PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS111-16/17**

Commissioner: **Gerhard Gertenbach**

Date of award: **31 May 2017**

In the matter between:

HOSPERSA obo F. LUBANYANA **APPLICANT**

and

DEPARTMENT OF HEALTH- KWAZULU NATAL **RESPONDENT**

DETAILS OF HEARING AND REPRESENTATION

1. This matter was placed on the roll for arbitration before me on a number of occasions at Clairwood Hospital in Durban, but it was finalized on 05 May 2017. The applicant was represented by a Union Official, Mr. S. McGladdery and the respondent was represented by its Assistant Manager (Labour Relations).The applicant Ms. F. Lubanyana, sought re-instatement in the event that the award was made in her favour. The parties were afforded seven days within which to file written closing arguments which rendered the award due on 26 May 2017. This issue will be dealt with hereinafter. The proceedings were recorded.

PRELIMINARY ISSUES, JURISDICTION and ISSUES TO BE DECIDED

2. At the outset of the proceedings I did not understand McGladdery to say that he intended filing a preliminary issue relating to the respondent's alleged breach of the Collective Agreement. This only came to my attention when I read his written closing arguments and I intend dealing with this issue as

well as the question of jurisdiction hereinafter. I need to decide whether or not the Applicant's dismissal was procedurally and substantively unfair and if so, determine the appropriate relief.

BACKGROUND TO THE DISPUTE

3. A bundle of documents was handed in and marked 'A'. To the extent that the representatives dealt with the documents, I was enjoined to accept and consider the documents for what they purport to be for the purposes of this award. The applicant commenced employment with the respondent on 6 May 1991 as a General Assistant. She was dismissed on 25 January 2016, at which time she earned a salary of R14 753.75 per month, and at that time she was employed as the Linen Bank Manager. She was charged and found guilty of the following offences*: (a) On the stock taking of January 2015 and April 2015, you alleged (sic) forced staff members to pay R200 to be on the stocktaking for your personal gain; (b) On 9 January 2014 and 10 March 2015 you ordered items of a power soap (OMO 9kg bags), deliberate (sic) that are not used in laundry; (c) You misused your power, by instructing six (6) of your staff members not to come to work on 15, 16 and 17 April 2015, without any leave approval. In that you incite other staff to unprocedural and unlawful conduct; (d) On or about 2015 you took bribes of R5 000 from Doreen in exchange of employment of her son, and also took R20 000 from China Nzama in exchange of employment of her child.*

THE RESPONDENT'S CASE

4. The respondent's first witness Mr Nicolaas Cebekhulu testified under oath that he is employed by the Department of Health as the Assistant Director at Ilembe Health District in Stanger. The applicant is known to him and he chaired her disciplinary inquiry and found her guilty of the four offences on the charge sheet. He confirmed that he dismissed the applicant and referred to pages 66 and 67 of Bundle A, which is a written summary of his findings.

5. Under cross-examination the witness testified that he is a qualified Human Resources Manager and that he acquired a certificate from the Technikon of South Africa in 1990. He also holds a Public Management Diploma from the Technical College, and he has commenced his studies for a Diploma in Labour Law at the University of Johannesburg. He had training to preside at disciplinary inquiries as well as training as an investigating officer. He denied that his final outcome of the disciplinary inquiry was late, and he submitted that he had acted fairly and in an unbiased manner.

6. It was put to him that an application was made for his recusal based on the fact that he was having coffee with the respondent's representative. His response was that the employer had prepared coffee for everybody who was present.

7. He denied that no evidence was led in respect of the charge of R5 000.

8. When asked why he cautioned the applicant's representative, he said that it was because the representative asked irrelevant questions and that he delayed the process unnecessarily and that he requested the representative to rephrase a question.

9. When it was put to him that no witness testified that the trust relationship had broken down, he responded by saying that a supervisor testified that the relationship was not on good terms. He admitted that no evidence was led in respect of the alleged bribe of R20 000.

10. The respondent's second witness was Ms Pumulele Ngobesi who testified under oath that she has been employed as the Principal Linen Orderly since 2011. She confirmed that the applicant was known to her and had been her manager from 01 July 2011 up to the date of her dismissal. She confirmed that she testified at the applicant's disciplinary inquiry.

11. Her job responsibilities included the supervision of staff, the monitoring of stock and managing the department as a whole. She was also in charge when the Linen Bank Manager was not available.

12. She confirmed that the department did not use OMO soap at all and she did not know why the applicant had ordered the soap, which is not used, because they get a stain remover to remove the stains from the linen.

13. With reference to page 68, she confirmed that her name appears on this document, which is an attendance register, and that the applicant was on leave from 15 to 17 April 2015. During that time she acted as manager.

14. Under cross-examination the witness testified that she was unaware of the fact that a certain Khumbule testified at the disciplinary inquiry that she had a death in the family. It was put to the witness that

the applicant will say that they used soap powder from time to time, although it was not always OMO. It was also put to the witness that a *bomb* was a mixture of a combination of stain remover and soap. The witness said that she was unaware thereof. She also did not know whether a certain Ngobesi had given soap powder to the applicant to test.

15. When asked whether it was an offence if something was ordered and that order was not approved, she replied: *It depends what is needed and one cannot order items that are not needed.*

16. When it was put to her that the applicant will say that she forged the applicant's signature on page 29 and that she regarded herself as *the law*, she responded by saying: *This is new to me*.

17. Under re-examination she testified that she was never charged for not being at work, and she admitted that it was her signature that was on page 29.

18. The respondent's third witness Ms Carol Linda Mkhwane testified under oath that she is presently employed by the respondent as the General Orderly in the linen bank, and that she has held the position since 2006. The applicant is known to her and the applicant was her Manager at the time of the dismissal.

19. She admitted that she was present at the January and April 2015 stock takes, and she further submitted that she paid R200 to the applicant to attend the stock take. When the money was given to the applicant, there was nobody in the vicinity. The money was given to the applicant in the office and the applicant told her to close the door. The applicant told her that if she wanted to be on the stock take, she needed to pay her R200.

20. Under cross-examination the witness confirmed that she went to the stock take, and the fact that her name is on the document is proof of her attendance. She also signed the attendance register.

21. When it was put to her that the applicant will say that she had absolutely no role in the stocktaking and that she was simply asked to supply people, the witness submitted that she (the witness) spoke the truth and that the applicant was present at the stock take.

22. When asked why she paid the applicant R200, she testified that the applicant said that they had to

pay R200 if they wanted to take part in the stock take. She admitted that the payment constituted a bribe, which was paid many times, but that it was the applicant who wanted the R200. She confirmed that they were prepared to pay R200 to take part in the stock take, because they were paid R1 900 for the work. She admitted that it was wrong to pay a bribe, but she did not think that she could lose her job. She admitted having testified at the disciplinary inquiry that *it was not as if she had robbed a bank.* She submitted that giving a bribe of R200 and robbing a bank are totally different things. She submitted that she was not guilty of any offence.

23. It was put to her that nobody had corroborated her story and why should she be believed if she was indeed a deceitful person with no credibility.

24. At this juncture of the proceedings I asked a few questions to seek clarity, and by way of summary I was told that the entire process against the applicant was triggered by a collective grievance against her, which can be seen on pages 24A and 24B of the bundle, which contains the list of the signatures of those employees who had filed a grievance against the applicant.

25. The respondent's fourth witness Mr Lallchund Lutchminarain testified that he is employed by the respondent as the Acting Systems Manager, which is a position that he has held since 2010. He confirmed that he testified at the disciplinary inquiry, although he was not involved in the investigation. The applicant was known to him, because he was her manager and she reported directly to him prior to her dismissal.

26. He further testified that soap is not used in the laundry, and the only soap powder that is used is for slushing, which is provided by an outsourcing company and it is delivered in white hessian bags with no name on it.

27. With reference to page 14 of the bundle, he confirmed that this is a copy of the order forms used by the hospital stores. He further testified that the linen bank should not be ordering soap powder for the stores, because a slushing company brings the soap to the hospital; it is not ordered. He denied that he knew what a *bomb* was, and that this was the first time that he heard about the mixing of powders.

28. With reference to page 16 of the bundle he confirmed that the applicant had signed the document

which is the REQUISITION FOR SUPPLIES FORM where OMO had been ordered. He did not know who the second signatory was, but it should have been him who should have signed the document.

29. He admitted that the supervisor of the person making the requisition could also sign the document and that it is the second signature on the document that authorises the order. If there is no second signature on the document, the order will not be processed.

30. He could not remember whether he had received any leave application form from the applicant, but submitted that she should have applied in advance.

31. Under cross-examination the witness testified that the hospital consisted of different components and that he does not go to each component every day, although he keeps in touch with the managers and relies on their supervision. He would not know if there was a crisis until such time as they contacted him. He confirmed that soap is not ordered from the stores. He did not know whether there was a distinction between a soap powder and a stain remover and also said that there was no acting manager in the laundry.

32. With reference to page 17 of the bundle, he confirmed that this was a photograph of an OMO bag which was found during the investigations in the linen storeroom and at that stage it was still a full bag, but it was opened. A certain Mr Nene took the photo.

33. With reference to page 14 of the bundle, he testified that the applicant did not order the soap, but that the applicant approved the order. The person who approves the form confirms that the item is used in that specific department. The form does not go to the cash flow committee. Asked whether it was an offence to order *something*, he submitted that it is an offence to order *something* if it is not going to be used for official purposes. He also submitted that the requisition form *does not come past his desk*.

34. The respondent's fifth witness Isabelle Nzama (China) testified under oath that she has been employed by the respondent since 15 September 1988. The applicant is known to her, because the applicant was her manager prior to and at the time of the applicant's dismissal. At that stage she was employed as the Linen Orderly.

35. When charge (a) was read to the witness, she testified that she could not remember whether she was part of the stocktaking in January and April 2015. She submitted that if her name was on the list, she took part and she would have paid the applicant R200. When this amount was paid to the applicant there was nobody else present; just the two of them. The applicant did not give her a receipt.

36. With reference to charge (b), she confirmed that she had never used OMO with linen at all. Soiled linen is not washed, but it is *slushed* and soap is not used for this purpose.

37. With reference to charge (d), she testified that she paid the applicant R20 000. The first payment was R7 000 and the balance was paid in instalments of R2 000. She submitted a handwritten document which was marked "B", which contains the following information: that an amount of R7 000 made up of R5 000 and two payments of R1 000 each was paid to the applicant, and thereafter the applicant was paid instalments of R2 000 each in April, May, June, July, August, September and October 2014. She submitted that this was her own handwritten record of the payments she made to the applicant. It was not disputed that her son was appointed as a General Assistant on 7 April 2014. She further testified that when the payments were made to the applicant, nobody else was present, other than herself and the applicant.

38. With reference to the appointment of her son, she testified that *there was an opening after someone retired, and that is where she (the applicant) put him in*. She also testified that she was happy when the appointment was made.

39. She further confirmed that the R7 000 was paid before her child was employed. She was not sure whether the position was advertised, but the applicant had told her that the post was available. Nobody ever saw her making any of the payments to the applicant, and the applicant warned her not to tell anybody about it.

40. Under cross-examination she confirmed that page 13 is known to her, because her name is on it, although this was the first time that she had seen the document. She also confirmed that she signed the attendance registers at the time when they did the stocktaking.

41. When it was put to her that the applicant would deny that she had ever paid her R200, her response was: *She knows that I gave her the money and she said we must come in and put our name down, and you know you must pay me R200*. She admitted that the R200 was a bribe.

42. With reference to the job application and the interview committee, she testified that the applicant said that she would deal with it and that the applicant had given her son all the answers he needed. She reaffirmed that the applicant had given her the answers and the child needed to study the questions.

43. It was put to her that no one person has the power to make an appointment and that the applicant could on her own not have appointed her son. To this responded: *What does she mean when she said that she had arranged everything?* It was put to her that her son's appointment would have been unlawful, and if unlawful, he had to be dismissed. She did not see the payment of the R20 000 as a bribe. When it was put to her that it must have been a strange request (that is asking for R20 000 to be paid), her response was: *I am old fashioned and I believed in my manager.*

44. She denied that she knew that it was wrong to pay her manager the money and submitted that: *Everything my manager tells me, I believe*. She also confirmed that nobody was present when she paid the R7 000 to the applicant, and she also did not tell anybody about it, because the applicant told her not to tell anybody.

45. She confirmed that she went to the bank to take out a loan to pay the applicant and thereafter she paid the applicant every month. When she made the payments to the applicant she made sure that nobody saw her. The only proof that she had in respect of the payments was what she had written on the document (Bundle B).

46. The respondent's sixth witness Ms Zamafu Doreen Mafu testified under oath that she has been employed by the respondent since 1982 and that the applicant is known to her. The applicant was her manager prior to her dismissal, and at that stage she was employed as a Sewing Orderly.

47. She confirmed that she was also one of those people who had paid the applicant R200 and at the time when the payments were made, there was no third party present in the applicant's office. There were other people who also told her that she needed to pay the applicant R200 and no

receipts were given. She confirmed that she was the *Doreen* referred to in the charge in respect of the R5 000. The applicant took R5 000 from her.

48. The applicant told her that there was a post available and her son was going to be employed, and it was for that reason that she took out a loan of R5 000 and gave it to the applicant. When the payment was made, only the two of them were in the applicant's office. She further testified that China Nzama can confirm that the payment of R5 000 was made to the applicant. The applicant never told her why her son was not employed.

49. Under cross-examination the witness testified that payments were made in the applicant's office and there were no witnesses when the payments were made. The applicant told them that they all needed to pay R200, as this was the norm. When she paid the applicant the R200, the applicant put the money into her pocket. She also testified that other people told her to pay the applicant R200.

50. She could not remember that she had testified at the disciplinary inquiry that the applicant had allegedly called her and asked her to make payment of the R200. When it was put to her that she was now using two different versions and that her evidence was fabricated, she testified that she was telling the truth. She also admitted that the money that she paid was a bribe and that it was illegal. She submitted that nothing was ever done in writing and they were never told that they cannot pay bribes.

51. When it was put to her that the applicant would deny that she ever received the R200, her response was: *I don't know what you are talking about. How can she deny that she took it after she put it into her pocket?*

52. She confirmed that she had nothing against the applicant and that her only issue with the applicant was the R5 000 bribe. The applicant told her that she must arrange money to secure a job for her son, because there were three positions available. When it was put to her that the applicant had no authority to make appointments because she is only a supervisor, she responded by saying that the applicant was a manager.

53. When it was put to her that her version is highly improbable, she responded by saying that the applicant

knew that she was poor. It was also put to her that it was highly improbable for the applicant to demand money from her and that the payment of such money was a bribe. It was also put to her that she often takes bribes and as such, she is a dishonest person.

54. She was asked whether she had ever filed a claim with Old Mutual in respect of the death of her son. It was also put to her that the applicant will testify that the South African Police will come and testify that they were looking for her for having filed such a claim. She submitted that she was never charged for having paid a bribe, and neither did she report that she needed to pay money to the manager. It was put to her that she never reported it because it did not happen, to which she responded: *I have proof of that*. She also confirmed that she had shown China the money.

55. The respondent's seventh witness Nora Mthembu, testified under oath that she was employed by the respondent in 1987 in the sewing and linen department, but she is no longer employed, because she left in 2014. She left because she was unhappy and she went on pension at the age of 65. The applicant is known to her and the applicant was her manager. She confirmed that she testified at the disciplinary inquiry.

56. She confirmed that she laid a complaint at the court and that she also went to the Department of Labour, because she had to pay the applicant money to get a job for her children. She submitted that other people also paid the applicant.

57. She further testified that she paid the applicant five amounts of R3 000, because there were five people, being four children of her own, as well as her daughter-in-law. She paid the money to the applicant because her kids had to work and the applicant had the *power*. She had also spoken to her husband about it.

58. She further testified that she went to the Department of Labour and spoke to Mr Mdunge, who was the former Manager of Labour Relations. Mdunge called all the people who were paying bribes, but he swept everything under the carpet. She then went to the former HR manager, a certain Dhlamini and then to the police. She also told the people that Mdunge had told them that they needed to change their statements. She confirmed that these matters were investigated by a detective, but she did not know whether the applicant was investigated.

59. Under cross-examination she confirmed that she retired in September 2014. She did not testify at the applicant's disciplinary inquiry and she did not know the outcome of the South Africa Police case. She did not know that the applicant had not been charged and that the applicant had not appeared in court.

60. She had paid the money to her husband, who in turn paid the money to the applicant. It was suggested to her that what her husband told her was hearsay evidence, to which she responded that if he was called, he would come and testify. She further confirmed that her husband had met the applicant in town on a Sunday and had paid her R15 000 in cash at Beares, West Street, Durban. At that time she was at home. She denied that she was lying and confirmed that one of her children was appointed in the linen department. When it was put to her that this child had followed a legitimate process for the appointment and she was interviewed and got the job, and furthermore that her child was appointed by a service provider and not by the respondent she replied as follows: *Yes, because I paid*.

61. She admitted that paying the money constituted a bribe, but she did it because her children were desperate. She could not respond to the suggestion that the South Africa Police could find no basis in respect of what she had told them. It was put to her that her character was in question, because she was trying to claim for an injury on duty in 2006, although she only had a bruise. To this she responded by saying that she was hit by a car.

THE APPLICANT'S CASE

62. It would be appropriate to record at this juncture that the applicant's evidence was presented in an extremely longwinded manner and I intend recording the gist of her evidence in the following abbreviated manner.

63. The applicant, Florence Carolina Lubanyana, testified under oath as follows:

- She commenced her employment as a cleaner with the respondent in 1991.
- She did not approve the orders.
- It is not wrong to make an order.
- The main store does not give items that are not used.
- She knows Ngobesi and he did not give her samples to test.

- She did not phone any staff member not to come to work.
- With reference to page 68, she did not instruct any of these people not to attend work.
- She had taken family responsibility leave and she had no discussions with the people who were not at work.
- She cannot recall which supervisors were absent. They only get the forms once they have been signed and approved by the supervisors.

  Re: The alleged bribes:
- She did not have the authority to make any appointments in the hospital, and it is HR who appoints the employees.
- She cannot influence applicants.
- She would not give promises of jobs to anybody, and she does not have such authority.
- She never took any money from anybody, and neither did she promise anybody a job.
- She never saw Nzama write her name.
- With reference to document B, she said that she had never seen it and neither did she know what the figures mean.
- She denied taking any money from anybody.
- In respect of the hearing, she confirmed that Hospersa represented her, and it was supposed to be a Mr Zuma.
- The employees came with a coffin with an image wearing old clothes and they said that the applicant was that image.
- The hearing did not continue on the (first) day because Zuma was involved in a motor collision and he could not attend. The matter was postponed.

64. Under cross-examination the applicant confirmed that she rotated her supervisors between 2007 and 2016. She also testified that during stock take the procurement department advises the other departments of the number of employees that are required.

65. In regard to the grievances, she submitted that she was told that the employees were given a blank piece of paper at the meeting, and after the meeting their names were attached to the grievance.

66. She did not know why they would say that she took R200 from them for the stock takes, and neither did she know why they would say that they gave her money to employ their children.

ANALYSIS OF THE EVIDENCE

67. In my deliberations I took note of section 188 of the Labour Relations Act 66 of 1995, (as amended) (LRA) in terms of which the respondent bears the onus to prove on a balance of probabilities that the applicant's dismissal was procedurally and substantively fair. I read this section in conjunction with section 2 (1) of Schedule 8 of the CODE OF GOOD PRACTICE: DISMISSAL, in terms of which a dismissal is unfair if it is not effected for a *fair reason* and in accordance with a *fair procedure*. As stated above, I need to decide whether the applicant's dismissal was procedurally and substantively unfair.

68. The next issue I will address is the credibility of the witnesses. Whether a witness should be believed or not, is a vexing question which is not easily answered and neither can it be answered by consulting authorities. However difficult it may be, the courts have observed that the *demeanor* of a witness should be observed to decide whether a witness is truthful. The problem of deciding the truthfulness of a witness on demeanor is aptly summed up in *S v Kelly 1980 (3) SA 301 (A)* when the Court said: *there can be little profit in comparing the demeanor only of one witness with that of another when seeking the truth. In any event …… demeanor is, at best, a tricky horse to ride.* Be that as it may, although demeanor cannot be a substitute for evidence, it can assist to enhance the credibility of oral testimony.

69. In assessing the applicant, I concluded that she is an intelligent, assertive and well spoken person. In my assessment of *only her demeanor*, I could not conclude that she was not telling the truth. However, this finding must be weighed up against the evidence of the respondent's witnesses and in particular Mkhane, Nzama, Mafu and Mthembu, all of whom I found to be honest and truthful witnesses when assessing *only their demeanors*. To this I have to add that they did not falter, notwithstanding having been subjected to aggressive and at times emotional cross examination by McGladdery. Moreover, and this I record with the greatest of respect to each of them; I found them to be the proverbial *salt of the earth* individuals with little or no education who were content to do menial jobs for many years which consisted of washing dirty laundry and slushing laundry soiled with faeces and blood to ensure their livelihood. This unfortunately made them gullible and on their own versions, they believed everything the applicant told them. Their apparent honest naivety when they stood firm after having been accused of being dishonest people because they had paid bribes and their displaced trust in their manager (the applicant), favours a conclusion that they were telling the truth. Our courts have

also held that the importance of assessing only the demeanor of witnesses should not be exaggerated as was alluded to in *S v Mgengwana 1964 (2) SA 149 (C)* when the court referred to the difficulty in observing the demeanor of *witnesses who wear masks* (my emphasis). In this dispute, one needs to take cognisance of the fact that it was the applicant who was required to wear the proverbial mask, which tends to tilt the scale somewhat in favour of the respondent's case. However, as stated in Kelly (supra) *demeanor is, at best, a tricky horse to ride* and this dispute cannot be decided on assessing only the demeanor of the said individuals.

70. Another *tool* arbitrators can use to address the credibility of a witness is cross-examination, the primary purpose of which is to attack the evidence the witness submitted *in chief* and attempt to destroy or reduce the credibility of such witness. Neither of the two cross-examiners succeeded in this primary function and all the witnesses exited the cross examination relatively unscathed in respect of their credibility and the presentation of their respective cases. This leaves me with two mutually destructive versions of which only one can be the truth. In Masilela v Leonard Dingler [Pty] Ltd [2004] 25 ILJ at 554 the court stated the following when it was faced with a similar situation: *This court is faced with two mutually destructive versions only one of which is correct. In deciding which version to accept and which one to reject, I am obliged to consider inter alia the issue on a balance of probabilities. The onus is on the Respondent to prove on a balance of probabilities that its version is the truth. The onus is discharged if the Respondent can show by credible evidence that its version is the more probable and acceptable version.* I have also taken cognizance of the degree of proof required by the civil standard as per Hoffman [The South African Law of Evidence AT 526] wherein it is stated that *it* (the degree of proof) *is easier to express in words than the criminal standard, because it involves a comparative rather than a quantitative test.* They continue to say that on the whole it is not difficult to say that one thing is more probable than another, although it may be impossible to say how much more probable. The civil standard was also formulated by Lord Denning in Miller v Minister of Pensions [1947] ALL ER 327 at 373 as follows: *It must carry with it a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not.*

71. From these cases it is clear that a decision needs to be made on a *balance of probabilities*, which is the third tool that can assist me in my decision making. This is in accordance with section 188 of the

Labour Relations Act 66 of 1995, (as amended) (LRA) in terms of which the respondent bears the onus to prove on a balance of probabilities that the dismissal was procedurally and substantively fair.

72. Before I consider the question of the applicant's guilt in respect of the charges, I need to consider McGladdery's submission that the charges were vague and it hampered the applicant in the preparation of her defence. This submission is rejected because the nature of the charges is not complex and it was obvious throughout the proceedings that she and McGladdery were at all times fully aware of what they were dealing with and they dealt with each charge effectively. Disciplinary enquiries should also be dealt with in a non-legalistic manner and I find that the respondent's alleged failure to disclose certain information did not prejudice the applicant in any significant way.

73. In respect of charge (a) I find that all the respondent's witnesses who testified that they had paid the applicant R200 to do a stock take were truthful witnesses. They did not falter under aggressive cross examination and the suggestion that their versions were improbable is rejected. The fact that they were always alone with the applicant when the money was paid, favours their version for all the obvious reasons, the most important of which is that the applicant needed to ensure that nobody else was present to protect herself. Hence McGladdery's submission that the applicant cannot be found guilty on this charge based on only the *say so* of the witnesses stands to be dismissed, because I have before me much more than only the *say so* of the witnesses. I also find that the probabilities favour the respondent and that it discharged the burden that rested upon it in respect of this charge and I find the applicant was correctly found guilty on charge (a).

74. In respect of charge (b) I cannot exclude the possibility that soap was used in the laundry but more importantly, there was much confusion on whether the applicant *merely ordered* the OMO or whether she indeed *authorised* it and some of the signatures on the requisition forms could not be identified. On the other hand the documentary evidence suggests that she authorized the order. In respect of this charge I find that the probabilities are equal and as per Denning (supra), the respondent's burden is not discharged and I conclude that the applicant was incorrectly found guilty on this charge.

75. In respect of charge (c) I find that there is not sufficient evidence before me to find that the applicant abused her power to instruct employees not to go to work and that she incited other staff members to unprocedural and unlawful conduct. Hence the applicant was incorrectly found guilty on this charge.

76. In respect of charge (d) I find that the probabilities favour the respondent in respect of the R5000 that she took from Doreen and the applicant was correctly found guilty in respect of this amount. With reference to the R20000 the applicant allegedly took from China, I have decided not to consider this charge because no evidence was led in respect thereof at the disciplinary enquiry. I find that the Chairperson erred when he found the applicant guilty on this charge.

77. I intend making short shrift of McGladdery's submissions in respect of the Chairperson's conduct and will commence with the application for his recusal (in particular) because he was seen having coffee with the initiator. The conduct of presiding officers presupposes not only that they must be impartial; they must also and at all times seen to be acting in an unbiased manner and there should be no grounds for even suspecting that their decisions could be influenced by another individual or extraneous circumstances. I have no doubt that the presiding officer should have avoided all contact with the initiator and that he should have acted with more circumspection. I find that the fact that the Chairperson had coffee with the initiator could have created a reasonable apprehension on the applicant's part of bias. This finding particularly holds true in the employment environment where the employer has the added risk of the taint of *institutional bias* to cater for. I find that the Chairperson should have recused himself and his failure to do so, rendered the applicant's dismissal procedurally unfair.

78. I have also considered McGladdery's submissions that the Chairperson breached the Collective Agreement in a number of ways, with particular reference to certain time limits relating to the outcome of the disciplinary enquiry that were not met, and other procedural directives relating to the manner in which the outcome of the enquiry was conveyed to the applicant, that were not complied with. The evidence confirms that the Chairperson indeed breached the Collective Agreement in certain respects and I find that this breach also rendered the applicant's dismissal procedurally unfair. For the sake of completeness I record that I am of the view that the Jacobs case referred to by McGladdery on page 5 of his closing arguments was quoted out of context and that the facts of this dispute are significantly different to those facts.

79. Within the applicant's employment environment and given her responsibilities as a Manager, I find that the seriousness of the offence must be considered in conjunction with the alleged breach of the trust relationship between the parties. Our courts have consistently followed the approach laid out in the

jurisprudence of the Labour Court in Standard Bank SA Limited v CCMA and others [1998] 6 BLLR 622 at paragraphs 38 - 41 where Tip AJ said: *It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee… A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it.* This dictum holds true in respect of the applicant because I find that her dishonest conduct breached the trust relationship and was destructive of it.

80. I have also considered McGladdery's submission that no evidence was led at the disciplinary enquiry that the trust relationship was severed. In this respect, our courts have of late held that in those instances where the offences are of such a serious nature that it can reasonably be concluded that the trust relationship was breached, that it is not necessary for the employer to lead evidence to that effect.

81. I also need to address the applicant's long years' of service. Although it is trite that long service is usually regarded as a compelling mitigating factor, the court in the matter of *Stroud v The Steel Engineering Co Ltd & another (1993) 2 LCD 259 (IC*) upheld the dismissal of an employee, notwithstanding twenty seven years' service as a result of the seriousness of the offence. Stroud was found guilty of a very serious offence (fraud) and the fundamental principle is that long service does not necessarily come to the assistance of an employee when serious offences are committed. I find that the seriousness of offences committed by the applicant outweighs any mitigation which she might have been entitled to as a result of her length of service. I find that the Chairperson correctly found that dismissal was the appropriate sanction, notwithstanding my findings recorded above to the effect that the Chairperson had erred in respect of some of the charges.

82. In the matter of *Sidumo and another v Rustenburg Platinum Mines Limited and another (2007) 12 BLLR 1097 (CC)* the Court held that *an arbitration award will be unreasonable and thus review-able if it is a decision that a reasonable decision maker could not have reached. The applicant would also have to prove that the result lies outside the range of reasonableness*. I find that the same principle can be applied to disciplinary hearings and I cannot conclude that the Chairperson's decision to dismiss the applicant does not fall within the ambit of these guidelines, notwithstanding the aforesaid procedural defects.

83. I am also required to consider whether the applicant should be awarded any compensation for having

been procedurally unfairly dismissed. Having regard to the seriousness of the offences that were committed over a long period of time, I find that the seriousness of the offences nullifies any right the applicant could have had in respect of compensation.

84. I finally need to consider McGladdery's submission that the respondent acted inconsistently when it decided to only charge the applicant and not the other employees who had paid the bribes, which is also as serious offence. I have no evidence before me to confirm that the respondent did not take disciplinary action against at all. In any event, all cases need to be considered on their own merits and with the evidence before me, I am not in a position to make a considered decision on whether or not the respondent had acted inconsistently.

85. For the sake of completeness I record that at the commencement of the proceedings, the respondent advised me that it intended calling no less than 28 witnesses who would testify in respect of charge (a). It was only after I had cautiously suggested that the number of witnesses should be reduced if at all possible, that I was advised that the number of witnesses would be reduced.

AWARD

86. The applicant's dismissal was procedurally unfair and substantively fair.

87. The applicant is not entitled to be paid any compensation for the procedural unfairness.

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G. GERTENBACH

ARBITRATOR