



ARBITRATION AWARD

Arbitrator: **Mr. Anand Dorasamy**
Case No.: **PSHS 590-11/12**
Date of Award: **25 MAY 2012**

In the ARBITRATION between:

NEHAWU O B O NGUBANE M B

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative

: MR M V HADEBE

Union/Applicant's address

: 224 7 MURCHISON STREET

LADYSMITH

3370

Telephone : 036 631 2599

Telefax : 036 631 2600

Respondent's representative

: MR M KHUMALO

Respondent's address

: PRIVATE BAG X 9928

LADYSMITH

3370

Telephone : 036 637 2111

Telefax : 036 631 0061

INTERPRETER

: Ms P M Hunsley

DETAILS OF HEARING AND REPRESENTATION

1. Mr M V Hadebe represented the applicant and Mr M Khumalo represented the respondent. The interpreter was Ms P M Hunsley.

The arbitration proceedings commenced at 10h00 on the 25 April 2012 at the Ladysmith.

After reverting to S 138 (1) of the LRA the parties agreed as follows:

- 1.1. No oral evidence would be led.
- 1.2 The respondent /employer will serve its Heads of Arguments on the on commissioner and applicant on or before 3 May 2012
- 1.3. The applicant/ employee will serve its Heads of Arguments on the commissioner and respondent on or before 10 May 2012
- 1.4 The respondent will serve its answering Heads of Arguments on the commissioner and applicant on or before 17 May 2012.
- 1.5 The award will be rendered thereafter.

ISSUE TO BE DECIDED

2. The issue to be decided was whether the dismissal of the applicant was procedurally and substantively fair. Should I find in favour of the applicant I am to determine the appropriate relief.

BACKGROUND TO THE ISSUE

3. The applicant faced two charges and he was found guilty and dismissed. The charges were as follows:

CHARGE ONE

It is alleged that on the 6th July 2010 at or near Ladysmith Provincial Hospital you attempted to steal the following Government property for own consumption: mince meat to the weight of 1.1 Kg and a roll of cling wrap when you tried to leave the Hospital premises in a white Mazda Rustler LDV registration number NPS 15055.

CHARGE TWO

It is alleged that on the 6th July 2010 at or near Ladysmith Provincial Hospital you were caught with unauthorised Government property namely 1.1 Kg mince meat and a roll of cling wrap when you tried to leave the Hospital premises in a white Mazda Rustler LDV registration number NPS 15055.

4. The applicant appealed the decision but the sanction was upheld.

He challenges the procedural and substantive aspects of his dismissal and seeks that his dismissal be reversed and the disciplinary enquiry should be started all over again and be presided upon by a different chairperson.

5. The respondent contends that the dismissal was procedurally and substantively fair and prays for the dismissal to be confirmed.

SURVEY OF EVIDENCE AND ARGUMENT

The salient aspects of the party's submissions are recorded below:

RESPONDENT'S SUBMISSION

6. These are the respondent's arguments against an application to have the dismissal of the applicant declared procedurally and substantively unfair.
7. The applicant is one Mr. M.B. Ngubane who was the Food Service Supervisor stationed at Ladysmith Hospital. He was charged with the unlawful possession of state property namely; 1.1 kg of cooked mincemeat and a roll of cling wrap and he tried to leave the hospital premises in a white Mazda Rustler with registration number NPS 15055.
8. It would appear that the charge sheet is a very serious matter taking into account the fact that the applicant was the supervisor at the time of the commission of the offence.
9. The applicant was charged with misconduct and was given a notice to appear at enquiry and was given a chance to plead either guilty or not guilty. He pleaded not guilty. All his rights were explained to him. Mr. Ngubane's representative raised a preliminary point on the basis of among other reason; the fact the case has been withdrawn in the criminal court of law. He made an application before the presiding officer that the Department must withdraw the charges. The reasons advanced by the applicant's representative are to all intents and purposes insufficient for the charges to be withdrawn. It is submitted that this will only have the effect of a delay but not nullification of the charges. The incident took place in July 2010 and the applicant was charged with misconduct on 09th December 2010. The delay is accounted for by the fact that witnesses were more often than not absent from work due to indisposition (sick leave). This according to me does not necessarily give rise to a fatal travesty of justice. It is submitted that the procedure was well observed because even after the applicant was dismissed he was given a right to appeal which he exercised but was unsuccessful.
10. It is therefore submitted that there was no considerable or remarkable procedural unfairness. The delay which occurred in dealing with this matter is negligible and therefore cannot be held against the respondent.
11. On substantive fairness, evidence led against the applicant was elicited from three credible witnesses, Mr. Mdletshe, Mr Le Roux and Mr. Van Zyl. I will not repeat the evidence but it is worth mentioning the fact that it was not argued by the applicant that security guards Mr. Le Roux and Mr. Van Zyl had an axe to grind with him. The applicant's evidence was just a bare denial of the allegations that were leveled

against him. There is no plausible explanation the container with 1.1kg of mincemeat was concealed under the driver's seat.

There is no further explanation as why the cling wrap was placed under a jacket on the driver's seat.

These witnesses told the presiding officer that the applicant did not make a statement with them

12. The applicant's version is that he was not asked for the explanation as to how and why the items were in his vehicle by the security guards. The evidence on the part of the department was that he was asked to write a statement which refused. The applicant did not refute that piece of evidence. The applicant was intent on taking these items outside the premises of the respondent.

He says it was his lunch but there is no reason why it was concealed under the car seat. He stated that it is known that he has a catering company therefore the cling wrap was also concealed under the jacket on the driver's seat. In the absence of such an explanation resulted in the presiding officer drawing the only inference that the applicant was intent on stealing the items.

13. It is submitted that the presiding officer was justified in reaching the conclusion of finding the applicant guilty of the charges as there was other inference which be drawn in the circumstances. The applicant's conduct was indicative of the intent to evade the security personnel. The applicant submitted the appeal's authority that he was not aware of the fact that he should declare his lunch, but by the very same vein it is surprising that the applicant found it also proper to hide his lunch under the driver's seat on his way out. The applicant also testified in the disciplinary hearing that he at one stage declared some goods for his private business, and he was required to produce receipts, this on its own is indicative of the fact he has all the reasons not to declare even the goods he legitimately own let alone those which were illegally removed from the premises of the respondent. It is further submitted that one does not declare goods in his way in if there is nothing to declare. The applicant works in the kitchen he therefore has to be aware that the food he is carrying may be the food which is also found in the hospital kitchen, therefore he has to declare anything edible because he is working with same.

14. The applicant testified that he was charged because of the grievance he lodged, the details of which we are not favoured with. If the applicant did believe that the charges were just another way of victimizing him because of the grievance he lodged, one is let perplexed with the reason why the applicant did not approach the court of law to halt the victimization. The applicant also stated that Mr. Mdletshe had something against him; he did not provide the details of the same. He failed to even tell the presiding officer of the existence of any bad relations between him and Mr. Mdletshe. Therefore it is submitted that the applicant failed to give a plausible account of his actions on the day in question, which in turn resulted in his conviction and sanction.

15. The sanction of dismissal is appropriate as the applicant was the supervisor and therefore had to be exemplary in his conduct which he failed. The applicant's conduct has an element of dishonesty in it as it involves unlawfully taking from the hand that fed him. He conducted himself in a manner that did not

benefit the leader and a supervisor. If the supervisor can steal from the employer he is representing one can imagine the level of self-help on the state property in that office.

16. It is on the strength of the above submission that the respondent prays that the applicant's application be dismissed.

APPLICANT'S SUBMISSION

17. These are the Applicant's submission in support of the Application to have the dismissal declared that it has been procedurally and substantively unfair.
18. The Applicant is Mr M.B. Ngubane who was the Food Service Supervisor stationed at Ladysmith Hospital. He was charged with unlawful possession of state property namely: 1.1 kg of cooked mincemeat and the roll of cling wrap.
19. The applicant argued and disputed the fact that the mincemeat that was found in his possession belonged to the hospital and the applicant further disputed that the mincemeat was 1.1 kg because the applicant did not observe the scaling of the mincemeat, he was stopped by the security officers and they searched him and he was then arrested.
20. It is further argued that the mincemeat belonged to the applicant because it was in the four corner lunch box which is divided into two sections, the mincemeat was on the other section of the lunch box, of which 1.1 kg was not going to fit in that section. Over and above that it is argued that the non appearance of the applicant in observing the scaling of the mincemeat raises a big problem because the applicant does not know whether the mincemeat's weight was including the lunch box's weight or not but the respondent failed to prove that.
21. The applicant further argued that as he understands that the mincemeat is perishable but the applicant's mincemeat was in his lunch box, the respondent failed to keep that mince in the lunch box and produce it in the Disciplinary Hearing as evidence and the lunch box belonged to the applicant and it was not produced as evidence and the respondent failed to bring the lunch box back to the applicant as it belonged to him.
22. The respondent failed to prove that if the employees entered the respondent's premises with their lunch boxes they must declare them.
23. It is further argued that the food services section is installed with surveillance cameras which were working at all times. The footage should have been obtained and stored so that they could be used as evidence but the respondent failed to do so.
24. The issue of the mince, whether it was under the seat or on top of the seat, firstly the applicant has to describe the type of the vehicle, was it a bakkie or white Mazda Bakkie with one long seat which covers the driver's section, therefore the meat was on top of the seat, the security officers pulled the seat in

order to search behind the seat, then the lunch box with mincemeat fell down under the seat and the respondent failed to describe the type of the seat.

25. The issue of cling wrap, the applicant's submission is that it was a half cling wrap which belonged to him which was kept behind the seat of his bakkie. The applicant has declared his business to the employer of which was not disputed by the respondent, therefore the applicant's submission is that the respondent failed to bring the cling wrap as evidence in the Disciplinary Hearing and the respondent also failed to prove whether the wrap belonged to the Department or not by failing to describe the cling wrap found with the applicant according to the sizes.
26. The respondent failed to describe whether on the 26th July 2010, the day of which the applicant was found with the possession of mincemeat, whether mincemeat was the menu for that day or not.
27. Due to the facts that has been presented above and a huge number of people who are unemployed in our country, I request that the respondent's submission be dismissed.

SURVEY OF EVIDENCE AND ARGUMENT

28. The applicant was dismissed and the matter was set down for arbitration.
29. The applicant was dismissed and seeks a finding that his dismissal was unfair. The respondent challenges the contention and seeks a decision that the dismissal be found to be fair and that the matter be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

30. This matter was cited as an unfair dismissal dispute in terms of Section 191 of the LRA and the issue to be decided was whether the dismissal of the applicant was procedurally and substantively fair.

THE PROBABILITIES

31. The charges relate to two items that of 1.1 Kg of mince meat and cling wrap found in the applicant's motor vehicle. The respondent contended that the items belonged to the government (the employer). The applicant contends that the items belong to him and that he ought not to have been disciplined and dismissed.
32. The applicant was stopped on his way out of the respondent's premises and the items were found concealed in his motor vehicle. When he was approached by the security officers to render an explanation for the items found in his motor vehicle he opted not to clear the issue. In doing so he allowed the security officers to conclude that there was no reasonable explanation from the applicant in respect of the items and therefore they detained him and pursued criminal charges against him.

It is a common occurrence that when employees enter the work premises they declare goods in their possession, so that when they leave the premises they could justify their claim that the goods belong to them.

There is no evidence tendered by the applicant that the goods in question were declared upon him entering the work premises. As a consequence thereof it may be assumed that the goods belonged to the respondent and were not lawfully in the applicant's possession.

33. Therefore I am inclined to prefer the version of the respondent over that of the applicant.

THE RELIABILITY OF THE WITNESSES

There was no oral testimony to make a finding in this regard.

THE ALLEGATION THAT THE APPLICANT'S DISMISSAL WAS PROCEDURALLY UNFAIR

34. I have taken cognizance of the decision in Sweeney/ Transcash [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitutes a rehearing *de novo* on the merits. The award must accordingly be based on evidence led at the arbitration, not on the record of the disciplinary hearing.

Further an arbitration is a new hearing which means that the evidence concerning the reason for the dismissal is heard afresh before the arbitrator. The arbitrator must determine whether the dismissal is fair in the light of the evidence admitted at the arbitration.

35. The arbitrator is not merely reviewing the evidence considered by the employer when it decided to dismiss, to determine whether the employer acted fairly. This does not prevent the arbitrator from referring to any enquiry record in so far as it is admitted as evidence in the arbitration.
36. The Code of Good Practice: Dismissal promotes progressive discipline, it distinguishes between single acts of misconduct that may justify the sanction of dismissal and those that may do so cumulatively. The Code identifies gross dishonesty, wilful damage to property, endangering the safety of others, assault and gross insubordination as examples of what may constitute serious misconduct that may justify dismissal as a result of a single contravention.
37. In this matter it is clear from the documents submitted by the respondent and the evidence tendered that the following may be reasonably gleaned.

The applicant was given a notice to attend a disciplinary hearing, attended the hearing, was found guilty and received his letter of dismissal and then appealed the decision but the sanction was upheld. He challenges the procedural and substantive aspects of the dismissal.

38. In terms of the guidance provided in the Avril Elizabeth Home for the Mentally Handicapped v CCMA as per A van Niekerk AJ the following is of importance:

Where there is no established procedure in the work place the standard required is the one referred to

in the Code. This requires no more than the following:

- (a) The conduct of an investigation;
- (b) Notification to the employee of any allegations that may flow from that investigation; and
- (c) An opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee; and
- (d) Communication of the decision taken including the reason for the dismissal; and
- (e) A reminder of rights to refer a dispute to the CCMA or to a bargaining council or to dispute resolution procedures established in terms of a collective agreement.

39. In deciding whether a procedure was fair commissioners should not adopt an overly technical approach and should bear in mind that the purpose of the recommended procedure is to provide an opportunity for dialogue and reflection regarding whether a fair reason for dismissal or some other sanction exists.

40. As a consequence of the above I do believe that the employer had miss-conducted itself in respect of the procedural aspect of the dismissal. In any event the applicant was a senior employee and ought to be aware of the respondent's disciplinary policy and practice.

The applicant was afforded the standard required in the Code of Good Practice. Therefore I determine that the procedural aspect of the dismissal to be fair.

THE ALLEGATIONS AGAINST THE APPLICANT:

41. The parties have raised various technical aspects arising from the disciplinary hearing of the applicant and I record that I have taken note of them and record the following for completeness and in determining this matter:

Section 138 General provisions for arbitration proceedings

(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(7) Within 14 days of the conclusion of the arbitration proceedings-

(a) the commissioner must issue an arbitration award with brief reasons, signed by the commissioner.

(10) The commissioner may make an order for the payment of costs according the requirements of law and fairness.....

42. The applicant was charged with two counts of misconduct and found guilty.

43. The question arises whether the above mentioned infractions/ misconduct are such that it warrants dismissal.

44. It is the prerogative of the employer to set standards that the employee is expected to render service.

45. The applicant had the option of rendering an explanation at the time of the incident to explain his right to ownership of the goods in question. The fact that he worked in a food related work station it would be reasonable to infer that he appropriated the goods with the intention of depriving the employer/owner of the goods.
46. As a consequence thereof I am inclined to prefer the version of the respondent over that of the applicant.
47. As a consequence of the above it is established that the applicant had been correctly found guilty of the charges.

The Code of Good Practice guides on fair reasons for Dismissal for Misconduct

(4) Generally, it is not appropriate to dismiss an employee for first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Example of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.

THE APPROPRIATENESS OF THE SANCTION

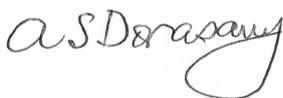
48. In respect of the reason for the dismissal, this is best left to the discretion of the respondent and in this case, it was justified in taking action against the applicant because his improper conduct was not acceptable given the fact the fact that he was a senior employee who had to set a good example to his subordinates.
49. I determine that the sanction imposed by the respondent to be appropriate and find no reason to interfere with the sanction of dismissal.

Therefore I find that the reason for the dismissal was fair.

AWARD

50. I find that the applicants' dismissal was procedurally and substantively fair.
51. The dismissal is confirmed.
52. The applicant's application is dismissed and he is not entitled to any relief.
53. This file may be closed.

DONE AND SIGNED IN DURBAN ON THIS 25 DAY OF MAY 2012.



Arbitrator: Anand Dorasamy