ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Commissioner: **Minette van der Merwe**

Case No: **PSHS521-18/19**

Date of award: **22 February 2019**

In the matter between:

NEHAWU obo Meschack Motsamai Nyambuza (Union/ Applicant)

and

Department of Health – Free State (Respondent)

DETAILS OF HEARING AND REPRESENTATION:

[1] The arbitration was scheduled for **15 February 2019** at the Boitumelo Hospital in Kroonstad**.**

[2] The Applicant was represented by Mr MJ Mofokeng whereas the Respondent was represented by Mr. M Nhlapo, Labour Relations Officer.

[3] Proceedings were mechanically recorded and copious notes were taken. Interpretation was done by Mr. Themba Tshabalala, Bargaining Council appointed Interpreter.

BACKGROUND TO THE DISPUTE:

[4] The matter was scheduled for arbitration in terms of section 191 (5) (a) in respect of a claim for unfair dismissal related to misconduct.

[5] The Applicant was employed as a Boiler Operator with a monthly salary of R 11 400.00 (eleven thousand four hundred rand) per months on salary level 4.

[6] The Applicant was charged with misconduct as follows (page 17 of the bundle):

"*That you are allegedly guilty if misconduct in terms of the disciplinary code and procedure in that, on the 15 April 2016 you allegedly committed theft when you drain diesel from storage tanks behind boiler house without permission from your employer*."

ISSUE TO BE DECIDED:

[7] I was called upon the determine the fairness of the dismissal on the following grounds:

i. Whether the Respondent was in breach of PSCBC Resolution 1 of 2003 by failing to finalize the Applicant's appeal within the prescribed 30 (thirty) days and whether such breach rendered the dismissal procedurally unfair
ii. Whether the sanction of dismissal was appropriate in the circumstances

[8] The following facts were common cause:

i. The Applicant was employed by the Respondent, with employment details as per paragraph 5 of this award
ii. The Applicant was aware of the rule in the workplace
iii. The rule was reasonable
iv. The rule was consistently applied
v. The Applicant broke the rule

[9] The Applicant sought an order that the Respondent was in breach of PSCBC Resolution 1 of 2003, and that his dismissal was procedurally and substantively unfair, and prayed for a remedy of reinstatement.

SURVEY OF EVICENCE AND ARGUMENTS:

Documentary Evidence:

[10] Bundle "A" was submitted into evidence on behalf of the Applicant, which bundle was also utilized by the Respondent.

Oral Evidence:

Respondent's Evidence:

[11] The Respondent called one witness to testify, namely Mr Peter Sello Motsemme who was the Chairperson of the Applicant's disciplinary hearing. Further, Mr Nhlapo argued the legal position regarding the non-compliance to PSCBC Resolution 1 of 2003.

[12] The testimony led is fully captured on the record of proceedings. I therefore do not deem it necessary to repeat it in this award.

[13] In essence, the case of the Respondent is that the non-compliance to Resolution 1 of 2003 did not prejudice the Applicant, and that there were compelling reasons for the non-compliance. The Applicant pled guilty to the charge levelled against him, and not to a lesser charge. The parties mentioned a plea agreement, but the powers to decide on an appropriate sanction still lied with the Chairperson. The sanction of dismissal was appropriate as the misconduct was of a serious nature, to which the breakdown of the trust relationship could be inferred, and further because the Applicant had admitted to the misconduct.

Applicant's Evidence:

[14] The Applicant relied on his testimony and did not call additional witnesses. Mr Mofokeng argued the legal position of the non-compliance to PSCBC Resolution 1 of 2003. The testimony led by the Applicant is fully captured on the record of proceedings and therefore I do not deem it necessary to repeat it in this award.

[15] The Applicant's evidence was in essence that he did not enter a plea of guilty at the disciplinary hearing. He did not commit theft, but did take the diesel without

authorization, but for purposes of utilizing it for the boiler. His dismissal was unfair as he was allowed to continue to work for two years after the dismissal, pending the outcome of the appeal.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[16] The Applicant proved to be a highly inconsistent witness and contradicted himself on a number of material aspects under cross-examination. The Respondent's witness created a good impression and was unwavering under cross-examination, and led consistent and credible evidence.

[17] The argument that there was a plea agreement to the effect that the Applicant would plea guilty to a lesser charge, was not supported by evidence, and is rejected. The purpose of a plea agreement is to admit to evidence/charges in order to receive a lesser sanction. The power to decide on the sanction is completely taken away from the decision maker, in this case the Chairperson.

[18] The concept of a plea agreement originates in criminal law, and in terms of the CPA (Criminal Procedure Act) section 105A(6)(a), the following has to be determined and recorded from the Accused prior to accepting a plea agreement:

- that he confirms the terms of the agreement and admissions;
- that he admits the allegations in the charge to which there is a plea of guilty; and
- that this is freely and voluntarily done.

[19] No evidence was led that would support the version of a plea agreement.

[20] It then follows that the Applicant entered a plea of guilty to the charge levelled against him (par 6 of this award).

[21] The definition of theft in terms of criminal law[1] is:

[1] [1] CR Snyman, *Strafreg*, Butterworths Professional Publishers (Pty) Ltd., 1981, page 511

"Theft is the unlawful, intentional assertion of another's movable bodily matter in circumstances in which the owner has a special right of ownership on the matter."

[22] The definition of theft in terms of general legal terms is:

"*A criminal act in which property belonging to another is taken without that person's consent."*

[23] The Applicant's version was that he took the diesel, without authorization, but to utilize it to start the boiler as part of his duties. Had the Chairperson heard the plea explanation, he would have had this version to consider prior to deciding on the sanction. The Applicant and his representative have respectively submitted during the arbitration that (i) the Applicant had provided the plea explanation and (ii) that the Applicant's representative at the disciplinary hearing, Mr Mofokeng, had put the plea explanation on record. I have already analysed the credibility of the Applicant, and find that such a plea explanation was not given at the disciplinary hearing in order for the Chairperson to consider. The Chairperson had repetitively testified that the Applicant pled guilty to the charge as levelled against him, and not on a lesser charge or with a plea explanation.

[25] The Chairperson's outcome of the disciplinary hearing (pages 16 – 22 of the bundle) further supports the evidence that the Applicant pled guilty to the charge, and offered no plea explanation. The documents were not challenged, and its veracity was accepted as it purported to be by the Applicant. The outcome of the disciplinary hearing was clear and unambiguous, and required no interpretation as to the intent of the Chairperson in the content of the document.

[26] The Court held in ***Nampak Corrugated Wadeville v Khoza*** *(1999) 20 ILJ 578 (LAC),* and referred with approval to the finding of ***Computicket v Marcus NO & others*** *(1999) 20 ILJ 342 (LC)*, that in matters where the sole issue is whether the sanction of dismissal was appropriate, the Arbitrator has the limited function of ensuring that dismissals do not fall outside a 'band of reasonableness', the parameters of which are determined by general principles of fairness. The closest the Courts have come to

suggesting some sort of a test, was in the judgement of ***Country Fair Foods (Pty) Ltd. V CCMA & others*** *(1999) 20 ILJ 1701 1701* at para 11 where one Judge remarked:

"*It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and to determine the sanction with which con-compliance will be visited, interference therewith is only justified in the case of unreasonableness and unfairness."*

[27] In the same judgement, another Judge found that dismissal can be said to be unreasonable when it induces a 'sense of shock'.

[28] In ***Sidumo v Rustenburg Platinum Mines Ltd.*** *(2007) 28 ILJ 2405 (CC)* it was ultimately held that the Commissioner must consider all relevant circumstances when considering whether dismissal was the appropriate sanction in a particular case of proven misconduct. This includes the importance of the rule that has been breached, the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, other factors such as the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record and that this is not an exhaustive list.

[29] The Chairperson testified on the breakdown in the trust relationship that he had inferred as a result of the evidence led before him, the seriousness of the offence and the Applicant's plea of guilty to the charge of theft.

[30] In the case of ***Impala Platinum Ltd v Jansen and others*** *[2017] 4 BLLR 325 (LAC)* it was held that, where the seriousness of the misconduct was of such a nature that the breakdown of the employment relationship can be inferred, evidence of same need not be led by the Respondent.

[31] The task of imposing sanctions vests in the Employer. It is a Commissioner's function to assess whether that Employer has exercised its discretion fairly.

[32] The sanction of dismissal was appropriate under the circumstances, as the misconduct was of a very serious nature, and had rendered the employment relationship intolerable

by its very nature. Dismissal as a sanction under the circumstances was not unreasonable or unfair.

[33] The dismissal of the Applicant was substantively fair.

[34] It was common cause that the Respondent had finalized the Applicant's appeal some two years after it was lodged and was in non-compliance of PSCBC Resolution 1 of 2003.

[35] PSCBC Resolution 1 of 2003 states in clause 8 as follows:

8. Appeal

8.1 An employee may appeal a finding or sanction by completing Annexure E.

8.2 The employee must, within five working days of the receiving notice of the final outcome of a hearing or other disciplinary procedure, submit the appeal form to her or his executing authority, or to her or his manager, who shall then forward it to the appeal authority.

8.3 The appeal authority may, on good cause shown, condone the late lodging of an appeal.

8.4 The appeal authority, who shall consider the appeal, shall be:

a. the executing authority of the employee, or

b. an employee appointed by the executing authority, who

i. was not involved in the decision to institute the disciplinary proceeding, and

ii. who has a higher grade than the chair of the disciplinary hearing.

8.5 If the person referred to in paragraph 8.4 requires a hearing, she or he shall notify the employee of the date and place.

8.6 The appeal authority may

a. uphold the appeal, and/or

b. reduce the sanction to any lesser sanction allowed in terms of clause 7.4.a of the Code, or

c. confirm the outcome of the disciplinary proceeding.

8.7 The employer shall immediately implement the decision of the appeal authority. Where the appeal authority decides to reduce the sanction or to confirm the

outcome of the disciplinary proceedings (e.g. dismissal cases), the sanctions will be implemented by the employer from a current date.

8.8 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.

Note: *The employee retains the right to utilise dispute-settlement mechanisms provided under the Labour Relations Act.*

[36] Although the Respondent was in clear breach of clause 8 of said Resolution, the Applicant could have referred a dispute to the PSCBC for non-compliance at any time in the two years that it took the Respondent to finalize the appeal. Clause 8 makes specific provision for the pursuing of a dispute under the LRA.

[37] It was held in the case of ***Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*** *(2006) 27 ILJ 1644 (LC); [2006] 9 BLLR 833 (LC)* that if Unions and Employers have agreed to a disciplinary model replicating the criminal justice model in the form of Policies or Collective Agreements, Employers are bound to apply the standards to which they have agreed. If they fail to do so, the procedure would be unfair.

[38] The dismissal was procedurally unfair, as the Respondent had not complied with its own Collective Agreement. However, in light of the fact that the Applicant had a right to refer a dispute to the PSCBC as an alternative, and that the Applicant continued to work and earn a salary pending the outcome of the appeal, it cannot be held that the Applicant was prejudiced. As such, no remedy is ordered for the procedural unfairness.

AWARD:

[39] The dismissal of the Applicant, **Meschack Motsamai Nyambuza,** by the Respondent, **Department of Health – Free State**, was substantively fair but procedurally unfair.

[40] No compensation is ordered for the procedural unfairness for reasons stated in par 36, 37 and 39.

[41] I make no order as to cost.

Signature: 

Commissioner: **Minette van der Merwe**