



ARBITRATION

AWARD

Panelist/s: Adv. Itumeleng Kgatla

Case No.: GPBC1504/2020

Date of Award: 25 May 2021

In the ARBITRATION between:

PSA obo F.FORTUIN

APPLICANT

And

DEPARTMENT OF HIGHER EDUCATION AND TRAINING

RESPONDENT

Union/Applicant's representative: Bongani Qankase

Union/Applicant's address:

Telephone: 072 621 1861

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Respondent's representative: Ms Masego Motshele

Respondent's address:

Telephone: 082 921 2681

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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

- [1] This unfair dismissal dispute was enrolled for arbitration in terms of Section 191 (1) of the Labour Relations Act 66 of 1995 and arbitrated for two (2) days at no 42 Johnsons Street in Randfontein, being the workplace of the Applicant. The arbitration was concluded on the 21st of April 2021 and written closing arguments by the parties were submitted on the 30th of April 2021.
- [2] Applicant was represented by Mr Bongani Qankase, a union official from the Public Servants Association (the PSA). Ms Masego Motshale represented the Respondent in her capacity as the Labour Relations Manager employed by the Respondent.
- [3] The proceedings were conducted in English without any need for interpretation. Digital and manual recordings were made during the process. Both parties were afforded the opportunity to present *viva voce* evidence under oath, in chief and in re-examination and to cross examine opposing testimonies. Written closing arguments were presented and considered.
- [4] In terms of Section of 138(7) of the LRA, the Commissioner is required to issue a signed arbitration award with brief reasons. It is for this reasons that only salient points will be referred to in this award even though all evidence and submissions were considered.

ISSUES TO BE DECIDED:

- [5] I am required to decide whether or not the decision of the Respondent to dismiss the Applicant for alleged misconduct in relation to unauthorized removal of College property is substantively fair and if I find that the dismissal was unfair, I must determine an appropriate remedy in terms of Section 193 (1) of the LRA.

COMMON CAUSE ISSUES

- [6] The Applicant was employed by the Respondent at salary level 5 with effect from 7 March 2007 and effectively dismissed on the 30th of October 2020 following the outcomes of the appeal process as signed by the Minister of Higher Education and Training.
- [7] The Applicant held a substantive position of Senior Administrative Clerk and was prior to her dismissal, appointed on acting basis as Secretary to assist in the office of the Deputy Principal Corporate Services.
- [8] The Applicant was responsible for organizing meetings and related logistics for the College Council as part of her responsibilities associated with the office of the Deputy Principal Corporate Services.

- [9] The dismissal of the Applicant relates to the incidences which took place on the 21st of September 2018 during a Council meeting organized by the Applicant as far as logistics and refreshments were concerned.
- [10] The Applicant earned a monthly salary of R17 051-00 as at the 30th of October 2020.

ISSUES IN DISPUTE

- [11] The Applicant alleges that she lodged an internal appeal within the prescribed Five (5) days from the date of the communication of the disciplinary outcomes by the Chairperson
- [12] The Respondent alleges that the Applicant removed College property and kept in in her possession without authority to do so.
- [13] The Applicant is of the view that her dismissal was unfair both on substance and procedure.
- [14] In terms of the relief sought, the Applicant is praying for reinstatement and compensation. The Respondent has recorded its prayer that this application be dismissed.

SURVEY OF EVIDENCE

RESPONDENT'S CASE

- [15] The 1st witness of the Respondent, Mr Doctor Malesela Phaka was sworn in and testified that he is the Deputy Principal Corporate Services responsible for Information Technology, Marketing and Communication, and Labour Relations.
- [16] The witness testified further he was not in attendance and learned about the incidents of the 21st of September 2018 through a written statement of the witness contained in page 5 of bundle "A", that the Applicant was found in possession of college property without authority. The property included tea spoons, hand paper towels, dish cloths and food (Chicken Licken) which was purchased for the purpose of the meeting.
- [17] The witness testified that the statement was submitted to him by Ms Hlamelo Debra Matlala who was in attendance of the proceedings on the day of the incident.
- [18] The witness testified that food of the Council meeting is procured in line with the procurement process and is put in the boardroom on arrival and the food can be taken by any person after the attendees have eaten. The witness testified further that College staff members are allowed to use utensils at designated places such as kitchen and staffroom and that such utensil should not be put in privately owned cooler bags
- [19] The witness testified that the Applicant was in the past sanctioned to demotion for committing a similar offence as per page 8 of bundle "A".

- [20] The witness testified under cross examination that he holds a Diploma and B.Tech in Human Resources and a Honours Degree in Psychology. The witness testified further that the incident was reported to him during the Management meeting through the office of the College Principal, in which meeting a decision to request further particulars from the witnesses who wrote the statements was taken. The witness testified further that another meeting was convened and a decision to write to the Applicant about the decision was taken.
- [21] The witness testified under cross examination that he only saw one (1) tea spoon and the dish cloth and that he did not see the chicken licken and the cool drinks as they were already removed and given away but does not know the date on which it was removed.
- [22] The witness conceded during cross examination that he is heavily reliant on the statements as he did not discover anything upon his own investigation.
- [23] The witness testified under cross examination that police were called to deal with the issues of the stolen money and only discovered the food in the office of the Applicant in the cooler box and that putting food in the cooler box is an indication that the Applicant had intention to remove the property without permission
- [24] The 2nd witness of the Respondent, Mr Phaladwa Mokgotsi was sworn in and testified that he is the acting Principal of Westcol College and that he has been employed there for the past 15 years and that he knows the Applicant as a former employee of the College.
- [25] The witness testified that on the 21st of September 2018 during the Council meeting proceedings and before lunch was served, he only saw the Applicant doing something under the table and was later accused by the Chairperson of the Council for stealing her money and that the Applicant refused to open her hand when confronted.
- [26] The witness testified that there was once an incident where food went missing and the Applicant was suspected but he is not sure if the Applicant was ever reprimanded for the same. The witness testified that authority to take left overs is given by the Principal even though there is no such a policy in place.
- [27] The witness testified that the Applicant was once found guilty and demoted for an offence involving dishonesty as per page 8 of bundle "A".
- [28] The witness testified under cross examination that he was shown cards by Ms Matshiliza who said she had withdrawn R2000-00, the witness testified further that the bag was on the floor but he does not know if the purse is folding or zipping and he only saw cards and not the money. The witness testified that he did not write a statement as he did not follow the matter through.

- [29] The witness under cross examination that he does not know the real reason why the Applicant was demoted and further that he does not know what would normally happen to kitchen utensils when the kitchen is closed.
- [30] The Third witness of the Respondent, Ms Faith Matshikkiza was sworn in and testified that she was the Chairperson of the College Council and knows the Applicant as a former employee of the College, who was the scribe during Council meetings at the time of her dismissal.
- [31] The witness testified that food, cool drinks and kitchen utensils of the college which were supposed to be in the meeting venue were found in the Applicant's office, put in the cooler bag and the locker of the Applicant and that such were found before the meeting could adjourn or the attendees had eaten.
- [32] The witness testified that, she together is Hlamulo Matlala and Mr Mokgotsi had gone to the Applicant's office to look for money which they were suspecting the witness had stolen.
- [33] The witness testified that the incident took place while the Council meeting for which she is the highest authority was still in session.
- [34] The witness testified under cross examination she gave the food and cool drinks found in the Applicant's office to the police who were about Four (4) or Five (5) because the food was in excess. The witness testified further under cross examination that all attendees were catered for despite the removal of the food by the Applicant.

APPLICANT CASE

- [35] The Applicant was sworn in as the first witness and testified that she was appointed as a Senior Administrative Clerk at the time of her dismissal and that her date of first appointment with the Respondent was 2007. The witness testified further that she was once, following disciplinary processes, demoted at her own request from the position of Call Tech Supervisor (Salary level 7) to Senior Administrative Clerk (Salary level 5) for reasons related to her having deleted financial records of the student from the system without authorization.
- [36] The witness testified that her duties were attached to the Office of Mr Phaka and that such duties included organizing meetings and related logistics such as food and paperwork relevant for the meeting. The witnesses testified that under normal circumstances, food would be delivered in the kitchen but on the day in question, the meeting was scheduled at the time when the kitchen staff had already knocked off and the kitchen was locked, as a result, the food was delivered on the passage and later kept in her office while waiting for the boardroom to be opened.

- [37] The witness testified that she determined the number of attendees after looking at the list of people who have sent their RSVP and after that, she took the food in a platter tray to the boardroom. The witness testified further that she removed excess food and utensils in the cooler box from the boardroom to her office to ensure that the boardroom looks neat and suitable for the meeting.
- [38] The witness testified that she put the excess food in the cooler box and the locker inside her office to avoid the food being contaminated by flies. The witness testified further that the food was discovered during the thorough search of her office by Hlamelo Matlala together with the police, which search was intended for money that the Applicant was accused of stealing from the Chairperson of the Council, Ms. Matshikiza. The witness testified further that she is not aware of any rule on how food for the Council meeting should be handled and that people always took food in excess after the meeting.
- [39] The witness testified that an email dated the 11th of June 2019 as per page 6 of bundle “B” was sent by Mr Douglas Martins who was her representative during the disciplinary hearing to Mr M Durant who was the Chairperson during her disciplinary hearing, in which email the results of the hearing were requested. The witness testified further that an internal appeal was lodged on the 14th of June 2019, effectively Two (2) days after receipt of the Chairperson's sanctions.
- [40] The witness conceded under cross examination that the food was the property of the college and that she had no authority to remove them but emphasized that there is no rule governing the removal and or handling of food during the meeting.
- [41] Ms. Hlamelo Debra Matlala was sworn in as the 2nd witness of the Applicant and testified that she was employed by the Respondent as a Student Support Services Officer with effect from the 16th of July 2012 and was effectively dismissed on the 29th of October 2020 when her internal appeal was dismissed.
- [42] The witness testified that she was a Shop steward of the Public Servants Association in 2016 and was elected as the academic staff representative in the Council of the Respondent with effect from 2017-2019. The witness testified further that she knows the Applicant from Randfontein Campus and that, in 2016 when she was shop steward, she assisted the Applicant with charges relating to the Applicant having deleted student information from the system without authority. The witness testified that the Applicant pleaded guilty and requested that she be demoted as she was not coping due to personal problems which included abusive relationship and abuse of substances.

- [43] The witness testified that there was plenty of chicken licken in the boardroom and that she is not aware of any rule relation to Council meeting set up and food management and that to her knowledge, people, including kitchen staff always took excess food from the meeting after Council attendees have eaten.
- [44] The witness testified that the Applicant was the scribe of the meeting and was also in charge of housekeeping and logistics which included food and paperwork for the meeting but is not sure if the Applicant had authority to possess items as found in her cooler bag.
- [45] The witness testified that two employees who were Public Servants Association (PSA) and National Educators, Health and Allied Workers Union (NEHAWU) members respectively and responsible for cleaning services were charged with theft of cleaning supplies, put through disciplinary processes, found guilty and sanctioned to two (2) months and three (3) punitive suspensions respectively. The witness further in her testimony identified the two employees as Ms. Meso Kgabi and Neo Mokadikwa.
- [46] The witness testified under cross examination that the meeting was still on during the discovery of food in the office of the Applicant and that she is not sure whether everybody had eaten at the time of the incident.

ANALYSIS OF EVIDENCE, ARGUMENT AND FINDINGS:

- [47] The statutory and other framework for the determination of this dispute is provided by the provisions of Section 185 (a) of the LRA, which reads as follows:
- "Every employee has the right not to be unfairly dismissed"*
- [48] The other framework is provided by the provisions of item 2 (1) of Schedule 8 of the Code of Good Practice of the LRA in relation to dismissal, which reads as follows:
- "A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure"*
- [49] Briefly, I a required to determine whether or not decision of the Respondent to terminate the services of the Applicant and its further refusal to entertain her appeal amounted to unfair dismissal. This entails an inquiry into the reasons for the dismissal, further the reasons for declining to entertain the appeal and whether the established procedures were followed.
- [50] It is common cause that the Applicant was in possession of the food, drinks and some kitchen utensils away from the meeting venue. It is further common cause that there are no rules governing the handling and management of food before, during and after Council meetings.
- [51] The fairness or otherwise of a dismissal thereof, depends on the facts of the case and the appropriateness of the dismissal as a penalty.¹The Applicant in this case is dismissed for keeping food meant for the scheduled Council

meeting inside her privately owned cooler bag and further keeping the same in the office furniture (locker) owned and kept in the premises of the Respondent.

- [52] The Respondent has argued that the Applicant had a clear intention of keeping the property for herself and by implication, depriving the Respondent of ownership and for the Applicant's own benefit. I find that proof to support the Respondent's argument in relation to the Applicant's clear intention is lacking and therefore, this argument should not be accepted. It is further common cause that the property never left the premises of the Applicant and therefore the argument that the Applicant intended to steal from the Respondent is not substantiated and should therefore fail.
- [53] The Applicant has argued that she had kept the food, drinks and utensils in the cooler box to avoid contamination by flies and further in the locker to maintain a tidy office space. I find the actions and precautionary steps by the Applicant were too convenient and therefore her explanation less probable.
- [54] The Applicant was by her own admission or testimony during examination in chief, demoted at her request from the position of Call Tech Supervisor (Salary level 7) to the Position of Senior Administrative Clerk after disciplinary proceedings against her in the year 2016 as per page 9 of bundle "A". The charge or offence on which the Applicant was demoted for in 2016 has no bearing or similarity to this current dispute.
- [55] The Courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behavior through a system of graduated measures such as counseling and warnings.²
- [56] It is common cause that there are no rules in place to guide and regulate the manner in which an employee tasked with arranging a Council meeting should deal with food in excess irrespective of whether or not participants have already eaten. It is further common cause that the food discovered from the office of the Applicant were given to the police by the Chairperson of the Council and further that the food in the boardroom was sufficient to cater for all the attendees. It follows that the food in the office of the Applicant was in excess.
- [57] Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes continued employment relationship intolerable. Examples of serious misconduct, subject to the rules that each case should be judged on its merits, are gross dishonesty or willful damage to the

¹ Item 2(1) Schedule 8 of the Code of Good Practice :Dismissal

² Item 3(2) of Schedule 8 of the Code of Good Practice: Dismissal

property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.³In the absence of the rules governing the determination of excess food and how it should be handled, I find that the conduct of the Applicant in the circumstances was not malicious or prejudicial to the Respondent.

[58] 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.⁴

[59] In the case of *Shoprite Checkers (Pty) Ltd v CCMA & Others (JA46/05) [2007] ZALAC 24*, the LAC held that, theft must be treated like all other forms of misconduct and that mitigating factors must be taken into account. The employee was caught on camera on three occasions taking and eating food belonging to the employer. The employee had worked for the employer for a period of 30 years and had a clean disciplinary record, the value of the item stolen was not high although the exact amount could not be determined. The Court found that the dismissal was substantively unfair, the Applicant was reinstated with a severe written warning but the reinstatement was not with full retrospective effect.

[60] It is clear from the case law referred to above that, a misconduct involving dishonesty does not automatically warrant a sanction of dismissal without taking into account certain factors, including the circumstances of the offence, the length of service and the disciplinary record of the employee. In the current dispute before me, the Applicant had a service length of 13 years, was once found guilty in 2016 and demoted with a salary adjustment. I take cognisance of the fact the dismissal was for possession of college property without authority, a competent offence of lesser weight and punishment compared to theft.

[61] It is difficult to conclude that the Applicant had the intention to deprive the Respondent of ownership of the food, more so that the food was found in the office of the Respondent and not at the exit point or outside the premises of the Respondent. I however find that, the conduct of the Applicant is not without misfeasance given the responsibility associated with the official position that the Applicant occupied in the employ of the Respondent.

[62] It is common cause that the final sanction of the Chairperson of the Disciplinary hearing was requested by the representative of the Applicant from Mr Phaka on the 11th of June 2019 and the same was received on the 12th of

³ Item 3(4) of Schedule 8 of the Code of Good Practice: Dismissal

⁴ Item 3(5) of Schedule 8 of the Code of Good Practice: Dismissal

June 2019 and further that, the internal appeal was lodged on the 14th of June 2019 effectively two days after receipt of the final sanction. I however appears that the relevant supporting documents in support of the appeal were only sent on the 25th of June 2019 without application, thus rendering the appeal late and defective.

[63] In the circumstances I find that the dismissal of the Applicant was substantively unfair.

REMEDY

[64] In the case of *ARB Electrical Wholesalers (Pty) Ltd v Hibbert (DA3/13) [2015] ZALAC 34*, the LAC's Wagly JP with Ndlovu JA and Coppin JA concurring, opined that, in terms of Section 193(1) of the LRA, the remedy that an employee whose dismissal is found to be unfair may be entitled to is reinstatement or re-employment or to be paid compensation. Section 193(2) then goes on to provide that the Labor Court or an arbitrator "must" order the employer to re-instate or re-employ an employee whose dismissal was found to be unfair unless certain exceptions set out in that sub-section apply or the reason for the unfair dismissal was only a failure by the employer to follow a fair procedure. The primary remedy reinstatement or re-employment does not include compensation. Reinstatement implies being placed back in the employment from the date of dismissal and the employee is therefore entitled to his full salary from the date of his dismissal to the date he recommences employment. With regard to re-employment, this can be ordered from any date after dismissal and a different date ordered at which the employee must commence rendering his/her services. Payment from the date of reinstatement and between re-employment date and the date of commencing employment again is not compensation but payment of salary for unfair dismissal. This is akin to granting specific performance or similar relief in a contractual dispute.

[65] In light of the personal circumstances, the status of the disciplinary record of the Applicant, the gravity and circumstances under which the offence was committed, the nature of the relationship and the prayer of the Applicant. I find that retrospective reinstatement is the appropriate remedy.

AWARD

[66] The Respondent is therefore ordered to reinstate the Applicant retrospectively.

[67] The Respondent is ordered to pay the Applicant an amount of **R 102 306-00** (One Hundred and Two Thousand, Three Hundred and Six Rands (**R17 051-00 x 6 Months**), being the monthly salaries due to the Applicant since the date of dismissal.

[68] The amount in paragraph 67 above is subject to normal statutory tax deductions.

[69] The order(s) in paragraph 66 and 67 above must be implemented on or before the 30th of July 2021.

[70] There is no order as to costs.

A handwritten signature in black ink, appearing to read 'Adv. Itumeleng Kgatla', with a long horizontal flourish extending to the right.

Name: Adv.Itumeleng Kgatla

(GPSSBC) Arbitrator