



ARBITRATION AWARD

Panelist/s: Mandla Nkabinde.
Case No.: GPBC600-2022.
Date of Award: 22 April 2023.

In the ARBITRATION between:

PSA obo Makhubo I.S.
(Union / Applicant)

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
(Respondent)

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The matter was referred as a dismissal dispute relating to misconduct. The matter was set down on several dates and concluded on 01 December 2023 at the department's venue in Standerton. The applicant was represented by Flip Van Der Walt a representative from PSA. The respondent was represented initially by Sankie Mkhonto a deputy director Human resource and later by M.S Mavhungu a deputy director in Human Resource. The parties submitted bundles and they were labelled "A" for applicant

and “R” for respondent. The evidence was led orally through five witnesses for the respondent and three for the applicant, documentary and electronically recorded. A signed pre-arbitration minute was also presented.

ISSUE TO BE DECIDED:

2. Whether or not the dismissal of the applicant was procedurally fair and consistent in comparison with three comparators and if not then award an appropriate remedy.

BACKGROUND TO THE MATTER:

3. The applicant was employed as an administration clerk since 01 September 2006. She was working initially at Breyten and was transferred to Standerton court. She allegedly embezzled monies and was charged with two counts. She was subjected to a disciplinary enquiry, found guilty and was dismissed on 13 April 2022. Her basic salary was R19 025.57. She alleged procedural unfairness and inconsistent application of discipline by the respondent hence this dispute.

SURVEY OF EVIDENCE AND ARGUMENT

RESPONDENT

First Witness Sankie Mkhonto Representative/Witness.

4. The witness testified that the applicant embezzled monies and was charged and she pleaded guilty and was dismissed. She was earlier given a final written warning with a suspension. The two comparators were not dismissed because they showed remorse and were transferred from cash-hall to other departments. The applicant's charges were too serious in comparison to the others. All the employees paid back the embezzled funds including the applicant. The conduct of these employees are same as that of the applicant, the reason the applicant was charged different is she pleaded guilty to a fraud charge different to what the others pleaded guilty to and fraud is more serious.

Second witness Dan Israel Silawule assistant director

5. He was the initiator in the disciplinary inquiry of the applicant. The applicant was charged with two count and two alternatives. She pleaded guilty on the main charges and the alternatives fell off. The applicant never engaged in bargaining discussion with the applicant before, during and after the inquiry. Mduduzi a representative from PSA represented the applicant and they pleaded guilty and offered to pay the amount through Jackson the manager and the case proceeded.
6. In the case of S. Shilaluke a comparator, the witness was the initiator. Shilaluke entered into a guilty plea discussions, he pleaded guilty to an alternative charge of dishonesty. He paid R6037.00back and was sanctioned a final warning and two months without pay.
7. In the case of W.J. Dladla a second comparator the witness was an initiator. Dladla embezzled monies. Entered into a guilty plea through a PSA representative Phillip Van Der Walt who is the representative of the current applicant. He pleaded guilty to dishonesty charge and mitigated on the circumstances of Dladla. The department considered the plea and sanctioned Dladla one month suspension without pay and a

final warning. On the two comparators' cases the union initiated engagements and the union did not engage the respondent on the applicant's case. The two comparators were charged with dishonesty and the applicant was charged with fraud which made her case not comparable. The charges of the comparators were amended to remove the gross as prefixes and that made them to be less serious and attract less severe sanctions. The charging of the applicant was not delayed after the respondent was aware of the incident, it immediately sanctioned an investigation. On the plea bargain engagements two other witnesses will testify.

Third witness Azwidihii Michael Ndiitwani senior Labour Relations Specialist

8. The witness chaired the case of P. Majola a comparator. She Embezzled state funds and was charged with four main counts of fraud and four alternatives counts of negligence. She entered into plea bargain discussions, she pleaded guilty to all alternative charges. The monies were not recovered during the hearing. As a sanction she was ordered to pay the monies back. Two months suspension without pay and a written warning.

Fourth witness Stephen Masuku senior legal officer

9. He chaired S. Shilaluke's case who is a comparator mentioned by the applicant. He was charged with gross dishonesty. A preliminary point was raised with him, it related to the amendment of the charge he granted the application and the charge was amended to dishonesty, so that the respondent would not pray for dismissal. Shilaluke pleaded guilty and he compared this case to that of Nofuyo Jiyane and he sanctioned him to two months suspension without pay and a final warning.
10. He also chaired Dladla's case. Similarly a preliminary point was raised and not opposed by the employer, the charges were amended. He pleaded guilty and was sanctioned to one month suspension without pay and a written warning, in an appeal it was changed to final warning.
11. He also chaired the inquiry of the current applicant. Her both charges were fraud and the alternates were gross dishonesty. The applicant pleaded guilty on fraud charges. No application for the amendment of charges was tendered. He sanctioned her to dismissal because she had previous final warning and fraud was a serious charge. The cases he chaired the charged employees paid back the monies, including the applicant. The charges can be amended any time before verdict, no prejudice to any party.

Fifth witness Ms Pfarelo Racheal Mandiwana Labour Relations officer/assistant director

12. The issue of the applicant was referred to her office on 21 May 2021. Her office started with investigation. On 01 July 2021 she was served with a precaution letter of suspension. 15 July she was given a notice to attend inquiry on 20 July 2021. In March the matter was not reported to HR but to the finance officer.

THE APPLICANT

13. There was a discrepancy between the monies paid to the witnesses and she was suspended for eight months. During the disciplinary inquiry the respondent's representative Mr. Dan Silawule and her union representative Mduduzi Simelane

engaged and agreed that she would plead guilty and she would pay the money and she would be sanctioned with a less severe sanction. Mr. Modiba from head office facilitated the back payment which was done within seven days. Before the chairperson she pleaded guilty, the inquiry was short. W.J. Dladla pleaded guilty on dishonesty. The State lost the J49 witness fees. Same as with Mr. S Shilaluke. Mr P. Majola differs from Dladla and Shilaluke only in that he pleaded guilty on negligence. All the other employees were not suspended like the applicant was.

Second witness Mduzuzi Simelane

14. He represented the applicant at the inquiry. He and Dan Silawule the respondent's representative met at the office next door of the venue of the inquiry. They discussed and agreed that the applicant will plead guilty, pay back the money and be sanctioned less than a dismissal. The payment had to be done within seven days. They both joined the chairperson and presented the agreement which was verbal and she pleaded guilty as agreed, mitigation and aggravation were to be tendered. The money would be paid through the region and the proof of payment was sent to Sankie Mkhonto the deputy director.

Third witness Phillipus J. van Der Walt Labour Relations Officer At PSA

15. He represented Dladla and Shilaluke the comparators. In both these cases the chairperson was Mr Masuku as he also chaired the case of the applicant. Mr D. silawule was the respondent's representative in all three cases. The plea bargain discussions resulted in dismissable offences amended at the advice of the chairperson to make them less severe in order to attract a less severe sanction. The money was paid back the same day in the case of Dladla but in the case of Shilaluke it had been paid back by the time of enquiry. The union also had a problem with the time it took the respondent to press charges against the applicant, they believe the respondent created an impression that all was well.

ANALYSIS OF EVIDENCE AND ARGUMENTS

16. The procedure and inconsistent application of discipline were in dispute. Procedural unfairness was disputed on the basis of the time it took to press charges against the applicant only.
17. The inconsistent application of discipline is a substantive dispute which will by definition refer to substantive unfairness on the basis of the charges, the findings, the sanctions and the reason/s or absence thereof of why only the applicant was suspended whereas the three comparators were not.
18. The time that was questioned by the applicant representative was the time the finance office suspected and internally started investigating if indeed there were monies missing or not. Once the conclusion was reached that there were funds that were unaccounted for, the matter was passed on to the Labour Relations office for a formal investigation.
19. Given that the investigation involved monies that are connected to the members of the public it probably would take longer than an investigation involving bodies and or individual employees within the employ of the respondent.
20. I do not find any undue delay in the time it took to press charges against the applicant.
21. On the dispute about the severity of the sanction as it relates to the inconsistent application of the rule between the applicant and three comparators and the precautionary suspension that was invoked only against the applicant, the case of the applicant was chaired by the same chairperson who chaired the cases of the three

- comparators and the respondent's representative was the same in all these cases including that of the applicant. The three comparators were represented by the same representative from PSA, the union, who is also a witness in these proceedings.
22. The applicant committed same offences as the other three comparators but she was the only one suspended for eight months. The respondent argued that the charges were not the same and the sanctions they attracted were also different. The evidence showed that the charges were not different and where they were coded/labelled different the actions and the modus operandi out of which the funds were misappropriated were all exactly the same.
 23. In two cases, that of Dladla and Shilaluke the comparators, their charges were attracting dismissals on first occurrences, these charges were amended on the advice of the chairperson who was engaged by the representatives of the three comparators and the respondent.
 24. The respondent representative disputed the plea bargaining discussion with the applicant's representative, what the representative cannot dissociate with is how the respondent's financial person came to arrange for the pay back process as this person was not known to the applicant and did not participate in all the cases of the department presented in this arbitration. It is not in dispute the money was paid back by the applicant, this could not have happened without an approved arrangement which could only be endorsed by the respondent's representative or anyone assigned/directed so by him.
 25. The way the respondent treated these comparators has had an effect of allowing a situation of using/abusing the disciplinary code of the respondent to formulate charges for those you decide to dismiss and for those you decide to not to dismiss. This is a structural/systematic manipulation of the disciplinary code.
 26. The respondent testified that the reason for the dismissal was that the applicant had a final warning which is now a common cause but there is no explanation why he changed the charges of all the three comparators which directed to lighter sanctions/warnings on first instances, those comparators can misappropriate monies again and that will still be their first offences, that would further inconsistency. In all these cases the respondent lost the J49 fees.
 27. Item 3(6) of Schedule 8, Of the Labour Relations Act stipulates that an employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration. The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike.
 28. In *Gcwensha v CCMA and others* (2006) 3 BLLR 234 (LAC) the court stated "Disciplinary consistency is a hallmark of progressive labour relations that every employee must be measured by the same standards. The court also indicated that when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated. The courts have also distinguished between historical and contemporaneous inconsistency.
 29. It is established that inconsistency dispute is a substantive dispute, if found to be unfair the remedies applicable to substantive dispute are applicable.
 30. In casu the respondent deprived himself of assessing the gravity of the misconducts by changing the charge labels. He disregarded the modus operandi of these employees. He could not the merits as these sanctions took a form of settlements. He capriciously singled out the applicant in a way that will not correct the conduct of other employees for the reasons related to how he charges for these misconducts.
 31. I find the dismissal of the respondent to be procedurally fair but substantively unfair.

Remedy

32. The applicant was suspended for eight months with pay and it worked on her dignity and psychology, considering how the comparators were treated. She paid back the money. She was dismissed on 13 April 2022. Her arbitration concluded on 01 December 2023.
33. I found it appropriate to re-instate the applicant on the same or similar position that she held before the dismissal, on the same terms and conditions as those before the dismissal and the same salary plus the adjustments that may have occurred between the date of dismissal and the re-employment date.
34. The re-instatement with a portion of back pay and the fact that she paid back the money I found it sufficient to correct the conduct.

AWARD:

1. The respondent is ordered to re-instate the applicant retrospective from 01 November 2023.
2. The re-instatement is on a same or similar position and level as the position she held before the dismissal.
3. The respondent is ordered to pay the applicant her full salary from the date of re-instatement which amounts to R114 153.42 as a six months back pay plus any applicable adjustments that may have occurred since her dismissal.
4. The applicant is directed to report for duty on 2 May 2024 at Standerton court at 9:00 AM.

Commissioner: Mandla Nkabinde



Date: 22 April 2024

(Council name) Arbitrator

GPSSBC