



# ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy  
Case No.: PSHS8-10/11  
Date of Award: 4-Dec-2011

In the ARBITRATION between:

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PSA OBO SIBIYA N F.

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative : MR D GOVENDER  
Union/Applicant's address : P/BAG 59  
ULUNDI  
3838  
Telephone : 035 874 3067  
Telefax : 035 874 4015/ 792 2596

**Respondent's representative** : Ms N A GUMEDE  
Respondent's address : PRIVATE BAG X 051  
PIETERMARITZBURG  
3200  
Telephone : 033 395 2787  
Telefax : 033 395 3220

**Details of hearing and representation:**

1. The arbitration proceedings commenced at 10H00 on the 11 November 2011 at the Nkonjeni Hospital Boardroom , Mahlabathini. Mr D Govender of PSA represented the applicant and Ms N A Gumede represented the respondent.
2. The applicant raised a Point In Limine and made submissions and the respondent agreed to make written submission on or before the 15 November 2011 and copy be sent to the PSA. The PSA would respond if necessary on or before the 17 November 2011. The parties thereafter indicated to me that there was a possibility that the matter may be settled and that the award be stayed. The respondent's proposals were not accepted by the applicant and the respondent filed its papers on the 4 December 2011.

**ISSUES TO BE DECIDED**

3. I am to decide whether the applicant should be re-instated to her former position due to the respondent inserting the incorrect date when the misconduct occurred. Should I find in favour of the applicant then I am to determine the appropriate relief.

**SUMMARY OF EVIDENCE AND ARGUMENTS**

The party's submissions are recorded below:

**APPLICANT'S (EMPLOYEE) SUBMISSION**

4. If the applicant's Point In Limine is successful then it would be the end of the matter. The arbitration was initially held on the 21 July 2011 and the applicant submitted her leave forms indicating that she was not at work at the time of the commission of the alleged offence.
5. It is common cause that the respondent checked if the date on the charge sheet was amended at the disciplinary hearing and confirmed that it was not amended.
6. The applicant submits that on the day of the alleged offence the 12 December 2008 the applicant was on leave.
7. The applicant prays for decision in favour of the applicant and that she be reinstated retrospectively.

**RESPONDENT'S (EMPLOYER) SUBMISSION**

8. The applicant declared a dispute alleging unfair dismissal. The matter was set down for arbitration on 11 November 2011.

9. It is common cause that the date appearing on the charge sheet is not the correct date on which the incident took place. The misconduct was committed during September 2008.
10. It is my submission that the applicant disputes the date, not the substance. It was not stated that the applicant did not commit the misconduct but it was only submitted that on the day in question she was on leave. The respondent has overwhelming documentary evidence to prove that the applicant committed an infraction.
11. It is further my submission that the applicant admitted to the charges on a reply form after she was served with a charge sheet. The applicant was afforded an opportunity to state her case at the hearing and was represented.
12. The question that has to be answered is what the applicant was responding to at the hearing if they now raise the issue of the incorrect date?. It is evident that the applicant is aware of the incident except that a wrong date was used on a charge sheet.
13. It is therefore important to mention that the misconduct committed by the applicant is very serious as it relates to fraud.
14. It is my prayer that the Commissioner rules that this matter be set down for arbitration for the substance to be tested.

#### **SURVEY OF EVIDENCE AND ARGUMENT**

15. The applicant was dismissed after a hearing, and her appeal against the decision was dismissed. At the arbitration her representative raised a Point In limine showing that on the date when the alleged offence took place she was on leave. She prays to be reinstated retrospectively.
16. The respondent concedes that the date recorded in the charge sheet was wrong but that she was charged with a serious offence constituting fraud.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT**

17. 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 ALLEGATION THAT THE APPLICANT'S DISMISSAL WAS PROCEDURALLY UNFAIR**

18. 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. 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.

19. 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.
20. 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, did not attend the hearing, was found guilty and received her letter of dismissal. She challenges the procedural and substantive aspects of the dismissal.
21. 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.
22. 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.
23. In this matter the applicant raises a technical point that the date on the charge sheet was not amended at the disciplinary hearing and because she was on leave on the day recorded in the charge sheet she should be absolved from the commission of the offence. This argument was not raised at the internal

disciplinary hearing but was raised at the arbitration. It is probable that had it been raised at the internal hearing stage it would have been corrected accordingly.

The fact that it was not picked up at the disciplinary hearing stage is advanced as an argument that the respondent actions amount to a procedural unfairness. On a technical basis argument this would have resulted in the acquittal in the criminal court where the test is beyond a reasonable doubt. In labour dispute resolution disputes the test is on a balance of probabilities which is a less stringent test.

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 only in so far as not amending the charge sheet Therefore I determine that the procedural aspect of the dismissal to be unfair.

#### **THE ALLEGATIONS AGAINST THE APPLICANT:**

24. The applicant was charged as follows:

On the 12<sup>th</sup> December 2008 you created the following transactions on persal without authority to

1. Liberty Moon Trading 4 CC Order No. AO 116713 Amount R 17 060.00
2. Thuthu's Supply Services CC Order No. AO 116715 Amount R 9 500.00
3. Vusumndeni Order no. AO 116722 Amount R 8 420.00

According to Resolution 1 of 2003 your actions constitute misconduct which is FRAUD.

25 In respect to the matter at hand it is clear that the applicant in respect of the substantive aspect of her dismissal save for a technicality did not defend this aspect at the internal enquiry and as such was found guilty of the allegations against her and this was confirmed when her appeal was dismissed.

26. As a consequence of the above it is established that the applicant had been correctly found guilty of the charges and that the employer's decision on the substantive aspect of the dismissal was fair..

#### **THE APPROPRIATENESS OF THE SANCTION**

27. 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 that fraud , corruption has the result of depleting the effective functioning of state institutions and the government is embarking on great efforts to stamp out this scourge that has the effect of reducing the effectiveness of the state in providing quality and economic service to the citizens.

28. I determine that the sanction imposed by the respondent to be appropriate and find no reason to interfere with the sanction of dismissal.

29. In respect of the finding that the dismissal of the applicant was procedurally unfair I have taken into account the provisions of section 193 of the Labour Relations Act read as follows into consideration.

(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

30. The Point In Limine succeeds only on the procedural aspect but not on the substantive aspect.

31. I do not believe that the procedural defect was so great to award any compensation to the applicant.

**AWARD**

- 32. On the Point In Limine raised I find that the applicants' dismissal was procedurally unfair but substantively fair.
- 33. The dismissal is confirmed.
- 34. The applicant's application is dismissed and she is not entitled to any relief.
- 35. No order for costs is made.
- 36. This file should be closed.

**DONE AND SIGNED IN DURBAN ON THIS 5 DAY OF DECEMBER 2011.**

A handwritten signature in black ink, appearing to read 'a S Dorasamy', with a stylized flourish at the end.

**Arbitrator: Anand Dorasamy**