

ARBITRATION AWARD

Case Number: GPBC2497/2018
Senior Commissioner: Elsabé Harmse
Date of Award: 1 February 2020

In the **ARBITRATION** between

PSA OBO TF RACHEKU

(Union/Applicant)

And

DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES

(Respondent)

Union/Applicant's representative: Mr. Qankase

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

Respondent's representative: Department of Agriculture, Forestry and Fisheries

Respondent's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was set down for arbitration on 23 July 2019 at the offices of the General Public Service Sectoral Bargaining Council, 260 Basden Avenue, Lyttelton, Centurion. The matter was part-heard, and was finalized on 24 January 2020. The dispute was referred to the Council in terms of section 191 (1) [191 (5) (a)] of the Labour Relations Act 66 of 1995 (hereinafter referred to as “The Act”). **This arbitration was conducted with due cognisance of the *Arbitration guidelines: Misconduct as published*, to the extent that these *guidelines* had bearing on the proceedings.**
- [2] The Applicant was represented by Mr. Qankase, an official from the PSA. Mr. Mathebula appeared for the Respondent during the proceedings. The Applicant did not request the services of an interpreter.
- [3] The arbitration proceedings were digitally recorded. Handwritten notes were also taken.

PRELIMINARY ISSUES

- [4] No preliminary issues were raised before me.

ISSUE TO BE DECIDED

- [5] I must decide whether the dismissal of the Applicant was substantively fair. If I find that the dismissal was substantively unfair; I must grant appropriate relief.

BACKGROUND TO THE ISSUE

- [6] The following facts were common cause:
- a) The Applicant started working for the Respondent on 1 April 2016 and was dismissed on 22 November 2018.
 - b) The Applicant was employed as an agricultural food quarantine technician.
 - c) The Applicant earned R20 206.25 per month at the time of her dismissal.
 - c) The Applicant was charged with the following:
“On or about 17 January 2018 while on official duty at OR Tambo International Airport, you allowed passengers to leave the searching area without opening and searching their luggage, in exchange of money (bribe).”

[7] The Applicant is challenging the substantive fairness of her dismissal in that she did not take a bribe, it was not expected of her to open luggage, inconsistency and she was not trained. The Applicant is seeking reinstatement as the primary remedy in this matter.

[8] The Respondent submitted a bundle of documents marked "R".

SURVEY OF EVIDENCE AND ARGUMENT

[9] I have considered all the evidence and arguments raised by the parties, but because the Act requires brief reasons (*section 138(7)*), I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings and resolve the dispute.

The Respondent's evidence

Video footage formed part of the Respondent's evidence and was played at this stage. In short the following could be seen on the video footage:

It can clearly be seen that two passengers came into the search area and spoke to the Applicant. She starts cutting the plastic wrap of the same passengers' bag and then stops. One passenger takes something out of his handbag and gives it to the Applicant. The Applicant takes it and stops opening the luggage and allowed the passengers to leave the search area. ***It must be noted that the video footage was not place in dispute by the Applicant and she admitted that it was a true reflection of what transpired on the day.***

Mr. Lawrence Mochena of the Respondent testified as follows:

[10] He is the manager and the Applicant reported to him. The Applicant was working at OR Tambo Airport and she had to regulate the agricultural products coming into South Africa. Passengers are stopped randomly to be searched. Their luggage must be opened and checked inside. The Respondent was informed by the Airport that one of their employees were seen on the video taking money from a passenger. On the footage the Applicant did not open the luggage and searched it. She started cutting the plastic wrap and then stopped. She had to search for contraband items in their luggage. The only way to see whether a passenger has contraband items in their luggage is to open the luggage and search it. He is not aware of other employees that committed the same misconduct and was not dismissed. Mr. Kato also took a bribe, he was charged but before his hearing took place he resigned.

During cross-examination:

[11] It is impossible to see whether a passenger is carrying a contraband item if their luggage is not opened and searched. The Applicant was trained. The Applicant worked at the search area, her duty was to search passenger's luggage.

The Applicants' evidence

Ms. Tebogo Frieda Racheku the Applicant testified as follows:

[12] Her duty at the terminals were to interview passengers and find out whether they have agricultural products with them. If you suspect something you must interview the passenger and use your discretion on whether you are going to search their luggage. There is no policy that guides them on how to do it. On 17 January 2018 she called a passenger travelling from China to Mozambique. She asked the passenger what he had with him, he said fabrics. She was busy cutting his bag. She realized that he had a connecting flight to Mozambique and she stopped. She did not receive a bribe. The passenger was not coming to South Africa and he would not have South African rands with him because he was coming from China. She also argued that if she did receive a bribe there would have been a record of her exchanging the money for rand. ***(This argument was very confusing to me as she could not explain what type of record she was referring to and how the exchange of foreign currency takes place).***

[13] She also stated that Mr. Kato committed the same misconduct but he was not dismissed, he resigned. There is no guideline on how to search, they use their own discretion. She interviews the passengers at the search area and depending on how the interview went she decides whether she wants to search their luggage or not. She is able to determine when someone is lying about the content of their luggage.

During cross-examination:

[14] She did not know when Mr. Kato resigned or the reason for his resignation.

ANALYSIS OF EVIDENCE AND ARGUMENT

[15] Section 192 of the Act states as follows: *“(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. (2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.”*

- [16] Dismissal is not in dispute. The onus is on the Respondent to prove that the dismissal is both procedurally and substantively fair as required by *section 188(1)(a) and (b)*.
- [17] The Applicant is challenging the substantive fairness of her dismissal in that she did not take a bribe, it was not expected of her to open luggage, inconsistency and she was not trained. I will only deal with these specific aspects in my award.

Substantive fairness:

- [18] According to *Schedule 8 of the Code of Good Practice: Dismissal item 7* for a dismissal to be substantively fair, the following should be considered:
- “(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace; and*
- (b) if a rule or standard was contravened, whether or not –*
- (i) the rule was a valid or reasonable rule or standard;*
- (ii) the employee was aware or could reasonably be expected to have been aware, of the rule or standard;*
- (iii) the rule or standard has been consistently applied by the employer; and*
- (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.”*
- [19] A high premium is placed on honesty in the workplace. Conduct involving dishonesty by employees damages the trust relationship on which the contract is founded. Dishonesty can consist of any act or omission which entails deceit. This may include withholding information from the employer or making a false statement or misrepresentation with the intention of deceiving the employer. Withholding the truth in important circumstances that affect other parties is no less of an act of dishonesty than lying. In *Nedcor Bank Ltd v Frank & others (2002) 23 ILJ 1243 (LAC)* the Labour Appeal Court held that dishonesty entails **“a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently”**.
- [20] In *Fidelity Cash Management Service & Others v CCMA & Others* the LAC held as follows: **“In line with the decision of this Court in Engen and Algorax, the Constitutional Court decided in Sidumo that the reasonable employer test must not be applied and there should be no deference to the employer’s choice of a sanction when a CCMA commissioner decides whether dismissal as a sanction is fair in a particular case”**. Indeed, both in Engen and in Sidumo this Court and the Constitutional Court, respectively, said that the commissioner must decide that issue in accordance with his or her **own sense of fairness**. (see Engen at par 117 at 1559 A, - par 119 at 1559 H-I; par 126 at 1562 C-D, par 147; Sidumo’s case at paras 75 and 76). In par 75 in the **Sidumo**

case the Constitutional Court, inter alia, said: ***“Ultimately, the commissioner’s sense of fairness is what must prevail and not the employer’s view.”***

[21] In terms of the Sidumo judgment, the commissioner must:

(a) *“take into account the totality of circumstances” (par 78);*

(b) *“consider the importance of the rule that had been breached” (par78);*

(c) *“consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal” (par 78);*

(d) *consider “the harm caused by the employee’s conduct” (par 78);*

(e) *consider “whether additional training and instruction may result in the employee not repeating the misconduct”*

(f) *consider “the effect of dismissal on the employee” (par 78);*

(g) *consider the employee’s service record.”*

[22] The video footage taken of the incident between the Applicant and the two passengers in question was overwhelming. She did not dispute the footage and it can clearly be seen that the one passenger takes something out of his bag, passes it to the other passenger who then gives it to the Applicant. Thereafter it can be seen how the Applicant places it in her pocket and stop searching their luggage and let them go. I find the Applicant’s many arguments quite confusing, contradictory and impossible. On the one side she wants to argue that she did not receive any training and that she did not know how to search luggage, but on the other hand she was able to carefully explain to me how she goes about doing her job. She also argues that the passenger had a connecting flight and therefore she stopped cutting the plastic around his luggage, what begs the question is why did the passenger have all his luggage with him if he has a connecting flight? Usually the luggage are transferred from one plane to the other without the passengers having to do it themselves.

[23] Furthermore I also find it strange that the Applicant is able to determine whether someone is lying to her when she asks whether they have contraband items with them. Based on their answer she decides whether she is going to search the luggage or not. It was stated by the Respondent that she must search everyone that is sent to the search area’s luggage. In respect of whether she accepted a bribe from the passenger the only explanation she gave was a bare denial. Revelas J commented on the implications of a “bare denial” as an Applicant’s “defense” in the unpublished matter under case number JR1046/02 in ***Shoprite Checkers (Pty) Ltd v CCMA & others [reported at [2007] JOL 17267 (LC)]*** as follows: *“It does not lie in the mouth of a party who denies misconduct, to derive any benefit from the version which proves her denial to be false...Unfortunately she chose to deny the*

incident. Sadly, it happens so often that misconduct is falsely denied, which only further compounds the breach of trust of the employer in the employee..."

[24] Ngcamu AJ held in *Aluminium City (Pty) Ltd v MEIBC & others (2006) 27 ILJ 2567 (LC)*: "...once an employer established a *prima facie* case of misconduct, the onus shifted to the employee to provide a *credible explanation*..." The Respondent, on a balance of probabilities established a *prima facie* case of misconduct before me. The Applicant failed to establish a credible explanation in this matter.

Based on the above reasons I find the Applicant's dismissal **substantively fair**.

AWARD

[25] The dismissal of the Applicant **Ms. T. F. Racheke** by the Respondent **Department of Agriculture, Forestry & Fisheries** was **substantively fair**. The Application is subsequently dismissed.

DATED AT PRETORIA ON 1 FEBRUARY 2020.

Signature: _____



Senior Commissioner: **Elsabé Harmse**