GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

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ARBITRATION AWARD

Panellist/s: Seretse Masete
Case No.: GPBC2250/2019
Date of Award: 17 August 2020

In the ARBITRATION between:

PSA obo THAMSANQA CELE_____
(Union / Applicant)

and

DEPARTMENT OF EMPLOYMENT AND LABOUR_____
(Respondent)

Union/Applicant's representative: Archie Sgudla
Union/Applicant's address: _____

Telephone: _____
Telefax: _____

Respondent's representative: Sinazo Mhale
Respondent's address: _____

Telephone: _____
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Details of hearing and representation

1. The matter was held virtually on 17 August 2020 at 9h00.
2. The Applicant, **Thamsanqa Cele, (employee**) was represented by **Archie Sgudla** and the respondent, **Department of Employment and Labour (employer**) was represented by, **Sinazo Mhale.**
3. The proceedings were in English and audio virtually recorded.

Issues to be decided

4. I have to decide whether or not the conduct of the respondent by issuing the employee with a final written warning and making him to pay for the lost laptop, constituted an unfair labour practice.
5. I must determine the appropriate relief should I find that the conduct of the employer constituted an unfair labour practice against the employees.

Background to the dispute

6. The **employee,** was employed as a labour inspector at salary level 6 on 01 June 2012.
7. He was suspended by the employer for his alleged negligence which led to the loss of the Lenovo laptop which was allocated to him as a tool of trade.
8. His prayers were that the commissioner set aside the final written warning issued by the employer and the cancellation of the R25600-79 repayment of the lost laptop.
9. The employer rejected the employees' version citing that his conduct was negligent and he had to pay for the loss as per the departmental policy.
10. The employer called two witnesses and submitted two bundles of documents **marked ER1 and ER2** respectively. The employee testified as a sole witness and submitted one bundle of documents **marked EE1**.

Survey of evidence and arguments

The Employee's evidence and arguments

The employee Thamsanqa Cele testified under oath as follows;

11. On 06 September 2018 he went to his bachelor apartment which is on the 7th floor of the complex. He slept late at about 22h00 and the laptop was left next to the television. He was with his girlfriend and when they woke up the following morning, the laptop and some of his belongings including his own laptop were missing. The intruder seemed to have used the small window at the back because it was left open due to the heat in September. He reported the matter to the security officer of the complex. During his conversation with the security officer, one gentleman came and reported a loss of his girlfriend's cell phone during the same night. He further reported the matter to his superiors and also to the police. One of his superiors, Ms Phasha told him she was going to recommend that he was negligent. The person who investigated the case interviewed him and his girlfriend as well. He only received the intention to issue him with a final written warning in January 2019 as seen on page 20 **of ER1. Page 16, 17, and 18 of EE1** was his letter of appeal after having submitted his representation. However, he was issued with a final written warning and received a bill of about **R25600-79** which was the prize of the lost laptop. He never expected that a person could climb up to the 7th floor and enter the room from the back window, hence all upstairs houses do not have buglers at the windows. The laptop was on the TV stand in the house on the 7th floor and it was therefore safe. The employer did not give him any locker to lock in the laptop when at home.

The employer's evidence and argument

The employer's witness, Isaiah Seapose, testified under oath as follows:

12. He was employed as an assistant director security. Clause **4.2.2 of ER1** provides for the protection of the department's assets at work and at home. It provides that the assets must be kept in a safe place. According to him, safe place meant lockable locker or even wardrobe. The employee's statement indicated that the window was left open and that was a security breach. He confirmed the policy did not provide for a lockable place or wardrobe. He was not involved in the matter and did not visit the crime scene nor did he read the investigation report. He confirmed one would not expect theft through a window on the 7th floor but maintained the window was supposed to have been closed. He once lost a laptop but it was through a gun point, hence he did not pay anything for the lost item. He confirmed he had little knowledge about the matter but denied that he was giving his opinion.

2nd witness of the employer, Sydwell Thamsanqa Mngadi, testified under oath as follows:

13. He was employed as an assistant director HR dealing with among others, discipline and misconduct. **Page 20 of the ER1** was the intention to issue a final written warning to the employee. The purpose of the letter on **page 20 of ER1**, was to give the employee an opportunity to give the side of his story. It was put to him that the sanction was predetermined because the letter on page 20 already stated the intention to issue the employee with a final written warning. He denied that. Recovery of the loss was in terms of the Treasury regulations. The final written warning was informed by the investigation report which showed that the employee was negligent when the laptop was lost. He maintained that even if the employee's apartment was on the 7th floor, he should have put the laptop in a safe place and or locked it away. He was familiar with the disciplinary code and procedure, Resolution 1 of 2003. Final written warning depends on the seriousness and the impact of the misconduct. It was put to him that the employee should not know what could be the likely outcome of the matter in a letter of intention to discipline an employee. He did not comment.

Analysis of the evidence and arguments

14. In my analyses, I am not intending to reproduce everything said by the parties, I am only going to concentrate on the points which I feel are key in making a decision on the matter as guided by **Section 138 (1) of the Labour Relations Act 66 of 1995 (the Act).** The dispute between the two parties is centred around contravening a policy which is guided by **paragraph 7 in the code of good practice in the Act**, and that the employer already had decided on a sanction against the employee even before he was heard which is regulated by **the disciplinary code and procedure for the public service**, **PSCBC Resolution 1 of 2003** as amended (**the Resolution**).

15. The policy of the employer, **Clause 4.2.2 on page 7 of ER1**, states that*, after office hours, the laptop must be removed from the vehicle and secured in a safe place*. **Clause 2.4.5 on page 5 of ER1** *states that, make security a habit and stay in physical contact with the laptop when travelling. Get into the habit of locking the laptop when working with it or storing it*. **Page 1 of ER2, the 4th** sentence from the bottom, states that, *you are requested to ensure that your systems are* ***locked/password protected*** *when you are not working on them and that under no circumstances do you divulge your pass word to anyone*. **Clause 4.2.2 on page 7 of ER1** above, is not clear what or where a safe place is. The employer's witnesses testified that it meant in a wardrobe or lockable locker, but that

was not written in the policy and the witness confirmed that. **Clause 2.4.5 on page 5 of ER1 above,** says *Get into the habit of locking the laptop when working with it or storing it*. I do not understand in which context was the word locking was used, but it continues to say under no circumstances do you divulge your password to anyone. To me this locking is in the context of protecting the password and or preventing other people from using ones' credentials to avoid unauthorised use. One cannot for instance lock away the laptop while working with it, **see clause 2.4.5 above**. When reading further, **page 1 of ER2**, the forth sentence, see above, says **locked/password** protected. So it is not clear as I indicated above, whether the locking means putting the laptop in a lockable place or it means locking the laptop (log off) so that no other person could use it. The employer talked of the investigation report and I was not favoured with a copy thereof. I do not know what were the recommendations of the investigator except that I was told he/she found the conduct of the employee to have been negligent. The employer should have given the employee an opportunity to present his case in a disciplinary enquiry where he could challenge its decision by cross questioning its witnesses because to me, these allegations amount to a serious misconduct where money is involved.

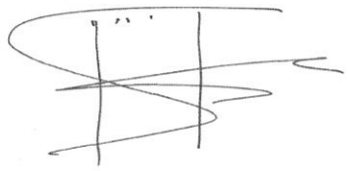
16. The seriousness or non-seriousness of the misconduct can be determined through the Resolution as follows; the Resolution classifies misconduct into less serious and serious misconducts**, see paragraph 5, in particular paragraph 5.5 and paragraph 6 of the Resolution.** In terms of less serious misconducts, no formal inquiry is necessary, see **paragraph 5.5 of the resolution**. In terms of serious misconducts, all procedures for a disciplinary enquiry must be complied with, see **paragraph 6 of the Resolution**. The employer decided not to use formal inquiry against the employee, which means the allegations were not serious. If the allegations were not serious, then why should the employee repay for the loss in an amount of R25600-79. This amount is too much and makes the misconduct to be serious. The employer found the conduct of the employee to have been negligent, but his negligence was not serious, hence no formal disciplinary enquiry against him. On the other hand, the employer wanted the employee to pay about **R25600-79** for the laptop lost due to his alleged negligent conduct, this does not add up. Would a reasonable man **conclude** that the misconduct of negligence where the offender was required to pay about R25600-79, was **less serious and no formal disciplinary hearing was required,** I do not think so.

17. ***In terms of Numsa obo Selepe v ORAWAB Investment (Pty) Ltd, t/a Bergview Engen one* stop [2013] 5 BALR 481 *(MIBC),*** It was held that*, the carelessness or mere failure which constitute ordinary negligence, changes in gross negligence to an indifference to and blatant violation of a work place duty. Gross negligence can be described as a conscious and voluntary disregard of the need to use reasonable care which has or is likely to cause foreseeable care, which has or is likely to cause a foreseeable grave injury or harm to persons, property or both. It focuses on the risks*

involved. As seen in **Numsa case** law above, a negligent misconduct which ends up causing or is likely to cause harm to the property, employer, employee or both, is a serious misconduct. I take negligence which caused an employer a loss, either monetary loss or loss of property or any other loss, as a serious misconduct, and a serious misconduct in terms of the **Resolution** must be followed by a formal disciplinary inquiry, **see paragraph 6 of the Resolution.** I further agree with the employee that it was inappropriate for the employer to say he (employee) had to respond as to why he should not be issued with a final written warning. It is trite that a sanction, in this case, a final written warning, cannot be issued or even suggested before the alleged offender is heard. My finding is that the employer acted improperly against the employee and therefore committed an act of unfair labour practice against him. The final written warning against the employee must be reversed and the penalty against him (employee) must be set aside.

Award

18. The employer**, Department of Employment and Labour** committed an act of unfair labour practice against the employee, **Thamsanqa W Cele.**
19. The employer is ordered to cancel the final written warning issued to the employee.
20. The employer is further ordered to cancel the repayment for the loss by the employee amounting to **R25600-79.**
21. Both orders in paragraphs 20 and 21 above, must take effect immediately on receipt of this award by the parties.
22. No order as to cost.



Seretse Masete Date 26 August 2020

GPSSBC Panellist