



IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in KIMBERLEY

Commissioner: PHOLO, GMP

Case No.: GPBC1330/2022

Date of Award: 14th July 2023

In the Dispute between:

PSA obo JACK

(Union/Applicant)

and

DEPARTMENT of CORRECTIONAL SERVICES

(Respondent)

Applicant's Representative: Mr Regardo Abercrombie

Respondent's Representative: Mr John Kambule



PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. This is an arbitration award in the matter between Mr SV Jack (applicant) and the Department of Correctional Services (respondent). The matter was set down for an arbitration in terms of section 191(5)(a) of the Labour Relations Act, 66 of 1995. The arbitration was held at the offices of the respondent on the 15 and 16 May 2023. The arbitration proceedings were electronically recorded, and the recordings are filed with the GPSSBC.
2. The applicant was represented by Mr Regardo Abercrombie (PSA - FTSS) and the respondent was represented by Mr John Kambule (DCS Official).
3. The parties handed me their respective set of documents. The applicant documents were marked bundle "A", and the respondent documents were marked bundle "B".
4. The parties requested to submit their written closing arguments on the 30th of June 2023.

THE ISSUE IN DISPUTE

5. The issue in dispute is the (un)fair dismissal of the applicant (Mr Jack), and therefore,
6. I am to determine whether the dismissal of the applicant was meted out in accordance with section 191(5)(a) of the Labour Relations Act, 66 of 1995.

BACKGROUND TO THE DISPUTE

7. The applicant was appointed by the department of Correctional Services on the 16th of July 2001 to the position of "**Correctional Officer**" (Grade 1), and at the time of his dismissal, he was placed at Tswelopele Correctional Centre (TCC), in Kimberley (Northern Cape).
8. The applicant was dismissed on the 2nd of August 2022, following a disciplinary hearing for alleged misconduct.
9. Given the dismissal, the applicant referred the matter to the Council (GPSSBC) for the alleged unfair dismissal. The Council attempted to resolve the matter through conciliation and when the matter could not be resolved, the applicant further referred the matter to an arbitration. As a result, the arbitration was held on 15 and 16 May 2023.
10. The applicant disputed both (a) the procedural, and (b) the substantive defects of his dismissal.



SUMMARY OF EVIDENCE AND ARGUMENT

The respondent evidence

Ms Mookgwane Audrey Qengwa testified under oath that:

11. She is employed as the "**Head of Centre**" ("HC") by the Department of Correctional Services (DCS), and that she is placed at Tswelopele Correctional Centre (TCC) in Kimberley (Northern Cape).
12. On the 21st of November 2021 whilst on duty, she went out for lunch and on her return at about 15:00 the applicant was standing at the "**boom gate**" and behind him were three (3) ladies. She stopped at the gate as normal expecting the applicant to open the gate.
13. Then the applicant told her that he is not going to open the gate for her because he (applicant) did not have lunch.
14. She then got out of the vehicle, into the guard room to record the incident in the journal, and when she was writing, the applicant touched her on the back. She told him not to touch her. He said something but she could not make out what he said. The applicant touched her for the second time on the back. She warned him again not to do that.
15. She went back to her vehicle whilst the applicant was still giggling, and one of the ladies told the applicant to stop. She felt embarrassed and she phoned the "Area Commissioner" (AC) who told her to put her complaint in writing.
16. She had no information as to why the applicant was not relieved to go for lunch because he reported to Mr Mokgantshang on that day.
17. According to the duty list (roster), five (5) officials were booked with the applicant at the access control gate during that day, but they were not on their post. She never had the chance to inquire about the absence of the other officials because of the incident.
18. She reported the incident to the South African Police Services (SAPS), and they were encouraged to talk to each other. As the result, the applicant apologised, and she equally accepted the applicant's apology. Given the apology, she withdrew the matter from the SAPS.
19. Her relationship with the applicant was deeper than normal prior to the incident. However, their relationship will never be the same again.



Ms Baradi Susan Mahloko testified under oath that:

20. On the 1st of November 2021, she was working at K6 and knocked off early. All the female officials were allowed to knock off early because it was the "local government election" day. They were released early to go and cast their votes. The HC was aware of the early knock off because it was her instruction to knock off at 15:00
21. She knocked off at 15:00 and was waiting for the transport at the "**access control gate**" where she found the applicant working alone. It was a bit hectic, and the applicant asked her to assist him to open the gate for the incoming vehicles.
22. She spotted the HC vehicle, and when she was about to open the gate, the applicant quickly closed the gate for the HC. The HC then requested him to open the gate for her and the applicant replied that he will not open the gate until he gets a reliver.
23. The HC got out of the vehicle and went straight into the office and the applicant followed her into the office.
24. The office is too small to accommodate two (2) people. It is not possible to have two (2) people inside without shoving and pushing each other. Small as it is, there is a table and a chair inside the office.
25. She does not know what happened inside the office between them but when the HC left the office, she said to the applicant "**it must be the last time you do that**" and the applicant replied that "**I needed the reliver**". The HC further said, "**it is your last day working for this department**", and the applicant went to open the gate for the HC, and she drove off.
26. She understood the statement by the HC that "**it must be last time you do that**" to refer to the applicant's "**refusal to open the gate for her**".

Ms Gail Lesego Tshite testified under oath that:

27. She is employed for 15 years by the department and on the 1st of November 2021 she was working at K6.
28. They knocked off early and her colleague (Ms Mahloko) was waiting for her transport at the back of the "**access control gate**", and though she had her transport, she opted to wait Ms Mahloko.



29. Whilst they are waiting, the applicant was working alone. He then asked Ms Mahloko to assist him with the incoming vehicles. Ms Mahloko opened for two (2) vehicles and the 3rd one was driven by the HC. The applicant then instructed Ms Mahloko not to open for the HC. He said he will handle it.
30. He then told the HC that he will not open for her "**until he gets the reliver**". The HC got out of the vehicle and entered the office, and the applicant followed her.
31. When she left the office, the applicant was following her. The HC told the applicant that "**it must be the last time you do that**". The applicant replied that "**he needed the reliver**". The HC then said, "**it is your last day working for this department**". She went into the car, the applicant opened the gate, and she drove off.
32. When she has left, they went inside the office to see what happened and they found out that she has endorsed the journal. She (Ms Tshite) asked the applicant why he did not open the gate for the HC and now they are going to be involved in the mess.
33. According to the duty list of the day, five (5) other officials were also booked to work at the "**access control gate**" with the applicant.

Ms Onica Lorato Yaso testified under oath that:

34. She is appointed by the department as the Deputy Director since 2020. She was appointed as the "**chairperson**" in the **disciplinary hearing** ("DC") of the applicant.
35. She believed the evidence of the HC when testified that as she (HC) was approaching the **access control gate**, Ms Mahloko was standing there, and that the applicant instructed her (Ms Mahloko) not to open the gate. The HC then asked the applicant to open the gate for her and the applicant said nothing but did not open the gate.
36. In terms of the duty list, Ms Mahloko was not booked at the access control gate. The applicant did not work 9 straight hours because it was just after 15:00.
37. Before making the outcome, she read the record of the applicant for the proceedings, and applicant's record was clean with no pending cases. However, given the seriousness of the charges, the applicant's unblemished record could not sway her decision from the dismissal because each case has its own unique merits.



38. The applicant was acquitted on charge 1 and found guilty on all other charges (2-6), and subsequent to that, she dismissed the applicant from the employ of the department.

The applicant evidence

Mr Sikwamkele Vuyo Jack testified under oath that:

39. He started working for the department on the 16th of July 2001. He acquired his training at Kroonstad College and thereafter he was placed at Douglas to perform the internal duties. He was later transferred from Douglas to Kuruman where he performed both internal and external duties. Finally, he was transferred from Kuruman to Kimberley (TCC) where he started with the internal duties before he was posted externally.
40. On the 1st of November 2021, the applicant was booked with Messrs Sagrys, Mathe, Hoff, and Mabandla. However, Mabandla did not come to work, and Ms Mathe left early at about 14:00 to sign-out the firearm. He did not know the whereabouts of Messrs Sagrys and Hoff, and as the result, he could not take lunch and leave Ms Mathe as a woman attend to the gates alone because there was an increased movement of vehicles (ins and outs).
41. At about 14:00 he reported his need for lunch to his supervisor of the day, Mr Mokgantshang as he was speaking to the supervisor, Mr Modise was present. At 15:00 Ms Ntanda arrived at the gate to wait for her transport, and after she was collected, Messrs Mahloko and Tshite arrived. Then Ms Mahloko started to assist with the incoming vehicles. When the applicant realised that Ms Mahloko is willing to assist, he then requested her to assist him with the gates.
42. He then the noticed the vehicle of Ms Qengwa (HC) and when Ms Mahloko was about to open the gate, he instructed her (Ms Mahloko) not to open the as he will attend to her. He wanted to bring it to the attention of the HC that since the beginning of the shift he never had lunch. He went to the HC to tell her that he needed a reliver. She then told him to **"open the gate"**. He replied that **"I will not open the gate until I get a reliver"**. Then HC asked, **"are you serious"**, and he replied **"yes"**.
43. She got out of the vehicle furious and went straight into the office to register the incident. He followed her into the office, and she was writing he patted her on the shoulder at the height of where the ranks are placed. He was trying to apologise. She then instructed him not to "touch her". He then apologised.



44. She finished writing and she went to the car, and he opened the gate for her. She then said to him "it is your last day working for this department" and she drove off. He was suspended after two (2) weeks of the incident.
45. The investigation was conducted, and the disciplinary hearing was convened. He was found guilty, and subsequently dismissed from the department on the 2nd of August 2022 for the allegations of "**contravening the DCS code of conduct**".

ANALYSIS OF EVIDENCE AND ARGUMENTS

46. There are certain things that need to be considered prior to reaching a proper conclusion in progressive discipline. These shortfalls are found in the outcomes of the disciplinary hearing as well as the appeal process of the applicant. The proper numerical counting which excludes the multiples, are always starting with a number "1", in simple terms, this means first things first.
47. On the 1st of November 2021, the applicant was booked on duty with other four (4) officials, and for the reasons unknown to the applicant, these other officials except for Ms Mathe were not in their post. It is right to assume that Mr Mokgantshang, (supervisor), knew the whereabouts of these officials and/or they reported their whereabouts to him. Therefore, if these officials did not report their whereabouts as it appears to be, then their act of leaving the post without permission is likely to confirm the lawlessness in the workplace. Their act might also suggest that the issue of discipline is used selectively in the workplace.
48. As a result of the unavailability of the other officials, the applicant had to work for the period exceeding five (5) hours without the opportunity of lunch. This act breaches the basic right of the applicant as an employee as afforded by the **Basic Conditions of Employment Act, 75 of 1997**. This right as contained in section 14(1) reads thus "**an employer must give an employee who works continuously for more than five (5) hours a meal interval of at least one continuous hour**". I must say that this is the right that cannot be denied.
49. For what it seems a "**don't care attitude**", the incident was reported to the supervisor, but nothing is done. Then the frustration of not being afforded a lunch hour by the supervisor triggered the stoppage of the innocent the HC who was not aware of the failures of the



supervisor. Be that as it may, the HC was unreasonably impacted by the reaction of the aggrieved and frustrated employee.

50. Incorrectly so, the applicant resorted to attract the attention of the HC by blocking her entry into the Centre. The act that landed the applicant into the trouble with the HC. He demanded the immediate reliever, and the HC could do nothing about that at the time. She did not deserve the kind of treatment. On the other hand, the applicant needed to be listened to. It was the first time the issue of the reliever was brought to her attention. Therefore, whilst it was opportune time for the applicant to raise his frustration to the HC as the senior official, the fact remained that, it was wrong for the applicant and unfair to the HC.
51. I am moved by the argument advanced by the applicant that he could not have taken lunch and leave the female official (Ms Mathe) alone in the post not knowing where the other officials were. This makes sense to me because there must be a reason to post five (5) officials to post, for one (1) official to be left alone. Though, none of his colleagues thought like the applicant did, he remained in the post despite not having lunch under the circumstances.
52. To the greatest extent, the approach of the applicant irritated the HC for in which I understand. His irritation to the HC led to his disciplinary hearing and the subsequent dismissal. It must be noted that, if the applicant could have been allowed his lunch, the HC could not have been blocked for entry into the Centre. The sole source of these misfortunate series of distress is the **"supervisor"**. Be that as it may, shallow investigation report left supervisor off the hook because he supposed to oversee the team and failed. The investigation report failed to detail (a) why the other 4 officials were not on the post, and (b) why there was no reliever, if the report did not cover those aspects, then it was too shallow to assist the issue of discipline.
53. It was unfair for the applicant to work for excessive hours without lunch, to work alone in a shift allocated 5 officials, and to report his right for lunch to his immediate supervisor with no intervention. These abnormalities are confirmed as correct by the fact that, the supervisor and 4 officials were not even mentioned in the report. Hence, my believe that the investigation report was not up to standard it deserves.
54. In line with the above, my finding should not be interpreted as I condone the act of the applicant for **"refusing the HC entry into the Centre"**. The fact remains that if all the officials on duty may performed their duties diligently, the unfortunate incidents will not occur.



55. The applicant has shown the great sign of remorse and regret for his actions against the HC, and he accepted his responsibility for his wrong-doing. He also acknowledged that he could have handled the incident differently.
56. The applicant was also charged for "**committing and act of sexual harassment**". The HC testified that she was touched on the shoulder and at the back at the door as she was living the office. The applicant accepted to have tapped the HC on the shoulder at the level of the rank. He did that as he was trying to catch her attention for the apology. He realized that she was angry when she sharply instructed him to stop doing that.
57. When the HC finished with the journal entry, she walked out, and as he was following her with intention to open the gate, he missed the step and stumbled at the doorstep, and as he attempted to regain the balance, he touched her with the flying hand from the back.
58. Messrs Tshite and Mahloko, the 2 of the respondent's witnesses testified that the office for in which the applicant was booked was too small to accommodate 2 people at the same time.
59. It is strange that the applicant was found guilty of these charges (a) failing to carry out lawful order or routine instruction without just reasonable cause, (b) dereliction of duty, and (c) displaying disrespect towards others in the workplace, whilst there was no evidence was led and/or linked the applicant to those allegations. Surely, stopping the official at the access gate has nothing to do with those charges. The evidence of the presiding officer was somewhat merely a "hearsay", because she was more repeating what was presented before her during the disciplinary hearing with a lot of evidence being forgotten.
60. Given the arguments, I agree with the apex court in ***Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC)*** that "***in approaching the dismissal dispute, impartially a commissioner will have to consider the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must consider the basis of the employee's challenge to the dismissal***". I must further indicate that the phrasing of the charges (p.61, B) leaves much to be desired as they appear to be an open-ended statement than the disciplinary hearing charges. Be that as it may, the applicant was dismissed



for blocking the HC from the entry into the Centre, for in which the applicant also conceded to. This action under the circumstances does not justify a dismissal.

61. Furthermore, in the apex court as stated above, it was declared that ***"there are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list"***. In this matter, the harm caused to the applicant by the supervisor was more severe than the harm caused to the HC (employer). However, the applicant as the experienced official should have acted better and differently. Hence, the serious written warning valid for 6 months.
62. Despite my comments on the open-ended charges against the applicant, I still subject myself to the argument in the matter between ***Toyota SA Motors v CCMA (2016) 37 ILJ 313 (CCT228/14)*** that irrespective of the nature of the charges and/or the incorrectness charges ***"the commissioner is compelled to determine whether the employee was guilty of the misconduct for which he/she was dismissed for"***, the applicant was "guilty" for the refusal to allow the HC enter to the Centre. Given the court judgement, I find applicant guilty for the act even though the charge was not "specifically" spelt out in that manner, it only happened because of the highly skilled respondent representative who provided proper interpretive context to reflect an offence.
63. I am of the view that the dismissal of the applicant was too harsh and that the equitable sanction for the offense to be a serious written warning valid for six months. The warning will be effective from receipt of this award and will automatically lapse after a period of six months.
64. I find the dismissal of the applicant to be procedurally fair, furthermore, there is no evidence presented before me to contest the procedure of the disciplinary hearing. On the other hand, after assessing the arguments presented before me, I find the dismissal of the applicant to be substantially unfair. Therefore, the applicant be retrospectively reinstated to his position with no loss of benefits.



AWARD

I therefore rule as follows, that:

- 65. The dismissal of the applicant was procedurally fair and substantively unfair,
- 66. The applicant to be reinstated retrospectively to his original position,
- 67. The applicant to be paid the amount of R278 919,84 subject to the statutory deductions,
- 68. The amount in the paragraph 67 above, be paid on or before 15 August 2023, and
- 69. The applicant to report for duty by the 1st of August 2023.

PHOLO, GMP

GPSSBC Commissioner



Signature: _____