



ARBITRATION AWARD

Case Number: PSHS460-11/12

Panelists: Malusi Mbuli

Date of Award: 23-05-2012

In the **ARBITRATION** between

PSA obo Priscilla Grootboom

(Applicant)

And

Department of Social Development – Eastern Cape

(Respondent)

HEADNOTE:

Applicant was subjected to a disciplinary enquiry and was dismissed after she was found guilty of fraud and dishonesty.

Applicant admitted that she cashed the cheques but she paid them to the service providers and as stipends to volunteers. The applicant 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 Humansdorp.
2. The applicant, Mrs. Priscilla Grootboom, attended the hearing and was represented by Adv. B. Dyke, a legal representative appointed by the applicant.
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 15th May 2012, and was finalized on the same day but the parties agreed to file their closing arguments on the 18th of May 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 as an Assistant Director at the Social Development offices in Humansdorp and was later dismissed by the respondent for misconduct in that she was dishonest and defrauded the Department of Social Development.
7. The applicant dispute the allegations leveled against her and 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 and did not lead any evidence in this arbitration hearing but agreed on common cause facts, mitigating factors and admissions that will be summarized below. It then follows that the arbitration hearing was not recorded and the summary of the common cause facts as signed by the parties and their arguments will form the record of this hearing.

10. Facts that are common, admissions and mitigation :

—That until the date of dismissal the applicant was employed by the Department of Social Development as an Assistant Director at the departments Social Welfare Services Component until 25th July 2011.

- During the period 2007 to 2009 the applicant cashed cheques of the Sibanye Family Resource Centre which are subject of this arbitration, being project money funded by the respondent Department of Social Development.
- The applicant utilized the cheques to pay stipends to volunteers and service providers in Humansdorp and Jobertina in terms of the business plan for services delivered by the volunteers on a monthly basis.
- All cash that was paid out to volunteers for Humansdorp and Jobertina for the period in question was paid in cash and was receipted by each volunteer on a monthly basis and payments to service providers are supported as per the documents set out in the hearing.
- All financial documentation and receipts were handed over by the applicant to Mr. Mayekiso on the 14th of September 2010 and that she cashed the cheques on behalf of the Chairperson and Treasurer of the project because they were always not available to cash cheques at the last day of each month and that there were no complaints from volunteers that they were not paid.
- According to bank policies, two members of the entity need to cash cheques but in these instances the cheques were cashed by the applicant alone but there are no complaints over the three years from volunteers that they did not receive their stipends on a monthly basis nor has an audit established otherwise.

- No policy existed until 2009. From 2010 financial year claim forms had to be processed when expenditure occurred. Claims in 2007 to 2009 were approved by respondents Provincial Office before expenditure and approval was always given by fax or telephonically by provincial staff per Mrs Hlanganyana and Mrs. Z. Mtetho.
- The applicant is a breadwinner at home and never benefited from any breach nor did her family and no fraud was committed. There was no monitoring, supervision, guidance or support in respect of pilot project and the applicant did her best in the circumstances.
- She raised her concerns and challenges in writing and this was never addressed and that there were no policies available within the respondent for operating a legal entity or NPO. The Project Manager was never appointed officially as an accounting officer and the Sibanye Center operated as an autonomous entity and decisions were made for themselves and by themselves.
- All services were rendered for cheque signed and authorized and the treasurer did not have the time to drive up and down to other members on their own expenditure to sign cheques and therefore it was given to me to assist in this regard.
- The department allowed the situation to continue for a number of years without complaint or remedial steps being taken.

11. Issues that are in dispute:

- Whether the applicant committed fraud and whether she was dishonest in the performance of her duties.
- 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 and dishonesty in that she cashed the cheques of Sibanye Family Resource Center with intent to defraud the Center of their project money which is funded by the Social Development which caused actual prejudice or which has potential prejudice to the Center, that she deprived the Center of the use and possession by also keeping their cheque book and that she without authority from the Department processed payments on behalf of Sibanye Center which has become irregular expenditure in terms of the Public Finance Management Act.
16. Such transgressions are regarded as serious acts of misconduct by the employer as regulated by the Public Service Disciplinary Code. The applicant denies the allegations leveled against her and argues that her dismissal was substantively unfair.
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. It is also not disputed that the applicant cashed the money of the Sibanye Family Trust Center without the other signatories to the cheques even though she argues that she was authorized and that the Chairperson and the Treasurer were not available. It is disputed that the applicant had intentions of permanently depriving the Center of their cheque book and also disputed that she had authority to process such payments.
18. The question that this arbitration therefore has to answer is whether the employee broke the rule that existed and was prohibited by the employer. In relation to this case the applicants defense is that she cashed the money of the project because the chairperson and treasurer were always not available to sign, was authorized to do so by the committee and that the project had to run. She also says that the money that she cashed was used to pay stipends for volunteers and also to pay service providers and that there was no loss or prejudice that was suffered by the employer. She averred that no complaints were received from the people who were supposed to be paid. The applicants representative argues that the applicant did not commit fraud because her actions were authorized, had no intention to defraud the department and the project, there was no misrepresentation and that there was no prejudice or potential prejudice to the employer.

19. The applicant in the first place was not supposed to cash the monies of the project herself because there are authorized signatories to do that on behalf of the Project and she knew that she was not supposed to cash the Projects money herself. What made the applicants conduct worse and unacceptable was that these are not only cheques paid out to the service providers or to volunteers but cash drawn by the applicant and allegedly paid to the recipients.
20. This conduct is defenatelly against any good and sound financial practices as that money cannot be properly accounted for and it does not required a person to be an accountant to know that this practice cannot be an acceptable practice. The applicant went to the bank and misrepresented the project as if she is the only signatory to dispose of the funds of the project and whether she was authorized to draw that money or not even though I do not accept this argument is not entitled to cash the money of the project.
21. This is the reason why the applicant is guilty of fraud. She intentionally and knowingly misrepresented herself to the bank, that she is the sole custodian of the projects money and can cash it and she indeed cashed the money. I also do not accept the argument that there was no prejudice cause to the department because the applicant could not properly account for the money that she took from the project. It is also interesting to note that for a number of years the bank allowed a person (applicant) to cash money that does not belong to her. I wish this matter has been fully investigated by the bank as well.
22. After the money was cashed by the applicant it is immaterial whether she paid it to the correct recipient or not because the applicant had nothing to do with the custody of the Projects money and she misrepresented herself to the bank that it was her money and really I cannot understand how the bank has paid out this money to a stranger. The argument that she was trying to assist the project to run is unacceptable because if the applicant had such good intentions she was supposed to seek necessary authority and become the sole signatory of the projects funds. The fact that the volunteers and service providers did not complain does not exhanorates the applicant from the fraud that she committed.
23. The applicants conduct does not just amount to dishonesty but gross dishonesty because this happened repeatedly and that it is a lot of money that she cashed. 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.

24. 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 and the applicant is guilty of this charge as well.
25. The applicant knew that the cashing of the projects 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. She also admitted that she received the amount from the project and that she paid it out as stipends to volunteers and to the service providers but there was no proof or evidence that the money was all paid to the service providers.
26. Even though in a dismissal dispute like this one the employer bears onus, in a situation where the applicant uses projects money, she who has used such money must account for it and the worst part is that the applicant has not shown any remorse for what she has done but instead justifies her actions.
27. The applicant was until her dismissal employed as an Assistant Manager in Social Welfare Services Component of the employer at Humansdorp and as a coordinator of the project knew or is expected to have known that cashing of the project money was prohibited by the Department and it was even worse when that money is not accounted for.
28. 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 projects account and failure to do so creates a presumption that such a person has used the money that she has not been accounted for for her own benefit.
29. The applicant's version is improbable when considered against the facts that are presented. In concluding whether the applicant's dismissal was fair or not I have considered the negative effect that this transgression has at the workplace and the broader community, 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.
30. I am of the firm opinion that the applicant committed the transgressions for which she has been charged 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 Town (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.

31. In this dispute the interests of the employer far outweigh those of the applicant. The applicant also tried to justify her wrongdoing throughout the processes leading up to and including this arbitration hearing and therefore cannot be trusted. The relationship between the employer and employee has broken down.
32. 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.
33. I therefore make the following award.

AWARD

34. The dismissal of the applicant, Priscilla Grootboom, by the employer, Department of Social Development – Eastern Cape, was procedurally and substantively fair.
35. The applicant is therefore not entitled to any relief.



Signature: _____

Commissioner: **Malusi Mbali**