employee knew, or ought to have known, that the conduct constituted grounds for disciplinary action".

It is argued that it the respondent's duty to ensure that the acts of racism within its workplace are decisively dealt with. The sanction that was pronounced by the chairperson of the hearing was substantively fair considering the actions of the applicant comparing a black person to a monkey/baboon.

The respondent stated that considering the historically development of our country it is will know that black people were demeaned and at times were compared to monkeys. The applicant being coloured himself and comparing to Mr Madlanato a black person it then become clear that his conduct amounts to racism. Moreover, the courts have ruled that it is possible for a black person to be racist towards another black person and therefore there is no need to have different races for one to commit racism. The acts of the applicants are evident enough that the respondent cannot be allowed to continue with the applicant. Racism is condemned from all angles in our country and it would be very wrong for the respondent to allow employee who is found guilty of it to continue working for it. It is argued that the trust relationship has been broken down and an automatic dismissal must be found to be fair.it is submitted that based on the type of misconduct committed by the applicant the only appropriate sanction against the applicant is dismissal and therefore argument that the dismissal was substantively fair should be maintained.

Procedurally the respondent submitted that the respondent did not abandon its intention to deal with the misconnect of the applicant when it was first reported in 2015. It is the respondent who failed to do what he had promised to do and that is to apologize to the victim (Mr Madlanato). That caused the respondent to delay in dealing and finalizing this matter. The other factor was the fact that there was something that is conceived as cover-up by those who were aware about this matter hence when this matter was final brought up to the investigating officer the respondent immediately proceeded with the disciplinary action against the applicant.

The applicant thought the matter will just die because he later offers an apology to the victim. In considering the seniority of the applicant's position, so as to justify proper ventilation of the misconduct in disciplinary proceedings, in line with the duty that rests on SAPS as public service entity and employer. On the delay in relation to the finalization of the appeal by the respondent it should be noted that the applicant did not suffer any prejudice because throughout when his appeal was pending, he continued to receive the remuneration from the respondent.

The applicant prayed pray that commissioner should not find that the respondent did not committed any unfair dismissal against the applicant but the dismissal was both substantively and procedurally fair.

The arguments were supported by case law and authorities.

The Applicant's Version:

[11] The applicant through the representative, Ms Z Graaff stated that there were procedural defects in his dismissal in that the applicant was charged in August 2017 backdated May 2015 and the grievances were received in 2016. It is within the Resolution that the employer should entertain the grievance within 30 days after referred and the employer failed to do so. The applicant received the outcome on 11 May 2018 and the outcome was dismissal. The appeal was lodged on 16 May 2018 and the outcome was only received after a year and 9 months. It is argued that the general rule is that a disciplinary enquiry must be held within a reasonable time from the date on which the alleged misconduct occurred and the applicant was charged was almost two years after the allegation took place. It is therefore legally unreasonable when an employer alleged disciplinary offences but delayed taking action. The applicant argued that the matter must be evaluated not as the foundation of a right to be tried without reasonable delay, but as an element in determining whether, in all the circumstances. The delay has to be reasonable. the longer the delay the more likely it is that it would be unreasonable. The explanation for the delay must be considered. In this case there are no reasons provided why the employer delayed

in charging him. The employer never communicated with the applicant in this regard. If this was done it could have reduced speculations about the employer's motives and accusations of unreasonable delay in proceeding with the disciplinary enquiry. It is stated that Resolution 1 of 2003 is silent on time frames, in respect of disciplinary hearings that must be held as soon as possible.

The procedures and time limits are a commitment to deal with discipline expeditiously, and they serve as a guide to how this can be accomplished. To hold that the procedure and the time limits are written in stone and immutable must necessarily imply that the first respondent elected to abandon or waive its wide powers of discipline, which the law requires to exercise in a reasonable manner. In respect of the outcome of the appeal which was handed down more than 1 year after he appealed are contrary to the rule of law. In terms of Resolution 1 of 2003, Disciplinary Code and Procedures for the Public Service provisions, the respondent failed to supply reasons for the lateness of the sanction nor the reasons to confirm the outcome of dismissal was given by the employer. It is therefore essential for the appeal process enabling the losing party to take an informed decision as to whether to appeal or not, if reasons are provided. It is argued that the Resolution of 1 of 2003 is binding on both parties, and parties has a duty to implement provisions accordingly. Therefore, the respondent failed to observe it and there are procedural defects as argued above.

Substantively it is argued that In terms of schedule 8 of the LRA Act 66 of 1995, one of the requirements to consider is, was the employee aware, or could reasonably be expected have been aware of the rule or standard. The respondent did not apply his mind in that during 2015 there was no rule for social behavior in the department of what was acceptable and not in the workplace. There was no behavioral training given to the applicant to attend nor for any employee after he was charged, taking into consideration the employer allowed him to work until the date of dismissal of 21 January. It is submitted that the applicant was never suspended and which shows that the relationship is not retrievable broken down between the parties.

[12] He prays that the sanction of dismissal be set aside and be reinstated to his position.

The case of the applicant was supported by Case Law as well.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[13] The applicant in this case is challenging both the procedure and the substance of his dismissal and had pleaded not guilty on charges of racism against him at the initial hearing; the applicant is challenging substantive fairness in that the dismissal was not appropriate as a sanction and that there were a lot of delays procedurally in bringing the matter to finality. The respondent party in terms of ***s192 (2) of the Labour Relations Act 66 of 1995 as amended (LRA)*** bears the onus of proving that the dismissal of the employee was for a fair reason and it was done in accordance with a fair procedure. In dealing with the fairness of the dismissal of the applicant, I am required to have regard to the guidelines for dismissal contained in the LRA Schedule 8 Code of Good Practice Item 8 and 9. In this dispute all of the above is not in dispute, the only issue here is the harshness and the appropriateness of the dismissal as a sanction. It was common cause that the applicant in this case had a senior post and had made racial statements to the victims It was also common cause that the allegations against the applicant were serious and he pleaded not guilty at the hearing he is now aware that he has wrong employer and pleads for lighter sanction.

[14] In the case of ***MEC, Department of Health and Social Development Sectorial Bargaining Council and Others [2016]*** where senior managers were involved in misconduct of using an emergency air wing aeroplane to travel in an unauthorised trip to a soccer team, the employer had engaged in a plea bargaining with others and other were subsequently dismissed. The court had found that entering into a plea bargaining

was nothing unpopular or unfair. In this case the employee pleaded not guilty on charges of racism It is trite law that an employee has the duty to promote the interest of his employer's business and to uphold the good name as well as the reputation. In ***NUMSA AND OTHERS VS DUNLOP (PTY) LTD AND OTHERS, LAC DA16/2016,*** the principle of derivative misconduct was restated and the duty of good faith towards the employer was emphasised. It was demonstrated that the applicant was very much aware of the rules and he contravenes them as he pleaded not guilty at the internal hearing.

[15] I am guided by Item 3 (5) of the Code of Schedule 8 of the LRA which reads as follows:

> "When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself."

[16] The Constitutional Court in ***Sidumo & Others v Rustenburg Platinum Mines Ltd [2007] 28 ILJ 2405 (CC)*** has reinforced the guideline in the Code. It was held that Commissioners must consider the following factors: The importance of the rule and the employer's reasons for dismissal as well as the basis of the of the employee's challenge to the dismissal: the harm caused by the employee's conduct; the extent to which additional training and instruction may result in the employee not repeating the misconduct; the effect of dismissal on the employee and service record of the employee. In the case of ***Blitz Printers V CCMA & 1 Other (JR 1782/2012),*** the issue of remorse was considered especially that the employee took responsibility of his action and in this case the applicant did not show any remorse as he pleaded not guilty and it took him long time to apologize to the victim.

[17] In the circumstances I find that the Respondent succeeded to discharge its onus on the balance of probabilities, that the sanction of dismissal imposed was just and equitable given the racial discrimination that historically which the majority of the people suffered and prejudiced. I find that dismissal is appropriate sanction for the

transgressions. However, I find that there were a lot of delays in charging him, issuing of outcome and the appeal process which poses a lot of anxiety and strain despite the fact that the applicant was not suspended which I find to be in contravention of the spirit of resolving disputes speedily and the provisions of Resolution 1 of 2003.

[18] For the reasons given above, I find it fair and appropriate to award as follows:

AWARD:

[19] The dismissal of the applicant was substantively fair and procedurally unfair

[20] The respondent is ordered to the applicant an amount of **R142 980, 000** which is equivalent to **4** months salary within **14 days** on receipt of this award,

[21] No order as to costs.

Thus done and signed at Gauteng, Centurion

Name: SILAS RAMUSHOWANA

(GPSSBC) Arbitrator