

Council Name

# ARBITRATION AWARD

Panelist: Jeffrey Nkuna  
Case No.: GPBC 897/2019  
Date of Award: 13 November 2019

In the ARBITRATION between:

PSA obo K R Mlalazi

(Union / Applicant)

And

Department of Home Affairs

(Respondent)

**Union/Applicant's representative:**

Union/Applicant's address:

Telephone:

Telefax:

**Respondent's representative:**

Respondent's address:

Telephone:

Telefax:

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## ARBITRATION AWARD

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### DETAILS OF THE HEARING AND REPRESENTATION

1. This award is rendered in terms of section 138(7) of the Labour Relations Act, 66 of 1995 as amended (the LRA).
2. The dispute was referred for arbitration in terms of section 191(1) & 191(5) (a) of the Labour Relations Act 66 of 1995 as amended ("LRA") and the hearing was held on the 01 November 2019 at the GPSSBC Offices,, Centurion, Gauteng .
3. The Applicant, K R Mlalazi (Employee) was represented by Mr Bradley Benson an official from PSA, and the Respondent, Department of Home Affairs (Employer), was represented by Ms Lorato Kobese, an official from the Respondent Department.
4. Both parties handed in bundles of documents which were marked "Respondent's Bundle A" and "Applicant's' Bundle B" respectively. It was agreed at the commencement of the proceedings that the documents are what they purport to be.
5. At the end of the arbitration proceedings, both parties were directed to submit written arguments by not later than 16 November 2019. Both parties complied with the directive and those submissions were considered in this award.

### BACKGROUND TO THE DISPUTE

6. The Employee has been employed by the Employer as an immigration officer from the 22 October 2011 until he was dismissed on the 07 February 2019. It was alleged that the Employee contravened the Public Service Code of Conduct. The Employee was charged with two counts. The first charge was for gross dishonesty in that on or about 18 June 2017 at or near OR Tambo International Airport, he dishonestly and irregularly extorted undisclosed amount of money from Mr Norbert Lubanda and Ms Luntoto Lusemo, Congolese Nationals. The second charge was that for a gross negligence in that he deserted his work station. The Employee is challenging only the substantive fairness of his dismissal. The relief sought by the Employee is re-instatement.

### ISSUES TO BE DECIDED

7. I am required to determine whether the Applicant was dismissed. If so, I have to determine if the dismissal was substantively fair or not and order the appropriate relief.

## SURVEY OF EVIDENCE AND ARGUMENTS

### Employer's evidence

8. The Employer's first witness, **Mr Pontso John Walker** testified that he was employed as the immigration officer by the Employer. He testified that he was handed a video footage which showed the Employee was at his work station at Immigration cubicle 31 at the O R Tambo International Airport on the 18 June 2019. The Employee was portrayed by the video footage processing the entry of two Congolese nationals. The two nationals handed the Employee their passports. The male national was seen handing over to the Employee money notes and then took those notes back. After the two Congolese nationals were finished being processed, the Employee left his cubicle and was seen greeting or saying their farewells with the Congolese nationals. This witness further testified that he believed the Employee was being given money because the traveler had his hand in the right pocket and handed something to the Employee. He believed that was the exchanging of money between the Employee and male Congolese national
9. The Employer's second witness, **Mr Malose Alpheus Ledwaba** testified that he was the assistant director for the Immigration Unit based at OR Tambo International Airport and was responsible for the allocation of shifts for the immigration officers based at O R Tambo International Airport. The witness testified about the Employer's Policy and Procedures to be followed when processing the travelers' entry into the country. He further testified that when a traveler arrives, he/she is required to hand over his/her passport and other relevant documents to the immigration officer. There is no requirement that the traveler must hand over money to the immigration officer. He further testified that the immigration officers are not allowed to receive any gifts from the travelers. He further testified that the officials are not allowed to leave their cubicles at O R Tambo International Airport without the permission of their supervisors. He further testified that no official was allowed to accompany the travelers to go and collect their luggage at the carousels.

### Employee's evidence

10. The Employee, **Mr Resego Keita Mlalazi** testified that on the 18 July 2017 he attended and processed a Congolese couple who flew from Congo. He further testified that there were exchange of greetings and smiles between him and the travelers. These two nationals were particularly friendly people. He then asked them their flight number and they showed him their tickets. When he finished processing them, they then asked him where they can collect their luggage. Realizing that it was not very busy at that time and because this couple were very friendly, he decided to accompany them to collect their luggage. He further testified that he left the cubicle for less than 2 minutes. After he showed the area where to collect their luggage at the carousels, there were pleasant hand goodbye greetings and he went back to his cubicle. He further testified there was never an extortion on his side nor the exchange of money between him and the couple.

## ANALYSIS OF THE EVIDENCE AND ARGUMENTS

11. This dispute was referred to the Council in terms section 191(5) (a). Section 192 of the Labour Relations Act, 1995(LRA). The LRA provides that in any proceedings concerning any dismissal, the Employee must establish the existence of the dismissal. Once the dismissal is established, the Employer must prove that the dismissal is fair. Dismissal is not in dispute in this case.

12. The Employee faced two charges of misconduct for contravention of the Public Service Code of Conduct. **Charge 1:** It is alleged that he committed an act of gross dishonesty in that on or about 18 June 2017 at or near OR Tambo International Airport, he extorted undisclosed amount of money from Mr Norbert Lubanda and Luntoto Lusemo, Congolese Nationals. **Charge 2:** It is alleged he committed an act of gross negligence in that on or about 18 June 2017 at or near OR Tambo International Airport, he deserted his workstation without the permission of the supervisor.
13. Evidence was led by the Employer regarding the Policy and Procedures of processing and admission of foreign travelers in South Africa. Evidence was further led that the immigration officers are entrusted with a duty to ensure that the travelers who enter and leave the country do have proper and authentic documentation so as to ensure safety and security of this country. Evidence was further led that immigration officers are not allowed to demand money or receive any presents from the travelers. Further evidence was led that immigration officers on duty are not allowed to leave their cubicles without the permission of their supervisors.
14. As regards the **Charge 1**, the Employer relied solely on the video footage. Mr John Walker testified on both segments of the video footage which did not run for more than twenty minutes. The witness who testified on the contents of the video did not personally witness the alleged transgressions. The video footages are in two segments which each do not run for more than twenty minutes. The first segment showed the Employee being shown being given documents by travelers. The charge against the Employee is extortion. Even the second segment of the video footage cannot confirm that there was an exchange of money. It is also not clear from the footage itself what kind of documents were handed to the Employee.
15. Mr Walker testified that he believed that the Employee was being given money because the traveler had his hand in the right pocket. During cross-examination the witness admitted that he did not see any exchange of money but something which looks like money. The video footage did not confirm that the documents or envelope contained money. My analysis it is only the Employee and the travelers who could testify on the nature of documents that were handed over to him. The witness who testified about the video footage cannot even testify about the nature of currency as it is alleged.
16. No evidence was led that that indeed extortion took place. Further evidence was led that the documents of these travels were in order, it is not clear why should the Employee extort any money, if any, from these travelers. The Employee led evidence that exchange between himself and the travelers was pleasant. The only people who can testify that there were threats of extorting money can only be the travelers themselves. The people who were alleged to have been victims of extortion were not called as witnesses. The evidence by the Employee was not contradicted or challenged. I have no reason not to believe the version of the Employee. My findings is that the Employee cannot be found guilty of **Charge 1**.
17. As regards **Charge 2**, it is common cause that the Employee left his cubicle for not more than two minutes. The Employer's testimony was that the Employee cannot leave the cubicle without the permission of the supervisor. Further evidence was led that the Employee can only leave the cubicles when accompanying the travel to a secondary interview. Further evidence was led that the official can also leave the cubicle without the permission when he was responding to nature and wanted use the toilets. The Employee admitted that he left the cubicle without permission of his supervisor. He did that because he realized that it was not busy at that time and that he was asked by the travelers where they can collect their luggage. The Employee testified further that out courteousness and due to friendliness demonstrated to him by these travelers, as a sign of goodwill gesture he decided to accompany them to where the luggage was to be collected. He only left his cubicle for less than 2 minutes. One of the reasons for officials not allowed to leave the cubicles is the fact that it will cause inconvenience to travelers still on the queue.

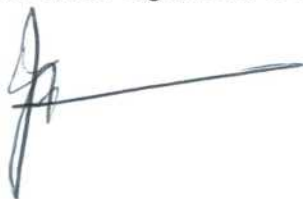


18. *In Unilong Freight Distributors (Pty) Ltd. v Muller (1998) 19 ILJ 229 (SCA)*, the court held that gross negligence may be said to have occurred if the employee is persistently negligent, or if the act or omission under consideration is particularly serious in itself. The Employee in the present case is charged with gross negligence in that he deserted his work station. The reasons among other things, for the Employee to require permission, is for the Employer to know the whereabouts of the Employee. The Employee was away from his work station for less than two minutes. It is not clear why this kind of conduct be classified as gross negligence. There was no evidence led to show that the absence of the Employee from his cubicle has prejudiced the Employer in any respect. My analysis is that no evidence was led to prove that the Employee was guilty of gross negligence. It is my finding that the Employee cannot be found guilty of **Charge 2**
19. The Arbitrator has a responsibility of determining on a balance of probabilities and select a conclusion from among several conceivable and plausible conclusions. The Arbitrator must assess the probabilities and improbabilities of each of the disputed facts and determine which is the most probable one. It is my finding that the Employer has on balance of probabilities failed to prove that the Employee's dismissal was substantively fair.
20. The relief sought by the Employee was re-instatement. I am accordingly ordering that the Employee be re-instated retrospectively with the back payment from the date of his dismissal

#### **AWARD**

21. The dismissal of the Applicant, K R Mlalalzi (Employee) by the Respondent, Department of Home Affairs (Employer) was substantively unfair.
22. I order the Employer to re-instate the Employee retrospectively to work with the same terms and conditions before his dismissal and must report at work on the 01 January 2019.
23. The Employee's salary be back dated in the sum R 196 882, 20 from the date of dismissal being the equivalent of 10 months' salary (R 19683.22 x 10).
24. The amount referred to in paragraph 23 is to be paid to the Applicant on or before 31 December 2019; and
25. As provided for by section 143(2) of the LRA, any unpaid amount due in terms of this award will attract interest at the rate prescribed in terms of section 2 of the Prescribed Rate of Interest Act, Act 55 of 1975, as from the date on which it was due
26. No order to costs.

**Dated and Signed at POLOKWANE on this 20 November 2019**



**Panelist: Jeffrey Nkuna**