



ARBITRATION AWARD

Panellist/s: Malusi Mbuli
Case No.: PSHS441-11/12
Date of Award: 6-Jun-2012

In the ARBITRATION between:

NEHAWU obo Siswana, L
(Union / Applicant)

and

Department of Social Development - Eastern Cape
(Respondent)

Union/Applicant's representative: _____
Union/Applicant's address: _____

Telephone: _____

Telefax: _____

Respondent's representative: _____
Respondent's address: _____

Telephone: _____

Telefax: _____

HEADNOTE:

Applicant was subjected to a disciplinary enquiry and was dismissed after she was found guilty of fraud, gross dishonesty and failure to comply with or contravenes regulation or legal obligation without permission, wrongfully organised the use of projects finances.

Applicant admitted and pleaded guilty to all these charges. The applicant also does not dispute the procedural fairness of her dismissal.

Applicant's dismissal was procedurally and substantively fair.

DETAILS OF THE HEARING AND REPRESENTATION

1. The matter came before the PHSDSBC for arbitration in terms of section 191(5) (a) (iii) of the Labour Relations Act No 66 of 1995 ("the Act"). It was set down for an arbitration hearing at the Department of Social Development offices in Queenstown.
2. The applicant, Ms. L. H. Siswana, attended the hearing and was represented by Mr. T. Sikiti, an official of the applicants trade union NEHAWU.
3. The respondent, Department of Social Development, was also present at the hearing and was represented by Mr. S. Bunguzana, an official of the respondent.
4. The matter proceeded on the 31st May 2012, and was finalized on the same day but the parties agreed to file their closing arguments on the 04th of June 2012.

ISSUE TO BE DECIDED

5. I am required to determine whether or not the dismissal of the applicant was unfair, and if so, I must determine the appropriate remedy in terms of section 193 and 194 of the Labour Relations Act 66 of 1995, as amended.

BACKGROUND TO THE ISSUE

6. Prior to the dispute the applicant was employed by the respondent Department of Social Development and was later dismissed by the respondent for misconduct in that she committed fraud, forgery and contravened the respondent's regulations.

7. The applicant does not dispute the allegations leveled against her but argues that the sanction of a dismissal that was imposed on her was too harsh and therefore argues that her dismissal was substantively unfair. The applicant does not dispute the procedural fairness of her dismissal.
8. He referred a dispute to the PHSDSBC in terms of section 191 (5) (a) (iii) of the Labour Relations Act 66 of 1995 as amended, alleging that the respondent has unfairly dismissed her.

SURVEY OF EVIDENCE

9. The parties agreed that the facts in this dispute were common because the applicant admitted all the allegations leveled against her and therefore the parties did not lead any evidence in this arbitration hearing but agreed to file their arguments not later than the 04th of June 2012. It then follows that the arbitration hearing was not recorded and the parties arguments will form the record of this hearing.

10. Facts that are common, admissions and mitigation :

- During the period in question the applicant deliberately defrauded the Department of Social Development and collaborated with the service provider to the amount of R51 000,00 for the container that was not delivered.
- Applicant forged the signature of her supervisor in order to access the money that belongs to the project and thereby committed gross dishonesty. The applicant also cashed cheques of the Department thereby ignoring the Departmental rules that were known to her.
- Applicant was a first time transgressor and by pleading guilty she showed that she was remorseful for her actions.

11. Issues that are in dispute:

- Whether dismissal was appropriate in the circumstances.
- Whether the applicants dismissal was fair or not.

ANALYSIS OF EVIDENCE AND ARGUMENT

12. Section 185 of the Act provides:-

‘Every employee has the right not to be:

(a) Unfairly dismissed.

13. The Act recognizes three grounds for termination of the employment relationship between parties. These grounds are the conduct of the employee, the capacity of the employee and the operational requirements of the employer’s business. The employer has the onus to prove that the dismissal of the applicant was procedurally and substantively fair.

14. In this dispute the applicant does not dispute the procedural fairness of her dismissal and the applicants dismissal was therefore procedurally fair.

15. With regard to the substantive issue, the applicant was charged and found guilty of fraud, forgery and dishonesty in that she defrauded and corroborated with the service provider to the amount of R51 000,00 for the container that was not delivered, forged the signature of her supervisor in order to access the the money that belongs to the project and ignored the rule against cashing of cheques.

16. Such transgressions are regarded as serious acts of misconduct by the employer as regulated by the Public Service Disciplinary Code. The applicant admit the allegations leveled against her but argues that her dismissal was substantively unfair because the sanction that was imposed was too harsh in the circumstances.

17. It is not disputed that the type of the transgressions dealt with in this dispute are serious acts of misconduct and therefore punishable by a dismissal for the first transgression. As stated above the applicant admitted all the allegations leveled against her.

18. The question that this arbitration therefore has to answer is whether the sanction of a dismissal imposed on the employee was too harsh in the circumstances. In relation to this case the applicant has no defense except to argue that the sanction that was imposed on her was too harsh in the circumstances.

19. The applicant in the first place was not supposed to cash the monies of the project herself because there is a rule against cashing of cheques and that rule is there for a reason. What made the applicants conduct worse and unacceptable was that she went out of her on way to forge the signature of her supervisor in order to access Departmental funds that were not in her custody.

20. This conduct is definitely against any good and sound financial practices as that money cannot be properly accounted for and it does not require a person to be an accountant to know that this practice cannot be an acceptable practice.
21. This is the reason why the applicant is guilty of fraud, forgery and dishonesty. She admitted to committing fraud, forgery and that she was dishonest in the performance of her duties. The applicants conduct does not just amount to dishonesty but gross dishonesty because she had all the necessary intention to defraud the Department. The money paid by Social Development to the project is for a specific purpose and is not intended to be used by the applicant as if it was her money. The applicant cannot be trusted by the employer and all her mitigating circumstances are outweighed by the aggravating circumstances.
22. The applicants failure to follow the internal financial procedures that are aimed at safe guarding the money of the project amount to irregular expenditure on the part of the applicant in terms of the Public Finance Management Act. The applicant knew that the cashing of the Departments money alone was prohibited by the institution and in doing that had intentions of defrauding the employer and acted in a dishonest and a fraudulent manner at least on a balance of probabilities.
23. Any person who is entrusted with the responsibility of handling any monies for any institution should account for any monies that are cashed or paid out of the Departments account and failure to do so creates a presumption that such a person has used the money that she has not accounted for, for her own benefit. In fact this fact is not denied by the applicant.
24. The applicant's version that the sanction imposed on her was too harsh in the circumstances is improbable and cannot be accepted when considered against the transgressions that she committed. The employer's version is probable and that the sanction of a dismissal was appropriate when considering the seriousness of the transgressions. In terms of the Public Service Disciplinary Code the types of transgressions for which the applicant has been found guilty are punishable by a dismissal and the employer has always been consistent in applying discipline and imposing a dismissal in respect of these allegations.
25. Furthermore in coming to the conclusion that the applicants dismissal was fair I have to look at the consequences of allowing the employees in positions of responsibility to do what the applicant did, the position that the applicant occupied, the example that she portrays to other employees and the general interest of the employer as a public institution.

26. I am of the firm opinion that the applicant committed the transgressions for which she has been charged and admitted to them and that the rationale that I have used in coming to this conclusion is one that qualifies when we talk about reasonableness and weighing the interests of both parties as directed in the Constitutional Court in its decision in **NEHAWU v/s University of Cape Tow (2003) (CC)** where the Court held that the arbitrator is expected to have regard to the interest of both parties in coming to a conclusion whether the conduct of the employer was fair or not.
27. In this dispute the interests of the employer and aggravating circumstances far outweigh those of the applicant and her mitigating circumstances. The relationship between the employer and employee has broken down even though the applicant has admitted to the allegations showing some form of remorse.
28. The employer's version insofar as it relates to substance is accepted and that of the applicant is rejected and this means that the employer has managed to discharge its onus in terms of section 192 (2) of the Act. Section 188 of the Act requires that a dismissal must not only be for a fair reason, but also effected in accordance with a fair procedure. I accept the undisputed employers version that they have followed a fair procedure and that the applicants dismissal was also procedurally fair. This means that the dismissal of the applicant was procedurally and substantively fair.
29. I therefore make the following award.

AWARD

30. The dismissal of the applicant, L.H. Siswana, by the employer, Department of Social Development – Eastern Cape, was procedurally and substantively fair.
31. The applicant is therefore not entitled to any relief.



Signature: _____

Commissioner: **Malusi Mbuli** _____