



ARBITRATION AWARD

Panellist/s: NTATE JOSIAS MABILO
Case No.: GPBC228/2021
Date of Award: 24 JULY 2021

In the ARBITRATION between:

PSA obo Visagie, A

(Union / Applicant)

and

Department of Correctional Services

(Respondent)

Union/Applicant's representative: Kobus Heyneke of PSA trade Union. _____
Union/Applicant's address: 54 Annecke Street, Sonheuwel Central _____
Mbombela, 1200. _____
Telephone: 0825508235/ 082 095 8598 _____
email: Jacobus.heyneke@dcs.gov.za _____
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Respondent's representative: Raymond Rhulani Shope _____
Respondent's address: Department of Correctional Services
2 Henshall Street, Nelspruit _____
1200 _____
Telephone: 0829594940 _____
email: rhulanishope@gmail.com _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration of the unfair dismissal dispute between PSA obo A Visagie (applicant) and Department of Correctional Services (Respondent) was held under the auspices of GPSSBS on the 14 July 2021 virtually.
2. The applicant was represented by Kobus Heyneke of PSA and the respondent was represented by Raymond Rhulani Shope, an employee of the respondent.
3. The proceedings were recorded electronically and manually.

ISSUE TO BE DECIDED:

4. I am required to determine whether the dismissal of the applicant was unfair or not, specifically with regard to whether the Delegate Authority was within his powers to order de novo hearing in light of clause 8.7.4 of Resolution 1 of 2006.
5. Remedy requested is re-instatement.

BACKGROUND TO THE MATTER:

6. The applicant started to work for the respondent on 25 June 1996.
7. At the time of his dismissal, he occupied the position of Correctional Officer CBI- 3.
8. He was of a salary notch of R 380583.00 per year.
9. The applicant was dismissed on 1 December 2020.
10. The matter was referred on the 29 January 2021.
10. The applicant appeared before a disciplinary committee and was sanctioned one-month suspension without pay.

11. He appealed the sanction of one-month suspension without pay and he was subjected to another disciplinary hearing in which he was dismissed.

SURVEY OF EVIDENCE AND ARGUMENT:

Respondent's Submission and argument:

The respondent's submission is as follows:

12. The respondent dismissed the applicant for having a relationship with an inmate.

13. The first disciplinary hearing found the applicant guilty and sanctioned him with 1 month suspension without pay as alternative to dismissal.

14. He appealed the sanction on grounds of harshness of the sanction and was subjected to a second disciplinary hearing for the same charges.

15. The second hearing resulted in him being dismissed, which he appealed and the appeal was unsuccessful.

16. When asked why two disciplinary hearings for the same charges, the respondent representative replied that they saw nothing wrong with it as the charge was a very serious one.

17. It was also argued that should it be found that the delegated authority erred in ordering re-hearing, compensation be considered rather than re-instatement due to the seriousness of the offence.

Applicant's Submission and argument:

The applicant's submission and arguments were as follows:

18. The applicant was called for a disciplinary hearing for proposing and falling in love with a female sentenced offender during her incarceration at Nelspruit Female Correctional Centre.

19. The applicant was found guilty by the presiding officer and sanctioned for one-month suspension without pay.

20. He then filed an appeal for the harshness of the sentence.

21. A de novo disciplinary hearing was ordered by the delegated authority, Acting Regional Commissioner.

22. At the second hearing, both the employee party and the employer party questioned the new hearing in light of the provisions of 8.7.4 of the Resolution 1 of 2006.

23. The hearing proceeded and the outcome of the second hearing was dismissal.

24. It is argued that 8.7.4 of the resolution 1 of 2006, makes provision for hearing de novo but only in the event of gross procedural errors. In the first hearing of the applicant's case no such errors occurred.

ANALYSIS OF EVIDENCE AND ARGUMENT:

25. The matter was referred as dismissal related to misconduct in terms of sections 191 (1) and 191 (5) (a) of the Labour Relations Act 66 of 1995. The matter was therefore set down for arbitration.

26. I am required to determine whether the dismissal was procedurally and substantively fair. It is specifically the procedure followed in relation to the two disciplinary hearings as against the provisions of Resolution 1 of 2006. The second hearing ordered by the appeal authority is at the centre of the dispute.

27. Section 188(2) of the LRA states that any person considering whether or not the reason for dismissal is a fair reason or whether or not a dismissal was effected in accordance with a fair procedure, must take into account any relevant code of good practice issued in terms of the LRA.

28. Again section 192 (1) provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Subsection (2) of the same section provides that if the existence of dismissal is established, the employer must prove that the dismissal is fair.

29. In the current case, it is common course that the applicant was dismissed after being subjected to two disciplinary hearings for the same offence. What is in dispute is whether the second disciplinary hearing was procedural or not.

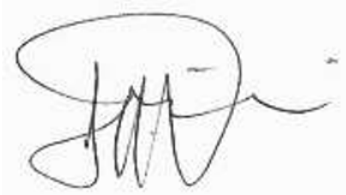
30. The disciplinary code which lay down guidelines and procedures to be followed to deal with misconduct had been made a resolution of the Council. Under normal circumstances, a code serves as a guideline and is not prescriptive. However, in the current case it had been made a collective agreement which is binding to all relevant parties. It must therefore be followed to the letter.
31. Resolution 1 of 2006 contains the disciplinary procedure and code. Item 8 of the code and specifically 8.7.4 makes provision for the appeal and actions that need to be taken by the authorities. Item 8.7.4 states that it is only when there are gross procedural errors that a re-hearing can be commissioned. The word "ONLY" suggest that all other reasons are excluded.
32. When the appeal authority ordered the re-hearing, the reason given was as follows: " This office could not find some answers or response out of this submission therefore a re-hearing from the start would be proper. RH Corporate Services to appoint a new and neutral chairperson to start the hearing from scratch". This was agreed to be common course by both parties. It is expected that the appeal authority knew under which circumstances could a re-hearing be ordered. No gross procedural errors are cited and yet re-hearing was ordered.
33. The re-hearing changed the result from suspension for one month without pay to a dismissal, which altered not only the process but the outcome as well. In this way the applicant was subjected to two hearings for the same offence which was in contravention of a collective agreement. While there was no challenge with the substantive fairness in the first hearing, the second hearing tempered with the first outcome and its substantive fairness.
34. Based on the above facts, I am convinced that the dismissal of the applicant was both procedurally and substantively unfair. Procedurally unfair in that the collective agreement was contravened, and substantively unfair in that the outcome was changed from suspension without pay to dismissal.
35. The fact that the applicant was given a suspension without pay to continue working means that relations between the employer and employee are still good.

AWARD:

1. The dismissal of A Visagie was both procedurally and substantively unfair.
2. The respondent is ordered to re-instate the applicant without retrospective payment.

3. The applicant to report for duty on 1 August 2021 at Nelspruit Correctional Services by 08:00 .

Done and signed on 24 July 2021.

A handwritten signature in black ink, appearing to be 'J. Mabiolo', written on a light grey background.

NTATE JOSIAS MABILO

(GPSSBC) Arbitrator