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AWARD RECIEVED ELECTRONICALLY
ON 28/1/2021

ARBITRATION AWARD

Panellist/s: Mavhungu M.S
Case No.: GPBC56/2017
Date of Award: 22 December 2020

In the ARBITRATION between:

PSA obo SG Mahumani

(Union / Applicant)

And

Department of Economic Development, Environment and Tourism

(Respondent)

Union/Applicant's representative: P Maponya
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Respondent's representative: M.T Mathlo
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the arbitration hearing between PSA obo SG Mahumani, the applicant, and Department of Economic Development, Environment and Tourism, the respondent.
2. The arbitration hearing was held on several dates 02, 03 March 2020, 21 July 2020, 15 August 2020, 05 and 24 September 2020, and the last sitting was on 27 November 2020 at the offices of Department of Economic Development Environment and Tourism. The hearing was digitally and manually recorded.
3. The applicant was represented by Mr. P Maponya an official from PSA. The respondent was represented by Mr. Mahlo the employee of the Department.

ISSUES TO BE DECIDED

4. Whether the dismissal of the applicant was procedurally and substantively fair ;
and
5. If the dismissal is found to be unfair, I must determine the remedy to be awarded.

BACKGROUND TO THE ISSUE

6. The applicant was employed by the respondent as Environmental Officer Production Grade C. Following a disciplinary hearing conducted, the applicant was found guilty on 2 allegations of misconduct and dismissed. The employee was dismissed for the allegations of misconduct as per page 2 and 3 of Bundle A document.
7. During arbitration the parties were allowed to cross examine and re-examine the presentation of their evidence as well as present closing arguments at the

conclusion of their case. Parties submitted the closing arguments as arranged. For the sake of brevity, the details of this will not be repeated in the award but it should not be construed that it was not considered.

8. The applicant alleges that the dismissal was procedurally and substantively unfair and is seeking retrospective reinstatement.

SURVEY OF EVIDENCE AND ARGUMENT

9. I am required to issue an award with brief reasons. I do not wish to offer an exhaustive survey of all the evidence and argument presented at the arbitration hearing. I have had regard to everything presented to me, and what follows is a brief summary of the evidence relevant to my findings only. The parties submitted a bundle of documents and were marked Bundle A.

The Respondent's case

10. **Ms. Winniefred Ann Klaassen** the respondent 1st witness testified under oath that, she is the Assistant Director in HRP (Human Resource Planning). Her duties amongst others were to be responsible for HR plan, updating persal, equity plan and recruitment plan.
11. During the head count in 2013/2014 she visited the districts offices to verify the officials. The attendance registers were checked as part of the process. The applicant signed the attendance register. The post of the applicant was almost advertised as the Chief Director indicated that he did not know the applicant.
12. During cross examination she indicated that she did not know of the position of the applicant as at 2006 as she was not part of the Department. She indicated that she could not confirm if the applicant had absented himself from January 2012 up until 08 April 2014 as he signed the attendance register during the head count. She indicated that she was not able to confirm if the applicant was not given any work to do and also not provided with the supervisor.

13. In terms of the placement register it confirmed that the applicant was placed in the Environment Special Programme. She also confirmed that she did not know as to who was the supervisor to the applicant and as such was unable to indicate as to who was the applicant supposed to enter into the performance agreement with.
14. **Mr. Leshabane Patrick Serepe** testified under oath that he is appointed by the Respondent as the Assistant Director. In the year 2012 he was appointed as the Assistant Director: Environmental Special Projects in Mopani District. He did not know the applicant but only saw him in the disciplinary hearing. The applicant's name was not on the list of Annexure D document (Attendance register).
15. He also indicated that as per page 83 of Bundle A the applicant signed the attendance register of those who attended the head count of the Department on 27 September 2012.
16. During cross examination he stated that he started to work in Mopani district on 03 January 2012. Upon reporting for duty he was not told of any employee who was absent from work. He indicated that the procedure to follow for a person who is not reporting for duty, he would write to HRM to notify them of the employee. Each employee was to complete his or her name in the attendance register. He also indicated that he is not aware of the provision of deeming dismissal. The name of the applicant was not written as he was not at work. He was not informed of the absence of the applicant. As per page 34 of Bundle A the applicant's name appears as one of the employees which he testified that he was not aware of such a document. Accordingly he was supposed to enter into the performance agreement with the applicant.
17. **Mr. Matome Malebati** respondent 3rd witness testified under oath that he is the Deputy Director in HRD in the Department. He is responsible to manage the performance and also to develop systems in the Department. As per the Department set up the unit of PMDS is located in Polokwane. It is coordinated from the Head Office to Districts office. The employees in the Department are expected to sign the performance agreement which on quarterly basis there are reviews. The performance agreements are to be signed at the beginning of the year. He also testified that from the year 2012 the applicant did not submit his PMDS documents.

18. During cross examination he indicated there were never PMDS documents submitted by the applicant. He also indicated that he was not in a position to deny if the applicant was directed to report to anywhere in the Department. He was also not sure as to who was the supervisor to the applicant.

The Applicant's case

19. **Mr. Mahumani, ("the applicant") 1st witness** testified under oath that he was appointed in the Department on 03 April 1986. In 2006 he was stationed at Bohlabela District as a game reserve manager. He was suspended by the Department in year 2002 up until December 2005.

20. On 15 May 2006 he was transferred/seconded to Mopani District office as confirmed on page 21 of bundle A document. He reported to the office of the District Coordinator (Ms. Khuzwayo). Upon reporting for duty he was not placed anywhere. He was not allocated the office or given any job description. There was no supervisor that was introduced to him. He also did not sign any Memorandum of Understanding/performance agreement. As per page 57 of bundle A document the applicant also complained to the office of Public Service Commission about his situation.

21. He testified that he was never charged for failure to enter into performance agreement with the employer and he was only charged in 2014. On 27 September 2012 there was a head count where he completed the attendance register as supported by document marked Annexure A on page 83. He testified that for the period January 2012 until 27 September 2012 he was in the office. As he did not have any allocated office he used different places as his office i.e. passage , colleagues offices and also under the tree.

22. He was then suspended from work on 14 May 2014 and was only charged in September 2014 which is 4 months after he was suspended. His suspension was lifted in November 2015 after he challenged it in the arbitration process. He was only placed correctly in December 2015 and was then allocated the supervisor and was also allocated responsibilities.

23. As a result of the disciplinary hearing he attended, he was dismissed in November 2015. He received the dismissal letter on 03 October 2016 which he appealed on 10 October 2016.
24. He testified that as for the performance agreement that he did not sign, there was no supervisor that was allocated to him. As per page 5 of Annexure H he wrote a letter to the Department which the respondent responded to it by 18 January 2012. There is also a letter on page 4 of Annexure H document to confirm that the applicant wrote a letter to the Department. As per the documents on page 7, 8 and 9 it confirms that the applicant communicated with the respondent. The applicant submitted the claims as reflected on page 7 to 9 of bundle H documents.
25. During cross examination he indicated that as per the document on page 21 of Annexure A he was given a secondment letter by the respondent. He indicated that as of the period between January 2012 and 08 April 2014 he was at Mopani District Office. He was not allocated an office and the supervisor. He did not even sign the performance agreement during the said period as he did not have the supervisor. As per page 2 of the bundle H documents it confirms the communication between the respondent and him. He also indicated that during the period of the head count he attended the session as it was placed in the notice board of the respondent.

ANALYSIS OF EVIDENCE AND ARGUMENT

26. Section 185 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that every employee has the right not to be unfairly dismissed or to be subjected to an unfair labour practice.
27. Section 188 of the LRA stipulates that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct and that the dismissal was effected in accordance with a fair procedure.
28. Whenever considering whether or not a reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure, I

must take into account any relevant code of good practice issued in terms of the Labour Relations Act, 1995 (“the LRA”).

29. Section 138 (6) of the LRA further provides that a Commissioner conducting an arbitration must take into account any code of good practice issued by NEDLAC and any guidelines published by the CCMA that are relevant to the matter being considered in the arbitration proceedings.
30. The applicant submitted as part of his opening that he challenges the procedure followed by the Department in disciplining him as the respondent dismissed him without considering that he appealed the decision. The applicant was dismissed on 15 November 2016. The respondent later considered his appeal and the outcome was then issued on 21 December 2016. The respondent upon dismissing the applicant failed to consider that the applicant appealed the decision to dismiss him. The provision violated by the respondent is in line with the disciplinary code and procedure. The appeal was then considered late after he was dismissed. In terms of clause 8.1 of the disciplinary code and procedures it indicates that “*The employee must within five working days of the receiving notice of the final outcome of a hearing or other disciplinary procedure, submit the appeal form to he or his executing authority, or to her or his manager, who still then forward it to the appeal authority*”.
31. It was also submitted that, the respondent delayed in charging him as he was charged for issues that happened in 2012 but was only charged in 2014.
32. The applicant did not indicate as to how he was prejudiced by failure to charge him on time. I concluded that the disciplinary proceeding conducted by the respondent was not conducted in accordance with the provision of the disciplinary code and procedures.
33. In the present case it is common cause that the applicant was dismissed by the respondent. The onus is on the respondent to prove that the dismissal was substantively fair.
34. Schedule 8 – Code of Good Practice: Dismissal (“the Code”) gives guidance to an arbitrator evaluating the fairness of a dismissal for misconduct. It provides that any person who is determining whether a dismissal for misconduct is unfair should consider whether or not the employee contravened a rule or standard regulating

conduct in the workplace, and if such rule or standard was contravened, whether the rule was valid or reasonable, the employee was aware of the rule, the rule was consistently applied by the employer and dismissal was an appropriate sanction for the contravention.

35. It is acknowledged that given the nature of the Respondent's business and the risks involved, it is crucial that it should have rules, policies, codes and procedures in place. A breach of such rules and policies should obviously not be treated lightly as the consequences could be dire not only for the Respondent but also for its clients. However, in considering the appropriate sanction for any breach, the employer is required to do so dispassionately and fairly. Where the employer has consistently ensured that the rules and policies are adhered to at all times and has consistently dealt with any breaches, any disciplinary action it takes pertaining to similar breaches would obviously pass the test of fairness.

36. Nevertheless the substantive fairness of a dismissal for misconduct is assessed according to a number of criteria. These are set out in item 7 of the Code of Good Conduct: Dismissal. This reads:

“Any person who is determining whether a dismissal for misconduct is unfair should consider -

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

(c) proof of the offence.”

37. The employer is required to prove, on a balance of probabilities, that the employee was actually guilty of misconduct. This involves proving that a rule existed, and that the employee actually broke that rule. The existence of a rule may be proved by reference to the employee's contract, or to an applicable collective agreement or disciplinary code. However, the rule need not exist in written form; it is generally

assumed that certain conduct is calculated to destroy the employment relationship, whether or not it is expressly prohibited in a contract or disciplinary code, and that the employee knew or should have known that this conduct could lead to dismissal.

38. In determining the issue whether the applicant had contravened the rule charged with, it is clear that I have to deal with two contending versions.
39. The applicant was charged with 3 allegations of misconduct and was found guilty on 2 of them. Following the disciplinary hearing he was dismissed. The applicant was alleged to have contravened paragraph 28.1 of the determination on leave of absence in the Public Service and continuous absenteeism as he was alleged to have been absent from January 2012 until the 08 April 2014. He was also charged with an act of contravening of paragraph 6.1 of the Departmental Performance Management Development System Policy.
40. The applicant's version as per charge 1 and its alternative was that he was never absent without leave and that he did not absent himself from January 2012 until 08 April 2014.
41. The respondent had a duty to try and locate the applicant as he was alleged to have been absent for a long time. The respondent did not submit anything to prove that they tried to locate the applicant. The period that the applicant is alleged to have been absent was long period that the respondent was supposed to have provided something to prove that they tried to locate him.
42. The applicant alleged to have reported to the office of the District Coordinator (Ms Khuzwayo) upon reporting for duty and was never introduced to the supervisor or explained as to what he was to do. The District Coordinator was not even called by the respondent in order to confirm or deny that allegation by the applicant and no reason was provided for failure to call her.
43. As per page 83 on Annexure A documents, the applicant submitted attendance register to prove that he attended the head count session of the respondent on 27 September 2012. The respondent did not dispute that the applicant attended the said session. The witness of the respondent (Ms. W Ann Klaassen) confirmed that the applicant signed the attendance register on the said day. It is therefore that if indeed the applicant attended the said session he could not have been absent as charged

by the respondent. The charge leveled against the applicant was for the period January 2012 and 08 April 2014.

44. The respondent as per the charge was not specific as to from what date the applicant was absent from work. The charge indicates the period as from January 2012 up to 08 April 2014. On 03 January 2012 the applicant wrote a letter to the Acting Senior Manager: HRM which was attached as per page 5 of bundle H document. The document as attached on page 5 of bundle H confirms that there was a communication between the respondent and the applicant. The respondent did not dispute the existence of the letter.
45. The respondent paid the applicant for the period alleged that he was absent from work. The respondent had an option to terminate the service of the applicant by applying the deeming dismissal provision as per Public Service Act in terms of section 17 (3)(a)(i). In terms of the above section it provides that "*An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her place of duty*". The applicant in terms of the allegations was alleged to have been absent for more than one calendar month. The respondent did not even submit as to why the provision of deeming dismissal was not applied. I find the applicant not guilty on the charge.
46. As per the charge 2 on which the applicant was charged with contravention of paragraph 6.1 of the Departmental Performance Management System Policy, it required the respondent to prove that the applicant failed to enter into the performance agreement when he was expected to do so. The applicant submitted in his evidence that he did not have the supervisor or anyone to enter into the performance agreement with. The applicant also submitted that upon being transferred to the District office (Mopani) he visited the office of the District Coordinator (Ms. Khuzwayo) but he was never introduced to the supervisor. The respondent did not challenge that evidence. The question to ask is who the applicant was supposed to enter into the performance agreement with.

47. The respondent witness (Ms. W Ann Klassen) also indicated during cross examination that she was unaware as to who the supervisor was or where the applicant was placed. She also indicated that she was not sure as to who was to enter into the performance agreement with the applicant.
48. The respondent second witness (Mr. L. P Serepe) who was alleged to be the supervisor indicated that the applicant was not in his unit and that he did not appear in the register of the unit. He also indicated that there was no performance agreement that was entered into. The witness was unable to indicate as to the efforts he did in order to enter into the performance agreement with the applicant. There was also no indication as to the disciplinary steps taken for failure by the applicant to enter into performance agreement. It is expected of the supervisor to take steps for failure by the subordinate to enter into the performance agreement.
49. Considering the evidence in totality, it is my view that the respondent had, on a balance of probabilities, failed to advance a compelling case justifying the dismissal of the applicant.
50. I, therefore, find that the dismissal of the applicant is procedurally and substantively unfair.
51. On the issue of the procedure, the respondent in dismissing the applicant failed to take into consideration that the applicant had appealed the decision to dismiss him. The appeal was considered later and the applicant then immediately declared the dispute with the council. The applicant after receiving the dismissal letter declared the dispute with the council and as such I did not find it as to how he was prejudiced by the conduct of the respondent and as such it is just and equitable not to compensate the applicant.
52. The applicant sought reinstatement in the event that I find dismissal to be unfair. The primary statutory remedy for a substantively unfair dismissal is reinstatement of the dismissed employee, that is, it is aimed at placing an employee in the position he would have been but for the unfair dismissal.
53. I consider reinstatement to be just and equitable in the circumstances.
54. In the light of the above, I find that the application of the applicant for reinstatement must succeed. The applicant is therefore reinstated retrospectively with terms and conditions as if he was never dismissed prior to 15 November 2016.

AWARD

55. I find that the dismissal of the applicant was procedurally and substantively unfair. In the premises, I make the following order:
56. The respondent, Department of Economic Development, Environment and Tourism, is ordered to reinstate the applicant, in its employ on terms and conditions no less favorable to him than those that governed the employment relationship immediately prior to his dismissal.
57. The respondent is therefore ordered to pay the applicant the amount of R1, 235,904.00, calculated as $R25748.25 \times 48$ months which is back pay , by no later than 15 February 2021, this is back pay of 48 months' salary counting from 15 November 2016 to 15 February 2021.
58. The applicant is to resume duties on the 16 February 2021.



Signature:

Commissioner: Mavhungu Musiwalo Seth