



ARBITRATION AWARD

Case No: **PSHS25-20/21**

Commissioner: **Tanya Roberts-Kruger**

Date of award: **23 July 2020**

In the matter between:

PSA obo of Dorah Mashile and 1 other

(Union/ Applicant)

and

Department of Health- Gauteng

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an Arbitration hearing in terms of a dismissal relating to misconduct, referred in terms of the section 191 (5) (a) of the Labour Relations Act 66 of 1995, as amended (the LRA). The Arbitration was heard on 19 June 2020 and concluded on 20 July 2020 at the SG Lourens Nursing College, 3rd Floor, Dzuloni Meeting room, Cnr Theodore Hove and Soutpansberg Street, Pretoria under the auspices of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC).
2. The applicants, Dorah Mashile and Minkie Teka, were present and represented by Mr. San Vermeulen, a union official of PSA. The Respondent was present and represented by Mr. Zama Shange an Employee Relations Manager employed by the respondent.

3. The proceedings were held in English and were digitally recorded.

PRELIMINARY ISSUES

4. The Respondent raised a preliminary issue in that the second Applicant, Minkie Teka was not cited on the notice of set down and therefore not part of the process. In addition, the condonation ruling that was made with regards to the late referral only dealt with the first Applicant, Ms. Dorah Mashile.
5. The Applicants representative submitted that the name of the second Applicant was captured on the 7.11 referral and stated that it was an oversight on behalf of the Council that the second Applicant was not cited. Both Applicant approached the Union at the same time after both of them being dismissed for the same or similar offence.
6. **Ruling: Based on the information provided the second Applicant was added to the 7.11 from referred by PSA on the date of the referral. The second Applicant therefore had an intention to be part of the process from the onset. The merits of the case is the same for both parties, therefor in terms of rule 35, the second Applicant is joined to the proceeding.**
7. The Respondent raised a second preliminary point in the form of a formal recusal of the Commissioner on the basis of reasonable apprehension that the Commissioner might not be objective in the evaluation of the merits. The Respondent indicated that originally it was not against the Commissioner dealing with the matter after her disclosure on 19 June 2020 that she worked with Mr Vermeulen as colleagues at the CCMA, but that it had subsequently reconsidered and on the basis above made a formal application for her recusal.
8. The Applicants representative indicated that the Respondent on 19 June 2020 did not object to the Commissioner hearing the matter after her disclosure. It was stated that the Respondent had an opportunity to raise the matter of recusal prior to the commencement of the case and it had failed to do so.

9. **Ruling:** Based on the application and the response by the Applicants representative the Commissioner denied the application for recusal on the following grounds. The disclosure was made on 19 June 2020 and was not objected to by either party. The Respondent had almost a month to approach the Council to make an application for the recusal of the Commissioner before 20 July 2020, it had failed to do so. The Commissioner had taken an oath and swore to deal with all matters with the highest level of integrity and the interest of justice. Further as per the *South African Commercial Catering and Allied Workers Union and Others v I & J 2000 (8) BCLR 866 (CC)* where it was held that the test of recusal rests on the one hand on the presumption that judicial officers are impartial in adjudicating disputes and on the other that the applicant for recusal bears the onus of rebutting the presumption of judicial impartiality. This was not done.
10. A third preliminary issue was raised by the Applicant party in that the discussion regarding inconsistency the Applicants requested disciplinary charges sheets and outcome reports for a number of employees and to date this information had not been supplied. The Applicant requested the Commissioner to sub-poena the Respondent in providing the documentation as requested.
11. The Respondent responded to say that there is no dispute that there were inconsistent sanctions in some of the cases as stated by the Applicant and stated that they will prove that the inconsistency is justified and further he stated that in order for the Respondent to hand over the documentation it would first have to consider the confidential nature of the documents as well as the availability of such documents.
12. **Ruling:** Considering the above and the fact that the Respondent does not dispute the inconsistency, as well as the onus being on the Respondent to prove the fairness regarding the dismissals. Also that the prescribed process regarding the sub-poena of information was not followed by the Applicant party, I ruled that the process would continue without the request for information.

ISSUE TO BE DECIDED

13. The matter was referred in terms of section 191 (5) (a) (iii) of the LRA where the reason for the applicants' dispute are recorded as an alleged unfair dismissal for misconduct.
14. I am to determine whether the applicants' dismissals were procedurally and substantively fair.
15. Procedurally it is disputed that the applicants were charged but that the hearing did not take place within the 10-day period as per Resolution 1 of 2003 and the appeal was not handled within 30 days as per the same resolution.
16. Substantively it was disputed that Respondent was inconsistent with its application and that the sanction of dismissal was too harsh.

COMMON CAUSE ISSUES

17. The Applicant, Dorah Mashile was employed as a Food Services Aid at Steve Biko hospital since 1 June 2015. Her gross salary at the time of her dismissal was R10 491.02. The Applicant attended a disciplinary hearing, received the outcome on 17 August 2018, she appealed the dismissal. The outcome of the appeal was received on 31 March 2020.
18. The Applicant, Minkie Teka was employed as a was employed as a Food Services Aid at Steve Biko hospital since 1 September 2013. Her gross salary at the time of her dismissal was R10 766.38. The Applicant attended a disciplinary hearing, received the outcome on 17 August 2018, she appealed the dismissal. The outcome of the appeal was received on 31 March 2020.
19. It is further common cause that the Applicants were charged with theft and pleaded guilty at the hearing.

SURVEY OF EVIDENCE AND ARGUMENTS

20. The Applicant submitted bundles of documents which was marked "A". The Respondent submitted two bundles of documents that were marked "R1" and "R2". Once both parties confirmed knowledge of the documentation it was accepted into evidence.

RESPONDENT'S CASE

First Witness – Elize Dreyer

21. The witness testified under oath that she is employed as an Assistant Director, Food Services at Steve Biko Hospital. She knows the Applicants as they worked in her department as Food Service Aids, she stated that they were both dismissed for being guilty of theft.

22. She stated that the rate of theft in the hospital is high and specifically in the Food service Unit. It escalated since 2017 as a result staff were addressed on numerous occasions on the issue, they were addressed through meetings and training sessions, addressed by the Labour Relations Unit and more security cameras were installed to combat the theft of food. In addition, a permanent security guard were placed in the unit that searched staff when they arrived and left for the day.

23. The witness stated that the implication of the high rate of theft in the unit was that a patient's right to a proper diet is being taken from them. A further implication would be that if a patient does not get a balanced diet it will take longer to return to good health and prolong their stay. In addition, a patient's medicine cannot be administered if he/she has not eating. A further implication is that the budget of the unit will be affected through an increase in expenditure.

24. The witness led evidence to prove that the Labour Relations officer was invited to address the staff on the issue of theft, this address took place on 13 November 2019. The attendance register indicated that the applicant, Ms Dorah Mashile attended the meeting on this day.

25. Another meeting on 11 July 2018 addressed the issue of theft and on this date the applicant, Ms. Minkie Teka attended.

26. The witness submitted that initially after the security guard was placed in the unit, the rate of theft reduced but increased again after some time.
27. The witness stated that all employees who were caught stealing were subjected to disciplinary hearings, some received 3 months suspension without pay and other employees were dismissed, employees in addition to the applicants.
28. The witness lead evidence on other employees who were charged with theft or dishonesty, summarised as followed:
- (a) Mr M Pheeha was charged with theft or gross dishonesty in that took a state property using a state truck to transport a canopy to Marabastad where it was sold. He was charged on 5 December 2017. The Applicant was found guilty and dismissed after a disciplinary hearing on 13 December 2017 and advised of his right to appeal the outcome of the hearing on 15 February 2017. He received the outcome in writing on 21 February 2017 and appealed on 27 February 2017. The witness stated that she was unaware whether the employee was dismissed after the appeal as he worked in another department.
 - (b) Mr M Anton was charged with gross dishonesty; contravening the internal circular number: 38 of 2015; unauthorised possession of medication and patient cards and causing damage to state property. He received his charges on 10 November 2016 to attend a hearing on 22 and 23 November 2016, the outcome of the hearing was given to him on 13 April 2017 when he was notified of his right to appeal. He appealed, the outcome of his appeal was unknown to the witness.
 - (c) Ms LR Bogopane was charged with theft, unauthorised possession of state property and alternative to allegation two (2) improper, disgraceful and unacceptable conduct in that she removed a number of food items without permission. She received her notice to attend on 26 July 2018, was dismissed and informed of her right to appeal on 17 October 2018, she appealed on 30 October 2018. Her outcome of appeal has not been communicated yet.
 - (d) Ms M Mogotho was charged with theft on 7 March 2018 to attend a hearing on 14 March 2018, she received her outcome of the hearing, to be dismissed and advised

of her right to appeal on 13 June 2018. She appealed her dismissal on 19 June 2018. The outcome of her appeal has not been communicated yet.

(e) Ms ME Maja was charged with gross dishonesty and falsifying records or any other documentation and a charge of stealing, bribes or committed fraud, the notice was issued to her on 22 August 2018. The outcome of the hearing was a sanction of dismissal communicated with her on 4 December 2018, she was also informed of her right to appeal. She appealed the outcome of her hearing on 11 December 2018.

29. Under cross-examination the witness confirmed that employees were given an opportunity to appeal the outcome of their hearing, these were dealt by the an appeals committee. The purpose of the appeal was to change the outcome of the hearing.

30. The witness confirmed that she had not led any evidence regarding the outcome of the appeals.

31. The attendance registers that were presented indicating that the Applicant's attended meetings were after the Applicants were charged.

32. The witness was requested to answer questions relating to information in the Applicants bundle, bundle A.

33. The Applicants were charged with one (1) charge each on 6 July 2018. Another employee Ms. M Masebe were charged with two (2) charges and the items that were allegedly stolen sounded more severe than those taken by the Applicants. The employee in question was still employed by the unit after a three (3) month salary suspension, this was after the Applicants were dismissed.

34. Mr. IPN Jula attended a disciplinary hearing after being charged with theft and unauthorised possession of state property on 18 April 2020, his sanction was three (3) months suspension without pay and a final written warning. No evidence was available to confirm whether he did have a three (3) months' pay suspension.

35. Mr. S Lephale, Mr. M Morake and Ms. B Nkosi were all three (3) charged with theft, were all still employed and not dismissed.

Second witness – Idah Pasah

36. The witness testified under oath that she was employed as an Employee Relations Officer at Steve Biko.

37. She testified that she knew the applicants as they were employed as Food Service Aids at Steve Biko. They were dismissed when the outcome of their appeals was finalised and communicated during March 2020. They were dismissed for theft.

38. She submitted that the applicants were not the only employees who were charged with theft. Other employees were also subjected to disciplinary hearings and dismissed for similar offences.

39. The witness stated that according to the Labour Relations Act, schedule 7, in matters of misconduct it must be established whether a rule was broken and that dismissal as a sanction must be consistently applied. She confirmed that it was the role of the chairperson at the hearing to pronounce the sanction.

40. The sanction is informed by the merits of the case, evidence provided and based on knowledge. Mitigation and aggravation is considered before the chairperson gives the sanction.

41. She explained that it is not likely for different employee's circumstances to be the same.

42. The witness stated that Ms. Masebe was also employed as a Food Services Aid, she attended a disciplinary hearing for theft and stated that her outcome was three (3) months suspension without pay and a Final Written Warning. She submitted that this employee's circumstances were different, she had been in the employment of the Respondent for more than thirty (30) years and was close to reaching retirement age. She was the only provider and her family was dependent on her.

43. The witness stated that the applicants had been employed for five (5) years.
44. The witness testified that she did a presentation to the Food Services Staff during November 2019, she stated that this was not the first time that she addressed them on issues of theft. She stated that employees were charged with theft prior to June 2018.
45. She confirmed that Mr. Peeha was charged with theft of a canopy in 2016, he was still employed, awaiting the outcome of his appeal. He appealed after the receiving a sanction of dismissal after the disciplinary hearing.
46. Mr. Anton was no longer employed as his dismissal sanction was upheld after the MEC considered his appeal. He was dismissed in December 2019.
47. Ms. Bogopane, worked as a Food Service aid, was charged with theft, she was dismissed, has appealed the dismissal, she was still waiting for the outcome of her appeal.
48. Ms. Mokgotho was charged with theft, worked in the Food Service Department, was dismissed after the hearing, appealed the outcome, was still employed awaiting the outcome of her appeal.
49. Ms. Maya was charged, attended a disciplinary hearing, was dismissed, appealed the outcome was subsequently dismissed after the outcome of her appeal, in March 2020.
50. Mr. Jula was subjected to a disciplinary hearing for stealing *claxane*, the outcome of his hearing was a final written warning and three (3) months salary suspension. He appealed the salary suspension outcome and was still waiting for the outcome of his appeal.
51. The witness stated that she had knowledge of the Labour Relations Act, in terms of how an employer applies a rule, whether there was a rule, was it known, was discipline applied consistently and stated that the outcome was dependent on the chairperson.

52. She submitted that when employees stole or in the event of allegations of theft, no cases have been dealt with progressively, all employees were subjected to disciplinary processes.
53. She stated that during the time of the meetings the applicants were still waiting for the outcome of their appeals.
54. Under cross-examination the witness stated that Ms. B Nkosi was charged with theft, she was still employed, her sanction was three (3) months' pay suspension. She could not remember the detail regarding Mr. S Lephale.
55. The witness submitted that the MEC had challenges dealing with the appeals, as all documentation was destroyed when the building burnt down.

APPLICANTS' CASE

56. The Applicant, Ms. Dorah Mashile testified under oath on behalf of both Applicants. She stated that she was employed for the Respondent for 4.5 years and at the time of her misconduct she had a clean disciplinary record. representative submitted that the Applicant was suspended on 23 March 2020, the letter was dated 18 March 2020. The Applicant's suspension was with immediate effect and the details regarding the alleged misconduct was not provided.
57. She submitted that in June 2018 she was caught taking a loaf of bread and oranges, she acknowledged that she took these items without authority and said that she was not proud of stealing. It was for this reason that both herself and Ms Teka pleaded guilty at the hearing.
58. She indicated that the Labour Relations Officer held a meeting in the kitchen to inform them about taking food, this was after her disciplinary hearing.
59. The Applicant submitted that on the day of the hearing, upon their return to the kitchen they found staff member crying and when she enquired about the reason for the crying

she was informed that it was because they were dismissed. The Applicant was surprised as the outcome of the hearing was not yet available. She immediately laid a grievance; the grievance was addressed by Ms. Pasha and an employee by the name of Mathew Mogopa told staff that they were dismissed but he did not disclose from whom he heard. He eventually apologised to the Applicants and all other staff for spreading the rumour.

60. The Applicant stated that when they received the outcome of the hearing they did appeal as they felt that the outcome was unfair. She stated that other employees did the same offence but the treatment they received were different. She stated that the treatment was supposed to be the same, all working for the Department of Health should be treated equally.
61. The Applicant stated that the employees who received different treatment were: Mary Masebe, she received three (3) months suspension; Brenda Nkosi, three (3) months suspension; Mc Donald, one (1) months suspension and he was still on probation at the time of the transgression; Maggie Mokgotho did the same offence but was still at work.
62. It was the Applicants case that they were not saying that what they did was right, they did however expect to be treated differently.
63. Under cross-examination the Applicant conceded being aware that theft was prohibited in the workplace. The Applicant further conceded that food items were for patients and that it was items belonging to the hospital.
64. The Applicant submitted that other employees who were treated differently did attend a disciplinary hearing, she stated that the decision to dismiss was taken by the employer.
65. The Applicant stated that she was not aware to put her version relating to Mr Mokgopa to the witnesses called by the Respondent.

66. The Applicant further did not put her version regarding Mc Donald to Ms Pasah when she was on the stand.

67. The Applicants sought retrospective reinstatement.

ANALYSIS OF EVIDENCE AND ARGUMENT

68. In terms of section 185 of the Labour Relations Act, 66 of 1995 (as amended) (“the Act”) every employee has the right not to be unfairly dismissed. Section 192 of the Act provides that the employee carries the onus of proving the existence of a dismissal, whilst the employer must prove that it was fair.

69. It is common cause that the Applicants were charged with theft on 22 June 2018 and attended a disciplinary hearing on 6 July 2018. The Applicants were dismissed on 17 August 2018, after pleading guilty in the hearing. The Applicants appealed the outcome of the hearing and received communication that the sanction of dismissal was upheld on 31 March 2020.

70. It was further common case that Mary Masebe, Sam Lephale and Brenda Nkosi were given a sanction of three months suspension without pay; and Mc Donald Morake was given a sanction of one-month suspension without pay.

71. In terms of clause 7.3(a) of Resolution 1 of 2003 – ***‘The disciplinary hearing must be held within ten working days after the notice referred to in paragraph 7.1 (a) is delivered to the employee’***. The applicants were given a notice to attend a disciplinary hearing on 22 June 2018. The disciplinary hearing was held 06 July 2020 on the fourteenth day.

72. In terms of clause 8.8 of Resolution 1 of 2003 – ***‘Departments must finalise appeals within 30 days, failing which, in cases where the employee is on precautionary suspension, he/she must resume duties immediately and await the outcome of the appeal while on duty’***. The Department gave the outcome of the appeal 592 days after the sanction of dismissal was communicated.

73. The reasons for the delay in dealing with the appeal as stated by the Respondent is noted, however does not take away from the fact that this was outside of the prescriptions of the resolution.
74. In light of the above I find that the Applicant's dismissal was procedurally unfair.
75. The Applicants pleaded guilty during the hearing and as a result is challenging the consistency applied by the Respondent.
76. The legal principles applicable to consistency in the exercise of discipline are set out in terms of Item 7 (b)(iii) of the Code of Good Practice: Dismissal and in item 77.2.3. of the CCMA Guidelines on Misconduct Arbitration and establishes a guideline for testing the fairness of dismissal for misconduct whether "the rule or standard has been consistently applied by the employer". This is often referred to as the "parity principle", a basic tenet of fairness that requires like cases to be treated alike.

The Courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires that an Employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other Employees in the past; the latter requires that the penalty be applied consistently between two or more Employees who commit the same misconduct.

However, whether or not an Employer was consistent in its application of discipline, forms part of a much bigger enquiry as to the appropriateness of the sanction of dismissal.

77. In ***G4S Cash Services v NBCRFLI and other (JR 1103/13) [2017] ZALCJHB 335*** (handed down on 6 September 2017) Honourable Acting Judge Baloyi held that it is highly notable that over the years the Courts have exercised caution when dealing with cases where inconsistent application of discipline happened to be an issue. It further held that it is trite that a plea of inconsistency should to a large extent be sparingly upheld by Arbitrators and with or without invitation, an Arbitrator is required to apply a discretion that is upon a consideration of all facts placed before him/her. The reason being that the raising of inconsistency cannot automatically constitute a bar to the

imposition of dismissal. The Court also clearly elaborated on this point in **Conmed Health CC v MBCCI and Others** at paragraph 8 as follows:

“As stated previously by this Court the parity rule does not take away the right of the employer to impose different sanctions on employees who were involved in the same act of misconduct. The issue when faced with the complaint that the employer has applied discipline inconsistently is to consider the fairness of such inconsistent application of discipline. In other words, the differential sanctions do not automatically lead to the conclusion that the dismissal was unfair. In assessing the fairness of the dismissal in a case involving the imposition of differential sanctions, the commissioner must consider whether there is an objective and fair reason for imposing different sanctions for misconduct arising from the same offence”.

78. In **Assmang (Pty) LTD t/a Khumani Mine v CCMA and others (JR 2416/15) [2018] ZALCJHB** (handed down on 24 May 2018) Honourable Judge le Grange said: *“Indeed, in accordance with the parity principle, the element of consistency on the part of an Employer in its treatment of Employees is an important factor to take into account in the determination process of fairness of a dismissal. However, as I say, It is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss....”*

79. The Respondent does not dispute the fact that some employees received a lesser sanction but it is the case of the Respondent that in all instances where an employee has been found stealing they have been subjected to a disciplinary hearing. In addition, the Respondent submitted that each case has its own chairperson and that the chairperson is the responsible person to pronounce the sanction. It was further stated that each employee has their own circumstances, circumstances that is taken into consideration by the chairperson at that point in time.

80. It is noted that a number of employees who have committed similar offences have been dismissed, appealed their dismissal and is awaiting feedback on their appeal, they are Mr. Pheeha; Ms. LS Bogopabe and Ms. M Mokgotho, others whose dismissals were upheld after the appeal was Mr. M Anton and Ms. M Maja. The

Respondent submitted that in one instance the outcome of dismissal was lesser after the appeal was for Ms. Masebe who submitted that she was close to retirement and had 30 years' service with the employer.

81. In light of the above, I find that the Respondent was consistent with its application of the rule and action taken once an employee is caught stealing from the employer.

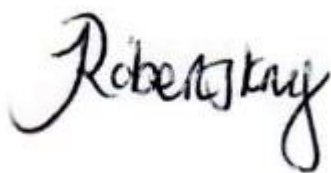
82. I therefore find that the dismissal of the Applicants was substantively fair.

83. I accordingly make the following award:

AWARD

84. The Applicant's dismissal was procedurally unfair and substantively fair.

85. In that the procedural unfairness stems only from the point of considering the appeal by the Applicants, and that such a delay did not prejudice the Applicants, in fact they received their monthly income for 19 months post the outcome of the disciplinary hearing I do not make any order for compensation.



TANYA ROBERTS-KRUGER