ARBITRATION AWARD

Panellist/s: **Bhekinhlanhla Stanley Mthethwa**
Case No.: **PSHS555-10/11**
Date of Award: **12-Apr-2012**

In the ARBITRATION between:

In the ARBITRATION between:

HOSPERSA obo Seedat, AS
(Union / Applicant)

and

Department of Health: KZN
(Respondent)

Union/Applicant's representative: Mr. H. Leshaba.
Union/Applicant's address: P.O. Box 231
Kloof
3640
Telephone: (031) 765-4629
Telefax: (031) 765-4629

Respondent's representative:	Mr. D. Nyembe
Respondent's address:	Private Bag X 9051
	Pietermaritzburg
	3200
Telephone:	(033) 395-2767
Telefax:	(033) 395-3220

Details of hearing and representation:

1. The matter was scheduled for arbitration on 5 & 6 December 2011 and remained part heard and it was heard again on 23 & 24 February 2012 at Ladysmith Hospital in Ladysmith. Mr. H. Leshaba, a trade union official of HOSPERSA appeared on behalf of Mr. AS Seedat (hereinafter referred to as the Applicant) and Mr. D. Nyembe represented the Department of Health (hereinafter referred to as the Respondent). The proceedings were digitally recorded.

2. Having presented their respective cases, parties agreed to submit heads of argument by 6 March 2012 and only did so on 23 March 2012. The last day of this arbitration is thus 10 April 2012.

Issues to be decided:

3. I am to determine whether or not the dismissal of the applicant was substantively and procedurally fair.

Background to the issue:

4. The applicant was appointed on 1 March 1991 as a Fitter. He was earning R11 265.00 in monthly remuneration when he left employment. He continued in that capacity until the 26th of June 2010 when his services were terminated for an alleged misconduct.

Summary of evidence and arguments:

5. All witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The respondent led evidence of Ms. Linda Alice-Anderson, Messrs. Robert Bongumusa Ngcobo and Daniel Dumezweni Dumisa. The applicant also testified. Their evidence may be summarized as follows;

Respondent's case:

6. The respondent contended that the applicant was dismissed for misconduct in that between August 2007 and December 2008 he submitted fraudulent Subsistence and Travelling claim forms where he claimed for 2.8 engine capacity instead of 1.8 engine capacity. As a result of the commission of the said offence the applicant was charged, found guilty and dismissed. It is on this basis that the respondent contended that the applicant's dismissal was both procedurally and substantively fair.

The respondent called three witnesses in support of its case.

First witness – Linda Alice-Anderson

7. Ms. Alice-Anderson testified as follows:

8. She was the Assistant Manager in the Human Resources Department. She was responsible to supervise the human resources staff. She was also dealing with the Subsistence and Travelling claims. The overtime claims would be processed by a supervisor concerned before they were submitted to the Human Resources department. The applicant also submitted overtime claims using the relevant forms. They were prescribed tariffs paid for the usage of a privately owned vehicle in carrying out official duties. The applicant has been claiming travelling allowance for a number of years. The applicant was not completing his claim form incorrectly; however, he was completing his vehicle capacity incorrectly. The applicant was completing the engine capacity as 2.8, instead of 1.8.

9. She did not process the applicant's claim forms. The Subsistence and Travelling policy between the years 2007 and 2009 remained the same. The new staff could not understand the Subsistence and Travelling policy. Other staff members have approached the Human Resources Department for assistance. Some people have understanding of completing the claim forms. The induction programme on the policy was introduced in the year 2009. He was not aware whether the applicant was inducted on the Subsistence and Travelling policy. The applicant did not attend management meetings.

Second witness – Robert Bongumusa Ngcobo

10. Mr. Ngcobo testified as follows:

11. He was employed as a Hospital Manager at the Greytown Hospital. He was the chairperson of the applicant's disciplinary hearing. The applicant pleaded guilty to the charges. Thereafter, representatives of both parties proposed to submit aggravating and mitigating factors in writing. The applicant was

represented by the trade union official, Mr. Suleman. The applicant was not sworn in because he was not going to lead any evidence. He considered all the mitigating and aggravating factors submitted by the parties. He complied with the respondent's disciplinary code. The applicant's representative was not mitigating but he was dictating to him. The applicant did not show remorse.

12. He was not under any pressure when considering the applicant's case. His report was short simply because the applicant had pleaded guilty to the charges. It was the applicant who instructed his representative to plead guilty on his behalf.

Third witness – Daniel Dumezweni Dumisa

13. Mr. Dumisa testified as follows:

14. He was employed as a Chief Executive Officer at Ladysmith Hospital between the years 2005 and November 2011. The applicant was charged and dismissed for a fraudulent conduct. There was a Finance Manager who was also dismissed for the same offence. Once an employee has defrauded an employer the trust would be eroded.

15. It was the Investigating Officer in conjunction with the Treasury Department that would report cases to the police. He saw the appeal outcome and referred the same to the Human Resources department for further action.

16. He was not aware as to who signed the disciplinary hearing outcome on his behalf. He was not demoted when he left Ladysmith Hospital but he had requested transfer to Pietermaritzburg. He wanted transfer to Pietermaritzburg so that he would be closer to his family.

Applicant's case:

17. It was the applicant's case that he was misled by his representative to plead guilty during the disciplinary hearing. He did not commit any offence prior to his dismissal. The charges against him were unfairly splitted. The applicant did not know the rule governing Subsistence and Travelling claims. The chairperson had failed to apply his mind to the evidence before him. He also failed to consider mitigation factors presented to him. It was on these bases that the applicant contended that his dismissal was both substantively and procedurally unfair.

The applicant testified on his own and did not call any witness.

18. He testified as follows:

19. On 10 June 2010 he attended a disciplinary hearing. He was represented by HOSPERSA during the disciplinary hearing. He was advised that pleading guilty would result in receiving a lighter sanction. He pleaded guilty after his representative and the Investigation Officer had a private discussion outside the hearing room. It was after that private discussion that his representative advised him that he would be issued with a written warning if he pleaded guilty. That was the only reason that made him to agree to plead guilty. However, he was not guilty for defrauding the respondent. He did not understand the charges proffered against him. He was not given the details of the charges.

20. His claim forms for Subsistence and Travelling Allowance were signed by both his supervisor and the Head of Human Resources and Finance departments. They could have not signed his claim form if it was not in order. It was the Human Resources department that was filling in the amount to be paid. He was only recording the kilometres he had travelled when performing official duties.

21. He did not have access to the Intranet and he did not understand the Subsistence and Travelling policy. He was also not inducted on the Subsistence and Travelling policy. It was not easy to understand the claim forms related to the Subsistence and Travelling Allowance.

22. It was an error on his part to claim for 2.8 engine capacity; instead of 1.8. However, his vehicle had an accident and it was fitted with 2.8 engine; nevertheless, he did not register the changes with the traffic department.

23. He had been a shopsteward for 10 years and was 19 years in the service of the respondent.

Analysis of evidence and arguments:

24. The crisp issues in dispute are the substantive and procedural fairness of the dismissal. The respondent did not dispute the existence of a dismissal and the respondent therefore bears the onus of proving; on a balance of probabilities that the applicant's dismissal was substantively and procedurally fair. I will not repeat the whole of the evidence presented but will only refer to relevant parts thereof, although I have considered all of the evidence.

25. The disciplinary hearing of 10 June 2010 which led to the applicant's dismissal was triggered by the following charges;

CHARGE 1:

In August 2007 to December 2008 he submitted fraudulent Subsistence and Travelling claim forms where he claimed for 2.8 engine capacity instead of 1.8 engine capacity.

CHARGE 2:

His actions were regarded as an act of misconduct in terms of PSCBC Resolution 1 of 2003 in that he committed fraud.

CHARGE 3:

He prejudiced the administration, discipline or efficiency of the department, office or institution of the state.

26. After considering the above charges I concur with the applicant's representative that although the applicant was found guilty on charge 1 and 2 they were both based on the same facts and this amount to splitting of charges. In my view it is unfair to split one charge into two charges in the manner that the respondent did in this case.

27. In my view the first charge encompasses everything that the applicant is alleged to have committed. However, I am not suggesting that the respondent was not entitled to put alternative charges to the applicant; the respondent is well within its right to charge the applicant in the alternative but not in this fashion. Quite clearly you cannot find the person guilty on more than once on the same facts; that would be unfair.

The allegation that between August 2007 and December 2008 the applicant submitted fraudulent Subsistence and Travelling claim forms when he claimed for 2.8 engine capacity instead of 1.8 engine capacity

28. In his plea explanation, the applicant stated that he did not submit fraudulent claim forms since the engine capacity of his vehicle was changed from 1.8 to 2.8 capacity. He was always declaring that his vehicle was BMW 318. He further stated that he was not inducted on the Subsistence and Travelling

Policy and the claim forms used in claiming the said allowance were complicated. The charges against him were not clear. However, he was advised by his representative to plead guilty during the disciplinary hearing and he would be issued with a written warning. Be as it may; I am failing to comprehend how his representative would have persuaded him to plead guilty; if he did not commit any offence. Secondly, why the applicant was prepared to be issued with a written warning for something that he did not do. For these reasons; I find the applicant's assertion incomprehensive and improbable. I do not understand why a person of his calibre would have blindly followed a representative advised.

29. Having said that the fact that the applicant was represented it did not mean the disciplinary hearing was over after he had pleaded guilty as Ngcobo wanted us to believe. It was incumbent upon him as the chairperson to verify that the applicant understood and knew what he was admitting, and what the consequences of his admission were. It was very important to ensure that the applicant knew, in some level of detail, what the charges were to which he was pleading guilty of. It was the chairperson's responsibility to establish whether the applicant was voluntarily pleading guilty, that he did so from his own free will. Had the chairperson paid due attention to these details we could have not heard that the applicant was misled and he did not understand what he was pleading guilty on.

30. Although I do not find credence in the applicant's version that he was misled and coerced to plead guilty. However, I find the applicant's explanation immensely reasonable that he did not understand Subsistence and Travelling policy and he was claiming for 2.8 engine capacity because his car engine had had been replaced with 2.8 engine. At all times he was declaring that he was driving BMW 318. Further, that he was not trained in the said policy. Furthermore, the Subsistence and Travelling claim forms were challenging for many other employees and this version was confirmed by Ms. Alice-Anderson.

31. In light of the applicant's explanation why he claimed for 2.8 engine capacity, instead of 1.8 engine capacity; it would be unfair to conclude that his action displayed fraud or dishonest intent. In my view he had no intention to defraud the respondent.

32. The applicant has never hidden on the Subsistence and Travelling claim form that he was driving BMW 318. Had he put BMW 328 on his claim form and claim for 2.8 engine capacity that would have been displayed fraud or dishonest intent. In this instance he did not do that, however; his managers were approving his claim form for more than a year as 2.8 engine capacity while it was clearly marked as BMW 318 without raising any concern. Secondly, the applicant admitted even during this arbitration hearing that it was an oversight on his part not to go and register the changes on the engine capacity

with the Traffic Department. Accordingly, it is my finding that the applicant's conduct did not display fraud or dishonest intent.

The allegation that the applicant's dismissal was procedurally unfair

33. In view of my findings on substantive fairness it is not strictly necessary to make a finding on procedural unfairness as it will not impact on the remedy provided for by law. However, it was unfair that charge 1 and 2 arose out of the identical facts. This also compounded the seriousness of the matter in a manner which was unfair.

34. It was also unfair that the chairperson did not verify whether the applicant understood and knew what he was admitting when he was pleading guilty, and what the consequences of his admission were.

35. The applicant's right to a fair hearing were not given effect because he did not have the benefit of comprehending the consequences of his plea.

Appropriateness of the sanction:

36. In determining the substantive fairness of a dismissal dispute, a commissioner is guided by Schedule 8 of the LRA read with the principle stated in **Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC)** where the Constitutional Court endorsed a "reasonable decision-maker's test". Subsequently, the then Judge President of the Labour Appeal Court gave some guidelines to the test at hand and held that a commissioner must assess the fairness of the dismissal objectively by taking into account the totality of the circumstances.

37. It is common cause that the applicant claimed for 2.8 engine capacity; although it was disputed that he was entitled to so. However, it was established through evidence that his vehicle was transformed into 2.8 engine capacity. Therefore, in the circumstances of this case, dismissal as a sanction was grossly inappropriate. The applicant had been in the respondent's employment for almost 20 years. The applicant had an unblemished disciplinary record.

38. It was also common cause that the applicant performed his duties well for the past 19 years. He was competent and efficient in what he was employed to do. Furthermore, the applicant gave a reasonable explanation why he claimed for 2.8 engine capacity, instead of 1.8 engine capacity. This is why I did not

find dishonest or fraud intent on his conduct. Moreover, he showed remorse for failing to register the change of his vehicle's engine capacity with the traffic department. Acknowledgment of wrongdoing on the part of the employee goes a long way and that is a clear indication of the potential and possibility of rehabilitation including an assurance that similar misconduct would not be repeated in the future. Having considered all relevant issues I am of the view that the applicant's dismissal is substantively unfair. In terms of the Labour Relations Act reinstatement is the preferred remedy unless compelling reasons exist as to why this would not be possible. In this case I find no reason why reinstatement should not be ordered. Nevertheless, the applicant is not entirely blameless in this case, in that he failed to register the changes on his vehicle with the Traffic Department; it is fair to limit his back pay to 8 month's salary.

39. In the circumstances I make the following award:

Award:

40. I find the dismissal of Mr. AS. Seedat both substantively and procedurally unfair in terms of the provisions of the LRA as set out in the Code of Good Practice for Dismissals.

41. I therefore order Department of Health to reinstate Mr. AS. Seedat to his former position with effect from the date of dismissal (26 June 2010) on terms and conditions of employment that were applicable to him prior to the dismissal.

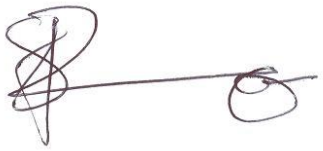
42. Mr. AS. Seedat must report for work at Ladysmith Hospital on 2 May 2012, at 08.00am on that day the respondent must pay him compensation in the amount of R90 124.00 (R11 26.00 x 8) less applicable taxation and statutory deductions,.

43. The Department of Health is also ordered to restore all benefits as they would have been accorded to the applicant had he not been dismissed on the above date (e.g provided fund, medical aid, if applicable) and make the necessary deductions from his back pay and other deductions such as tax and forward those to the relevant authorities.

44. No order as to costs is made.

DONE AND SIGNED IN PIETERMARITZBURG ON THIS 10TH DAY OF APRIL 2012.

Bhekinhlanhla Stanley Mthethwa



Signature