

ARBITRATION AWARD

Telephone:

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IN THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

HELD IN CENTURION

CASE NO : GPBC 1712 / 2017

DATE : 29 July 2019

In the matter between:

PSA obo MBENE

Applicant

and:

DEPARTEMENT OF HOME AFFAIRS

Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND PRESENTATION

1. This matter came before me at the offices of the General Public Service Sectoral Bargaining Council ("the GPSSBC") of 260 Basden Avenue, Lyttleton, Centurion.
2. Appearing before me was the Applicant and her representative from the PSA Mr. Joseph Mashigo.
3. The Respondent was represented by Mr Pule Tikane from the employer Labour Relations / Legal Division.
4. This matter commenced before the Commissioner on the 08th October 2018 and was concluded on the 11th February 2019.
5. The respondent submitted a bundle marked "A". The applicant submitted a bundle marked "B".

ISSUE TO BE DECIDED

6. The Commissioner is required to determine whether the dismissal of the applicant was procedural and substantively fair or not.

BACKGROUND TO THE ISSUE

7. The Applicant was employed by the respondent as a Refugee Reception Officer (RRO) on the 1st April 2008.
8. The applicant attended a disciplinary hearing, subsequent to the disciplinary hearing; a sanction of dismissal was imposed on her. That she filed an appeal against her dismissal and her appeal was dismissed.
9. The Applicant was dismissed on the 25th July 2017 and was earning R16 758.25 gross salary per month.
10. The applicant was charged and found guilty of the following allegations:

ALLEGATION 1

11. It is alleged that you committed an act of Gross Negligence in that on or about 26 March 2014 at or near the Marabastad Refugee Reception Centre, you irregularly changed the condition (s) of permits on National Immigration Information System (NIIS) from “to lodge appeal within (30) days” to “to be booked and/ or oral hearing date RAB” without authorization of the of the Refugee Appeal Board.

Refugee Names and serial numbers	Reference Number
Abu Nasser Yousuf	PTABGD 004780214
Muhammad Ilyas	PTAPAK 001450214
Abdur Razzak	PTABGD 002520214
Mohammad Daniyal	PTAPAK 002150214
Hanzala Hafeez Hafeez	PTAPAK 002320214
Sameer Salim Shaik	PTAIND 000780214

ALLEGATION 2

12. It is alleged that you committed an act of Gross Negligence in that on or about 26 March 2014 at or near the Marabastad Refugee Reception Centre, you irregularly printed below indicated permits without authorization of the Appeal Board, although the National Immigration Information System (NIS) indicated an instruction (s) on their conditions "TO LODGE APPEAL WITHIN 30 DAYS".

Refugee Names and serial numbers	Reference Number
Abu Nasser Yousuf	PTABGD 004780214
Muhammad Ilyas	PTAPAK 001450214
Abdur Razzak	PTABGD 002520214
Mohammad Daniyal	PTAPAK 002150214
Hanzala Hafeez Hafeez	PTAPAK 002320214
Sameer Salim Shaik	PTAIND 000780214

SURVEY OF EVIDENCE AND ARGUMENT

RESPONDENT'S CASE

13. The respondent led the evidence of Thivhafuni Mbevhana as their first witness who after being affirmed testified as follows: he is employed by the respondent as the Operations Manager at the Desmond Tutu Refugee Reception Centre. The applicant was employed as a Refugee Reception Officer and her functions included the registration of new applications, registering applications on the National Immigration Information System (NIIS), receiving applications for asylum seeker permits.
14. That the applicant was found guilty and dismissed for changing condition eight without authorization and further issuing permits to the asylum seekers listed in allegations 1 and 2. The applications for these asylum seekers had been rejected and these clients had to lodge appeals within 30 days.
15. Further that the applicant in assisting these clients was supposed to check condition 8 and ask for proof of appeal before changing the conditions and subsequently printing new permits. The applicant did not have the authorization to change the

condition on the permits of the clients. The applicant has also printed some of the permits days after their expiry date and in that case she was supposed to have handed the clients over to inspectorate. According to the witness the reason the charges were brought against the applicant over 2 years after the employer became aware of the alleged misconduct are valid.

16. It is submitted that the incident occurred in March 2014 and the charges were served in May 2017. The witness is the manager who reported the case to the unit of labour relations. On the 20th October 2014 he survived 4 bullets that went through his body. He was hospitalised and had to take temporary incapacity leave and returned to work in May 2015. That the PSA was informed that all the cases that he was going to be a witness in were postponed sine die.
17. Under cross examination he confirmed that the alleged misconduct took place on 26 March 2014 and the employer became aware of it on the same date. Due to the seriousness of the misconduct it had to be investigated and the investigation took place between March to October 2014.
18. That the reason there was a further delay between March 2015 when the witness returned from temporary incapacity leave until May 2016 when action was taken was because he had a lot of other cases to testify in.
19. The witness conceded under cross examination that there is an appeal clerk who is responsible to receive appeals from clients and to keep the stats for all appeals received. Further the witness further testified that one of the clients was caught by a security officer having the permits of the six clients in question in his underpants and the permits were handed to the witness for investigation.
20. The respondent called **Piet Maswanganye** who after being duly sworn in testified as follows: he is working as a security officer at the same office where the applicant was working. On 26 March 2014 when he was conducting an internal patrol, he went to the back and saw a group of people standing as if there was something happening. When he approached, he saw one of the clients dishing out permits in exchange for money. He confronted him and demanded that he should disclose everything that he was carrying. The client placed the items he was carrying on the table and the witness proceeded to body search him and found a lot of money on him and there were more items which were hidden in his underpants. That the witness ordered the client to take out the items in his underpants and when he took them out it was asylum permits. The witness took the permits and handed them over to Mr Mbevhana.
21. Under cross examination the witness conceded that as security officers they keep an occurrence book which records all security incidents. He confirmed that the incident

that he testified about was recorded in the occurrence book and could not say why the copies of that record were not attached in the respondent's bundle of documents. He

indicated that he could still serve those copies to the respondent's representative to bring to the arbitration.

22. The respondent's third witness was **Sarie Brits** who after being duly sworn in testified as follows: she is working at the Refugee Appeal Board as a senior admin officer in charge of the audit functions for the Appeal Board. When the first instance application has been decided as unfounded by the Refugee Status Determination Officer (RSDO), the client has 30 days to lodge an appeal. If the appeal is late it has to be accompanied by a condonation application. Those appeals are recorded on a list which is forwarded to the witness. If a notice of appeal has not been submitted within 30 days, the RRO is not supposed to print the permit.
23. Under cross examination the witness confirmed that the stats of appeal are captured on an excel spreadsheet. The appeal clerk who is stationed at the Refugee Reception Centre is the one who receives appeals and records the stats on the spreadsheet to send to her. The witness was pointed to a number of inconsistencies in the stats and after confirming that the documents she was pointed to be a record of the appeal stats she conceded that there were mistakes in the stats and said that it is human to make mistakes.

SURVEY OF EVIDENCE AND ARGUMENT

APPLICANT'S CASE

24. Applicant Nolubabalo Mbene after being duly sworn in testified as follows: before her dismissal from the employment of the respondent she was employed as a Refugee Reception Officer at Marabastad Refugee Reception Centre. She was appointed on 1 April 2008 and dismissed on 25 July 2017. She extended the permits of the six clients in question based on an instruction written on the Refugee Appeal Board confirmation of appeal letter as the ones in pages 1 to 5 of the applicant's bundle. According to the applicant when a client whose application has been rejected enters the Refugee Reception Centre, they are controlled by the security officers to the appeal clerk's office. The appeal clerk would then collect the appeal submitted by the client and register the appeal in her daily stats which is then sent to Sarie Brits.
25. Further that the appeal clerk would then issue a letter to the client similar the one on page 1 of the applicant's bundle which indicates that the appellant's appeal is pending due to one of the two reasons indicated on the letter.
26. That the appeal clerk would tick the applicable reason for the specific client, append a signature and endorse a stamp on the letter. When the client gets to the RRO with the

letter from the appeal clerk, the RRO verifies if the letter has been correctly completed, signed and stamped and then prints out the permit according to the condition indicated on the letter. The letter is the only confirmation that the RRO has that the appeal has been lodged because the appeal clerk does not register the appeal on the NIIS system which the RRO have access to but only on a spread sheet which is sent to the RAB office.

27. The applicant testified that she and her colleagues raised concerns with the Operations Manager regarding the manual system of appeal which resulted in disciplinary charges against employees. She stated that the stats kept by the appeal clerk is unreliable and that it is the only basis that the respondent relies on when alleging that permits were printed while an appeal had not been lodged. According to her evidence a meeting was held with the Ops Manager where these concerns were raised but they were never addressed. RROs print permits according to what the appeal clerk directs in a letter which is issued to the client and the client leaves with the letter while the expired permit is thrown into a box which is later burned by fire. That when the RRO is faced with an allegation they would have nothing to prove that they followed the direction of the appeal clerk.
28. Under cross examination the applicant conceded that the six applications for asylum were rejected and they had to appeal within 30 days. She relied on the direction of the appeal clerk to print and that was the only authorisation she needed to change condition 8 and to print out a new permit and issue it to the clients.

ANALYSIS OF EVIDENCE AND ARGUMENT

29. I can only interpret and analyse what has been laid before me, and as it stands it seems the dispute is about the fairness of the termination.
30. **It is not my intention for purpose of this award / determination to reflect verbatim the arguments / submissions that was made on record. I will only reflect the salient points of each party's arguments / submissions in so far as it has a bearing on the issue in dispute. It should by no means be accepted that aspect not mentioned in award / determination was not considered in determining this dispute.**
31. That it is common cause that the applicant does not dispute that she is the one who changed the condition (s) and printed the permits of the six clients in the two allegations that she faced. However, she disputes that there was a rule that contravened when she changed the condition (s) and printed the permits and denies that her conduct was

- gross negligent. She further disputes the procedure that the respondent submits should have been followed before extending the six permits in allegation one and two.
32. According to the evidence of the respondent's first witness, condition 8 which states that "RAB APPEAL WITHIN THIRTY DAYS" should not be changed by an RRO without the authorization of the Refugee Appeal Board (RAB). The RAB has deployed an appeal clerk at the Refugee Reception Centre to attend to all RAB matters. It is the evidence of the applicant which was not disputed by the respondent's witnesses that when a client who has been rejected and eligible to appeal comes to the Refugee Reception Centre, he or she is directed by the security officers who are responsible for queue management to the appeal clerk's office first.
33. It is therefore probable that the six clients in question were led to the appeal clerk's office to either lodge their appeals or check the status of their appeals if they had previously lodged them.
34. It was applicant's evidence that when the appeal clerk registers appeals of the appellants, the appeal clerk would compile daily statics of all appeals on an excel spread sheet. This evidence was not disputed by Sarie Brits, to whom these daily stats are sent. Once the appeal is registered on the stats, the appeal clerk would issue a letter to the appellant confirming receipt of the appeal and instructing the RRO to print a section 22 permit under a new condition which would be indicated in the letter with a tick. The letter would be signed and stamped by the appeal clerk then taken to the RRO section with an expired permit.
35. That when the clients get to the RRO section, they produce the expired permit and the letter of confirmation of appeal from the appeal clerk to the RRO. The RRO directed by the letter of confirmation would print the permit according to the new condition indicated on the letter. The confirmation letter would then remain with the client as proof of appeal.
36. That once the RRO has issued a new section 22 permit to the client the old permit is thrown in a box where they ultimately get destroyed by fire. What this means is that when the client has left the office, the only evidence that the RRO will have to prove that they issued the section 22 permit by instruction of the appeal clerk through the confirmation letter would be the stats of the appeal clerk.
37. Further this is so because the client would have left with the confirmation letter and the old permit would have been destroyed. This means that the stats play a very important role in resolving the factual dispute between the respondent and the applicant.
38. The respondent's version is that the six asylum seeker applicants did not lodge appeals when the applicant issued them with section 22 permits while the applicant's version

is that the six asylum seeker applicants were issued with confirmation letters that they had appealed and she printed based on these letters and the condition indicated in them.

39. The respondent's witness Thivhafhuni Mbevhana testified through page 111 of the respondent's bundle that he sent an email to RAB office requesting confirmation of whether the six clients had appealed or not.
40. The response he received was the one on page 111 by the RAB appeal clerk which indicates that the appeals of the six clients were not received. Sarie Brits conceded during cross examination that for such a confirmation to be given reliance is put on the stats. She or the appeal clerk would check on the stats of that specific day and if they cannot find the name or file number of the person the enquiry is about then they would conclude that such a person had not appealed.
41. Further the importance of the stats for the respondent's case is crucial as it is the premise from which the charges flowed. Had the names of the six applicants been found in the stats then the applicant would have not been charged or dismissed.
42. I am of the view that the respondent should have invested some of its time and effort to prove the reliability of the stats which is the evidence on which its case premised. Instead, the respondent did not make any effort to prove the reliability of the stats and it was the applicant who took the effort of discrediting the stats.
43. The applicant in her testimony led the enquiry to page 26 of the applicant's bundle which is a petition signed by herself and her colleagues. In the petition which the applicant testified that it was addressed to the Operations Manager Mr Mbevhana and refers to a meeting they held with him on the 7th March 2014 on the same subject, the employees were raising concerns regarding the appeal board process. According to the applicant's testimony and the said petition there were discrepancies at the appeal office which were resulting in officials being served with audi letters.
44. When cross examining Sarie Brits, the applicant referred her to page 1 of the applicant's bundle which is a confirmation letter that an appeal was lodged and condition 8 should be changed to "Awaiting RAB Hearing date". The date on which this letter was issued is 26 June 2014; it has a signature and the RAB stamp which are confirmation of its validity.
45. Further that this letter on page 1 was then read together with pages 17 and 18 of the same bundle. In page 17 it is where the stats compiled by the appeal clerk for the 26th June 2014 starts and on page 18 it is where the stats for that day ends. The witness was asked to look for the name or file number of the person appearing on page 1 to whom a confirmation letter was given and she could not find neither the name or file

number in the stats of that day. A similar demonstration was done with other pages in the bundle and in all the demonstrations it was evident that the stats of the appeal clerks are not reliable. If this person on page 1 of the bundle could not be found in the stats and the official who printed for him was to be accused of same charges that the applicant is facing, then the respondent would request a confirmation that the person had either appealed or not, the appeal office would search the appellant's name on the stats and not find it and then reply as they have replied in page 111 of the respondent's bundle that the person had not appealed. It would then be left to the official to prove that indeed the person had appealed.

46. However, the challenge with the official proving that the person had appealed is that the official as an RRO is left with no evidence to produce because the appellant would have left with the confirmation letter and the old permit would have been burnt.
47. The respondent in failing to prove that the stats can be relied on leaves a big room of doubt on whether the six clients had appealed and not captured in the stats or if they had not appealed at all. Since the onus of proof lies with the respondent, it would only be fair to take the version of the applicant over that of the respondent on this point.
48. The evidence of the security officer Piet Maswanganye lacked corroboration as he indicated that the incident that he testified about was captured in the occurrence book for that day and he would send the copy through to the tribunal but failed to do so.
49. During cross examination he was reminded that the same copy of the occurrence book was demanded by the applicant during the disciplinary hearing and he did not dispute this assertion which makes one doubt the existence of this record in the occurrence book because it would have made sense for him to come with it this time around knowing fully well that it might be demanded again.
50. Furthermore, the permits of the six clients in question which he found in possession of another client were all expired permits. It doesn't make sense how this client would give out expired permits in exchange for money.
51. It was further submitted that the applicant and her colleagues raised concerns with the Operations Manager regarding the manual system of appeal which resulted in disciplinary charges against employees. She stated that the stats kept by the appeal clerk is unreliable and that it is the only basis that the respondent relies on when alleging that permits were printed while an appeal had not been lodged. According to her evidence a meeting was held with the Ops Manager where these concerns were raised but they were never addressed.

52. That RROs print permits according to what the appeal clerk directs in a letter which is issued to the client and the client leaves with the letter while the expired permit is thrown into a box which is later burned by fire. That when the RRO is faced with an allegation they would have nothing to prove that they followed the direction of the appeal clerk.
53. Furthermore to strengthen their argument against the applicant, the respondent submitted faceless affidavits purported to belong to the refugees. The question is, how come the respondent did not bring the said refugees to the arbitration? Since the faceless affidavits were not accepted, it left me with probabilities as to the respondent actual intentions to dismiss the applicant.
54. It is submitted that the commissioner should find the applicant not guilty on both charges levelled against her and further find the dismissal of the applicant substantively unfair. The applicant is requesting reinstatement as the appropriate relief which is a primary relief of section 193.
55. Furthermore the Constitutional Court opined in the celebrated case of **Sidumo and Another v Rustenburg Platinum Mine Ltd and Others (2007) 28 ILJ 2405 (CC)** that when the Commissioner is seized with the dispute about the unfairness of a dismissal, the LRA require him to conduct two stages enquiry. The first enquiry is the factual one. That the factual enquiry is whether or not the misconduct was committed. That when the available evidence does not prove the commission of the misconduct which constitutes the reason for dismissal, then the dismissal would have been unfair and that would be the end of the enquiry. However if the misconduct is proven, the second stage of the enquiry will be ushered in. In this instance it is common cause that the applicants pleaded guilty on the main charges. Therefore the commissioner is required to move the second enquiry whereby it is required to assess the fairness of the dismissal according to his sense of fairness. That he should exercise value judgement, (See **Hullet Alluminium (Pty) Ltd v Bargaining Council for Metal Industry and Others (2008) 29 ILJ 1180 (LC), Para 26 -28**).
56. Further in the **SACCAWU** case the court found that; "The best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of discretion in each individual case.
57. That if a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. That it cannot be fair that other employees profit from that kind of wrong. Decision.... a wrong decision can

only be unfair if it is capricious, or induced by improper motives, or worse, by a discriminating management policy.

58. In **NUM and Another v AMCOAL Colliery T/A Colliery and Another (2000) 8**

BLLR 869 (LAC), in determining the fairness of the dismissal of 16 employees who had been dismissed for failing to comply with an instruction, the court said the following: (the parity principle was designed to prevent unjustified selective punishment of dismissal and to ensure that cases are treated alike. That it was not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence)

59. I am of the view that the Chairperson of the enquiry did not deal with the consistent application of the workplace rule when determining the fairness of the dismissals, other than simply indicating that after he had considered everything he decided to terminate the relationship based on consistency. No evidence on comparative matters was referred to nor was any evidence led in respect of similar cases to justify the Chairman decision.

60. For example Mr. Maswanganyi testified about what was recorded in the occurrence book and could not say why the copies of that record were not attached in the respondent's bundle of documents. He indicated that he could still serve those copies to the respondent's representative to bring to the arbitration.

61. In law, an employer can justify the dismissal of an employee not on new grounds but on the very same reasons that were presented in getting rid of the employee in question.

62. In **Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others (2008) 29 ILJ 964 (LAC)**, where the **Labour Appeal Court held as follows at paragraph 32:**

63. "It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where at the time of the dismissal the employer gave a particular reason as the reason for dismissal in order to hide the true reason such as union membership. In such a case the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that the employer gave for the dismissal but on the basis of the true reason for dismissal."

Time frame

64. It is submitted that the incident occurred in March 2014 and the charges were served in May 2017. The witness is the manager who reported the case to the unit of labour relations. On the 20th October 2014 he survived 4 bullets that went through his body. He was hospitalised and had to take temporary incapacity leave and returned to work in May 2015. That the PSA was informed that all the cases that he was going to be a witness in were postponed sine die.
65. This matter was, as a point in limine, brought before the chairperson of the disciplinary hearing. It was argued that the employer took so long to institute these disciplinary steps against the applicants that it waived its right to discipline them. It is submitted that the chairperson dismissed this argument and ruled that the hearing shall continue.
66. The applicant submits that the applicable collective agreement provides that disciplinary steps should be instituted within a specific timeframe.
67. It is then submitted that this is the appropriate forum to raise this aspect and to motivate that the respondent waived its right to discipline the applicant.
68. Further it is submitted that the respondent's Disciplinary Code and Procedure, which is a collective agreement per Resolution 1 of 2006, provides as one of the principles that disciplinary action must be taken promptly and timely. The respondent's Guidelines for Managers on the application of the Collective Agreement state that an investigation into misconduct should be finalized as soon as possible and as a guideline within 5 working days from the date that the investigator is appointed.
69. The respondent was definitely aware of the misconduct by March 2014. Yet it took the respondent another 2 years and 5 months to proffer charges against the applicants.
70. Further it is duly appreciated that it might had been a huge and time consuming and also that the seven days that it should take to conclude an investigation as referred to above, is not casted in stone, but only a guideline.
71. The applicant further submits that it is on strength of these facts submitted that the respondent failed to apply any sense of urgency in disciplining the applicant. The time that the respondent took to discipline the applicant can by no stretch of imagination be regarded as promptly and timely as envisaged in the principles of the collective agreement. For these reasons it is submitted that the respondent has waived its right to discipline the applicant.
72. Further in accordance time frames (Disciplinary proceedings on grounds of delay). That time frames for bringing disciplinary proceedings against employees are set out in paragraphs 7.1 and 7, 4 of resolution 1 of 2001, the peremptory provision of which

are, it was common cause, binding on the parties (**MEC: Department of Finance, Economic Affairs and Tourism (Northern Province) v Mahumani (2004) 25 ILJ para 2311 para 3; Lloyd v CCMA and Others [2001]9 BLLR 1072 (LC)**). The disciplinary process comprises an investigation followed by a hearing. Paragraphs 7.1 and 7.4 read:

- “An investigation should be finalized within two weeks from the date that an incident has come to the attention of the employer. That if the time cannot be met, the parties must be informed accordingly with reasons for the delay.
- The formal disciplinary hearing should be finalized within a period of 30 days from the date finalization of the investigation. If the time frame cannot be met, the parties involved must be informed accordingly with reasons for the delay. If the employer without good reason fails to institute disciplinary proceedings with a period of 3 months after completion of the investigation, disciplinary action shall fall away.

6.11. See **Van Eyk v Minister of Correctional Service & Others (ECJ 023/2005) [2005] ZAECHC 13 (20 April 2005)**

73. Further there is no substance to this matter as presented by the Respondent, in addition, the extent of the procedural unfairness in this instance is such so as to impact on substantive fairness and render it substantively unfair as well.
74. Taken on a balance of probabilities, based on submissions made, evidence and arguments submitted, I find that the dismissal was both procedural and substantively unfair.
75. Based on the above and on a balance of probabilities it is determine that the respondent acted unfairly to the applicant. That in the two years that the applicant has been out of service / unemployed, she has lost valuable assets and this dismissal has dealt a blow to her relationships, personal and otherwise.
76. Taken on a balance of probabilities, based on submissions made, oral evidence and arguments submitted, I find that the dismissal of the Applicant is procedurally and substantively unfair.

AWARD

77. The dismissal of the applicant by the respondent is both procedural and substantively unfair.

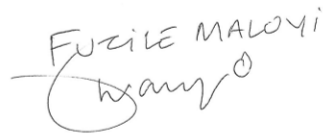
78. The respondent is ordered to reinstate the applicant on terms and conditions not less favourable than those applicable at the time of his dismissal.

79. **The compliance with clause 70 of my award applicant must be reinstated within one (1) day** after award has been issued to parties.

80. Given circumstances herein the applicant is awarded with (19 – nineteen) months financial compensation.

81. The applicant compensation due is calculated as follows: R R16 758.25 x 19 months
= R318 404. 75

82. I make no order as to costs.

A handwritten signature in black ink, appearing to read 'Fuzile Maloyi' with a stylized flourish below it.

NAME : FUZILE MALOYI
GPSSBC (PANELLIST)
DATE : 29 JULY 2019