

ARBITRATION AWARD



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

PANELLIST/S : FUZILE MALOYI

CASE NO : GPBC366/2017

DATE OF AWARD : 8 May 2019

In the ARBITRATION between:

PSA obo M.MOKOENA

(Union / Applicant)

and:

DEPARTMENT OF LABOUR

(Respondent)

Union/Applicant's Representative: SAM MBATHA

Union/Applicant's Address: PSA

Telephone:

Telefax:

Respondent's Representative: M.K. MATSHIKA

Respondent's
Address:

Telephone:

Telefax: _____

**IN THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL
HELD IN CENTURION**

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M.MOKOENA

Applicant

and:

THE DEPARTMENT OF LABOUR

Respondent

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DETAILS OF HEARING AND PRESENTATION

1. This matter came before me at the offices of the General Public Service Sectoral Bargaining Council ("the **GPSSBC**") 260 Basden Avenue, Lyttleton, and Centurion.
2. Appearing before me was the applicant and her representative Mr. Sam Mbatha.
3. The Respondent was represented by Mr. Martin Matshika from the respondent's Employee Relations Department.

ISSUE TO BE DECIDED

4. Whether the dismissal of the applicant was both substantively and procedurally fair.

BACKGROUND

5. The Applicant was employed as Senior Clerk based at Provincial Office: Braamfontein.
6. That part of her duties involves dealing with UIF issues such as assessing the applications.
7. It is alleged that she contravened the code of conduct of the public service and the standard operating guide or procedure.

8. Further applicant claim that her password was stolen by someone for a period of three years, 2013, 2014 & 2015 and that ended up defrauding the Department over R1, 6 million.
9. It is alleged that the applicant failed to follow the IT Policy. I.e. Alt, Ctrl, Delete and Enter of which it takes less than 5 seconds to apply it and that ended in her contravening IT Policy of the Department.

EVIDENCE AND ARGUMENTS

The Respondent's Submissions

The respondent relied on Three (3) witnesses to advance their claim;

10. The respondent submitted that they will show that the rule alleged to have been contravened in relation to the allegations proffered against the applicant existed and the applicant was aware of such a rule and that she did contravene or transgressed such a rule.
11. That the rules which have been contravened by the applicant are found in Code of Conduct of the Public Service and Public Finance Management Act.
12. The rule is also found in Annexure A of Resolution 1 of 2003.
13. Furthermore that the employee is having more than seven (7) years of service within the position she occupied, she was reasonably expected to have been aware of this particular rule but instead she transgressed or contravened it deliberately.
14. That her persal number and password were used to defraud the Department (UIF) for a period of three (3) years forgetting that she was required to change her password after every month and of which failure to do so, the system locks you out automatically.
15. That as per submission point 3.2 above, by her conduct the employee has acted against the Code of Conduct and has committed an act which is listed under serious misconduct on Annexure A of the disciplinary code and procedure.

Respondents' 1st witness: Mr. Gregory

16. After being duly sworn in Gregory testified as follows:

17. Gregory testified that the client came to the Department to report that she did not receive her UIF money and upon investigation, it was discovered that the client lodged an ordinary claim.
18. That he then requested an audit report and it showed that applicant assessed all 49 claims of which all of them were fictitious.
19. He testified as a result a criminal case was opened with South African Police Services and the matter still under investigation by the police.
20. Further that he traced 10 to 15 applications and discovered that they were for death benefits and the documents were missing.
21. The investigator indicated that applicant refused to sign the warning statement because she requested the documentations or files. He further testified that the applicant all forty nine (49) applications and all of them were fictitious.
22. That the credentials of applicant were used to assess claims and some changes to the banking details as per allegation 1 to 49. Further that an assessor plays a major role because if the claims look suspicious, the assessor has liberty to disapprove.
23. Gregory further testified that the applicant was aware of her responsibilities as an assessor and said that he requested files of all the claims assessed by her, but they could not be found.
24. Gregory was referred to page 17 to 22 and indicated that it was abstract from audit trail in respect of the applicant. .
25. Further that all applicants never approached the Department to claim for benefits but the system showed that the applicant assessed all of them.
26. That the applicant failed to safeguard her credentials / password for a period of three (3) years since 2013, 2014 & 2015.

Respondent 2nd Witness: Ms C. van Wyk (Former Supervisor)

27. After being duly sworn in Van Wyk was referred to allegation 1 to 49 and indicated that she never gave the applicant those files and they never appeared on her list.

28. She testified and emphatically that she never gave the applicant files in relations to allegation 1 to 49.
29. Further that an assessor has the powers to change the banking particulars and also approve or reject claims. That that the assessor should sign each and every claim she assessed.
30. She further testified that if an official changes the password, the particular person must complete the form, sign it and then forward to Pretoria for resetting.
31. That each and every employee has his/her own functions and passwords are not allowed to be shared.

Respondents' 3rd witness: Mr. V. Kwinika (Deputy Director): ICT Business Support)

32. After being sworn in, Kwinika testified that he is Deputy Director: ICT Business Support and they (ICT) supports the entire Department of Labour.
33. That the life span of password is 30 days and should one not change the password, the system locks the user out.
34. He also testified that in order for user to change password, the user must complete the form and send it to Pretoria.
35. Kwinika emphasized that the system allows only one user and the user cannot open the system multiple times and that is in line with ICT Policy.
36. That it is the responsibility of the user to close the system using, ALT, CTRL, Delete & Enter and should the user failed to comply in terms of the ICT Policy, it is a breach of ICT Policy.
37. Kwinika further testified that it is the responsibility of the user to secure password and employees is also prohibited from sharing password/s.

Unlawfulness: Is there a rule that existed or broken by the respondent?

38. The respondent further submitted that the applicant contravened / transgressed the code of conduct of the public service and IT Policy of the Department of Labour.
39. ***Intention:*** was the applicant aware of the above mentioned rules.

40. It is further submitted that the applicant has been occupying the same position for a period of more than 7 years doing the same duties. She was therefore reasonably expected to know about the rules as an employee and a public servant.

41. ***Balance of probability.***

42. It is further submitted, the respondent managed to prove its case on balance of probability in the sense that the applicant was aware and conceded that her credentials were used but puts the blame on someone else of which she failed to disclose the person's name.

43. Further, ***In Selamolele v Makhado 1988 (2) SA 372 (V) at 374j – 375(B)***

- The approach to the question whether the onus has been discharged was dealt with as follows: Ultimately the question is whether the onus on a party, who asserts a state of facts has been discharged on balance of probability and this depends not on a mechanical qualitative assessment of the truth and / or inherent probabilities of the evidence of the witnesses and secondly, an ascertain of which of two versions is more probable.

44. That ***In ABSA Investment Management Services (Pty) Ltd v Crownhurst (2006) 2 BLR 107 (LAC)***

- The Labour Appeal Court held that although our courts have on many occasions cautioned against attaching undue weight to witnesses' demeanor, an assessment of credibility goes much further. It involves an assessment of how witnesses fared especially under cross examination and in light of the probabilities pertaining to the particular dispute.

EVIDENCE AND ARGUMENTS

The Applicants' Submissions

45. Mbatha for the applicant submitted that the applicant was dismissed for several counts wherein a substantiated large amount of money was lost by the department through fictitious documents which were created by the employees to pay certain individuals.

46. That it is commons cause that the “culprit” was eventually found by the department.
However, the department went ahead to subject more other employees to disciplinary proceedings amongst them the applicant.

Point in limine

47. Procedural defect. Its common cause that the chairperson who presided over the case of Hilda Mangena v/s dept. of Labour and further presided over the case of M Mokoena the applicant was privy to the information when he dismissed the applicant. It was established that charges were the same, the initiator was the same, witnesses were the same and of course the chairperson was the same. “NB the chairperson firstly dismissed Ms Mangena and then later the applicant for the same case. It was brought to the attention of the initial chairperson, but he ignored this important procedural principle to be impartial.

48. Further that the respondent called their first witness during the arbitration: **Mr Cecil Gregory-** he submitted the following:

49. It is submitted that Gregory testified that he was the witness in the case of H Mangena and later in the case of M Mokoena the applicant, that the chairperson was Peter Mashile
“NB” common cause,

50. That according to his investigation Ms. M Mokoena (applicant) only captured the transactions.

51. That he only realized this after detection from audit trail. “NB” only her persal number and ID user number reflected, not to say she physically did the transaction.

52. That he picked up that all clients were recruited by Ms T Dladla who was an employee and was suspended by the employer, arrested and later dismissed.

53. That non-out of all the clients and witnesses interviewed knew the applicant but only Ms T Dladla

54. That the clients would be asked by Ms Dladla to open bank accounts, money would be deposited to their accounts, informed them to go and withdraw the money which would later be shared between the client and Ms. Dladla. “NB” no involvement of the applicant was proven.

55. That page 16 of the bundle does not implicate the applicant.

56. That he interviewed plus or minus 15 (fifteen) people and none of them implicated the applicant but Ms. Dladla

57. That according to him Ms. Dladla was the main brain in the whole debacle / saga

58. He further explained the process when applications are forwarded, that there would be a Declarer. Which will be as follows:

- Supervisor would receive the work done.
- Supervisor of the assessors receive and distribute the work to assessors.
- Assessor verifies and gives the work back to the supervisor.
- Supervisor of the assessor takes it to the paymaster.

59. That it is clear that the applicant would only process something received from her supervisor or something which has already been captured. She was in the middle or end of the process.

60. Further that the applicant was never suspended, arrested nor alternatively transferred. She actually remained in the same post till she was dismissed.

61. Gregory testified that he was aware that there was a “forget password” function which was later abolished. That it was abolished because it could be easily manipulated by employees.

Second witness: Charmaine Van Wyk

She testified as follows:

62. She was the supervisor of the applicant.

63. That functions of the applicant was to approve all claims of unemployment, maternity, illness and earth claims: “NB” approve not to create

64. That the applicant was one of the best performers.

65. Further Van Wyk explained the process of the application and that the applicant was at the last line in this process.

66. That she was aware that the applicant was working in cubicle with three (3) other employees

67. That she was aware of the investigation around Ms T Dladla.
68. That Mr. Mashile was a Presiding officer in the case of H Mangena who was dismissed before her hearing.
69. That the witnesses who testified in her hearing were the very ones who testified in the case of H Mangena before the same chairperson.
70. That all the clients (witnesses) were working together with Ms. Dladla to embezzle the department's money. "NB" None of them did know her but Dladla.
71. That Ms Dladla was working with the applicant in the same cubicle.
72. That Ms Dladla was later suspended, arrested and later dismissed from the dept.
73. That the no statement was obtained from applicant either by SAPS or the employer.
74. That there was a function called "forget password" which was used or applied when you have punched one button on the computer to indicate that you have forgotten your password.
75. That this function could be manipulated by other employees were not aware of this till the case of Ms Dladla.'that this function was immediately stopped (eradicated) after those finding and investigations.
76. That all documents she was processing she was getting from her supervisor *Charmain Van Wyk*. "NB' this was later confirmed by Van Wyk herself.
77. That the only person who could have used her password and ID user number to process the transactions could be T Dladla as all witnessed testified said they were paid accordingly to her after negotiated agreements.
78. Further, that the manipulation would easily occur when you leave your cubicle to go and collect your printed material from the printer which was 27 to 30 meters away from the cubicle.
79. That what links her to the so-called misconducts was only persal and ID user number which could be easily obtained through the "forget password" function
80. That if the "forget password" "function was order the department. would have not stip or abolish it.

81. That the only reason after she assessed and captured the transaction to send it back to her supervisor is for the supervisor to verify her work of the day.
82. That if the system had the daily statistics format, it would be easy for the employer to detect the wrong doings.

ANALYSIS OF EVIDENCE AND ARGUMENT

83. I can only interpret and analyze what has been laid before me, and as it stands it seems the dispute is about the substance of the termination.
84. The applicant referred a dispute of unfair dismissal to council; I have listened to the evidence and perused the bundles submitted in this matter to enable me to come to an informed decision.
85. I have noted that the dispute hinges around a scam that involve the applicants' personal number and passwords that was used to defraud the Department (UIF) for a period of three (3) years to the tune of R 1.6 million.
86. The applicant is disputing the allegation, claiming that her password / personal number was utilized without her knowledge.
87. ***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***
88. It is submitted that the applicant was working in cubicle with three (3) other employees. That the investigation focused on Ms. T. Dladla.
89. It was testified by the chief investigator Mr. Gregory he interviewed 15 witnesses and none of those witnesses implicated the applicant, but Ms. Dladla and according to him Ms Dladla was the main brain behind the scam.
90. That Ms. Dladla was later suspended, arrested and later dismissed from the Department.

91. It further submitted that, no statement was obtained from the applicant by SAPS or the respondent / employer.
92. That accordingly the (witnesses / clients) would be asked by Ms. Dladla to open bank accounts, monies would be deposited into their accounts, informed them to go and withdraw the money which would later be shared between the clients and Dladla – that no involvement of the applicant was proven.
93. It was also testified that if the system had the daily statics format, it would be easy for the respondent to detect the wrong doings.
94. It is further submitted that no witness was called by the respondent to come and lead the evidence that actually the applicant physically created and enacted the said fictitious claims.
95. The investigator himself Cecil Gregory said none of the plus/minus 15 (fifteen) interviewed people implicated her. He himself only relied on the audit trail. That Gregory conceded that the only person implicated by his witnesses was T Dladla and not he applicant.
96. That what links the applicant to the misconduct is only the audit trail.
97. That the “forget password function was manipulative hence, it was abolished.
98. That the applicant was never suspended, arrested nor alternatively transferred. That she actually remained in same post till she was dismissed.
99. Gregory testified that he was aware that there was a “forget password” function which later abolished. That it was abolished because it could be easily manipulated by employees.
100. **Further on the Procedural aspect:** Its common cause that the chairperson who presided over the case of Hilda Mangena v/s dept. of Labour and further presided over the case of M Mokoena the applicant was privy to the information when he dismissed the applicant. It was established that charges were the same, the initiator was the same, witnesses were the same and of course the chairperson was the same. “NB the chairperson firstly dismissed Ms Mangena and then later the applicant for the same

case. It was brought to the attention of the initial chairperson, but he ignored this important procedural principle to be impartial.

101. However, more employers are starting to afford employees some of these rights but are still falling short as regards the employees' right to an impartial hearing chairperson.

The reasons for this include:

- The employer's intention is to hold a kangaroo court and get the employee fired regardless of the consequences OR
- Those employees assigned the task of chairing hearings are not properly trained OR
- The employer does not understand what constitutes bias.
- There are in fact a number of factors that may suggest that the hearing chairperson could be biased. These include, amongst others, situations where the chairperson:
 - Fair disciplinary hearings are not optional
 - Has had prior knowledge of the details of the case.
 - The ability to make rulings in this regard that will stand up in court can only be acquired via substantial formal training and solid experience of the hearing chairperson.
- In the case of **FAWU obo Sotyato vs JH group Retail Trust (2001, 8 BALR 864)** the employee confessed to having stolen two bottles of beer from the employer and to drinking one of them during working hours. The arbitrator did not accept the confession as valid and also found that the chairperson of the hearing was biased. This was because the chairperson had caught the accused employee with the beers and had been involved in drawing up the charges. This created a reasonable apprehension of bias and rendered the dismissal procedurally unfair. The employee was reinstated with full back pay.
- In **SACCAWU obo Mosiane vs City Lodge Hotels Ltd (2004, 2 BALR 255)** the employee was dismissed for stealing an item belonging to a guest of the hotel

that employed the accused. The arbitrator found the dismissal to be substantively and procedurally unfair because the chairperson of the hearing had been biased and reinstated the employee.

- In order to ensure that employers do not lose cases due to chairperson bias or alleged bias at disciplinary hearings employers must ensure that:
- The hearing chairpersons have no involvement in or knowledge of the case prior to the hearing, like in this case.
- The hearing chairpersons have a solid understanding as to what constitutes apprehension of bias
- Rather contract in a labour law specialist to chair hearings where the employer has no internal official with the necessary qualifications and knowledge to carry out the task properly.

102. Therefore I am of the view the respondent has erred by utilizing the same Chairman for the applicant's disciplinary hearing with the same facts, same witnesses and so on.

103. As to circumstances around the reason for dismissing the applicant. I have the following points to make:

- a) All the witnesses that were implicated in the money scam did not implicate the applicant.
- b) The applicant was never suspended, arrested or removed from her position. Instead it submitted that the applicant remained in her tainted position until she was dismissed.
- c) That non – out of all the clients and witnesses interviewed knew the applicant but only Ms. T. Dladla.

104. Having been part of these proceedings and having heard testimonies, oral submissions and arguments. I am of the view that the respondent was on a mission to clean corruption in the section, but dealt in an unethical manner and in midst of all, it affected employees who could not be directly linked to the corruption.

105. Further evidence was led with regards to the “forget password” that has since been disposed with because of its easy manipulation by employees.

106. Further it was submitted that the employee was not at work when some of this transactions were performed whilst she was not at work.

107. 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.

108. 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.

109. Having satisfied myself with submissions made by both parties. I hold the view that although the applicant has raised many issues that would seem to exonerate her from the misconduct.

110. But what implicates the applicant in this case, is her (ID– PASSWORD) that was utilized gaining access into her computer.

111. The respondents witness testified that he is Deputy Director: ICT Business Support and they (ICT) supports the entire Department of Labour.

- That the life span of password is 30 days and should one not change the password, the system locks the user out.
- He also testified that in order for user to change password, the user must complete the form and send it to Pretoria.
- Kwinika emphasized that the system allows only one user and the user cannot open the system multiple times and that is in line with ICT Policy.

- That it is the responsibility of the user to close the system using, ALT, CTRL, Delete & Enter and should the user failed to comply in terms of the ICT Policy, it is a breach of ICT Policy.
- Kwinika further testified that it is the responsibility of the user to secure password and employees is also prohibited from sharing password/s.

112. Further that the Unlawfulness: Is there a rule that existed or broken by the respondent?

113. The respondent further submitted that the applicant contravened / transgressed the code of conduct of the public service and IT Policy of the Department of Labour.

114. The Intention: was the applicant aware of the above mentioned rules.

115. It is further submitted that the applicant has been occupying the same position for a period of more than 7 years doing the same duties. She was therefore reasonably expected to know about the rules as an employee and a public servant.

Balance of probability.

116. It is further submitted, the respondent managed to prove its case on balance of probability in the sense that the applicant was aware and conceded that her credentials were used but puts the blame on someone else of which she failed to disclose the person's name.

117. Further, what implicates the applicant is the use of her password that performed the transactions.

118. The applicant failed to give a reasonable or plausible explanation that will put doubt in my mind of the tribunal. Therefore on balance of probabilities the applicant has failed to convince me otherwise.

119. However I am of the view that a chairpersons should have a solid understanding as to what constitutes apprehension of bias, and that said the chairman who chaired the applicants two hearing with the same facts, witnesses and was indeed bias as submitted by the applicant's representative.

120. Therefore the applicant has failed to prove that the respondent acted unfairly in terminating her services. However, with regard to the apprehension of bias, I feel that the chairman did not apply his mind consistently.

- By having been part of a similar disciplinary hearing, with the same set of witnesses and also by having knowledge of the facts thereto.

121. Therefore as much as this application for unfair dismissal fails. I am of the view that the respondent has erred on the procedure and thus grant the applicant compensation in this regard.

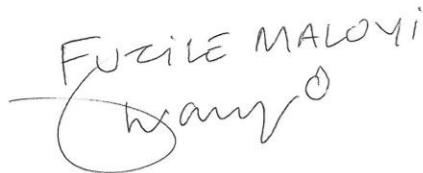
122. Thus on a balance of probabilities the applicant is compensated with an amount of (12 twelve) months.

AWARD

123. The applicant application fails.

124. The applicant is awarded compensation (**Twelve- 12 months**) calculated as follows: R
 $15'455.75 \times 12 = R 185\,469.00$

125. I make no order as to costs.

Handwritten signature of Fuzile Maloyi in black ink, with the name written above the signature.

NAME : FUZILE MALOYI
GPSSBC (PANELLIST)
DATE : 8 May 2019