



ARBITRATION AWARD

Commissioner: **Janine Carelse**

Case No: **PSHS121-22/23**

Date of award: **7 September 2022**

In the matter between:

DENOSA obo THABISA SIBONDA

Applicant

and

DEPARTMENT OF HEALTH – WESTERN CAPE

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing commenced on 11 July 2022 and was finalised on 22 August 2022. The hearing was held at the respondent's premises at Stikland Hospital, Bellville.
2. The applicant was present and represented by Mr Lucas Munzhelele, a DENOSA union official. The respondent was represented by Ms Xolelwa Makeleni, one of its employee relations officials.
3. The parties used a common bundle of documents that was marked bundle "A".
4. Both parties submitted written closing argument on 30 August 2022.
5. The proceedings were digitally and manually recorded and commenced in English.

ISSUE TO BE DECIDED

6. The issue to be decided is whether the applicant's dismissal was substantively fair. If I decide that the applicant's dismissal is substantively unfair, I must decide what the appropriate remedy will be for such unfair dismissal.

BACKGROUND TO THE MATTER

7. The applicant was employed by the respondent as professional senior nurse at the Dunoon hospital. She was charged, found guilty of, and dismissed for gross dishonesty in that she had allegedly fraudulently claimed double pay from the respondent for overtime worked on 14 and 20 October 2020. The applicant's case is that she had done so by mistake and was not aware that she received double pay from the respondent for the overtime worked on 14 and 20 October 2020. The applicant only challenges the substantive fairness of her dismissal and not the procedural fairness thereof. She wants to be reinstated with backpay.

SURVEY OF EVIDENCE AND ARGUMENT

Evidence

Respondent's evidence

8. Mr Sikhelelo Bomvana (Bomvana) testified for the respondent under oath, and he stated that he and the applicant used to work under the supervision of Ntshinga. Ntshinga resigned and he was the acting manager from August 2021. There was a discrepancy regarding the payment of claims of the nurses who worked in the emergency unit and management took a decision that an audit will be conducted for all nurses working in the emergency unit. It transpired that the applicant claimed twice from the respondent and from the nursing agency. Management decided to check on the system if the applicant was paid or not and the records showed that she received payment from the respondent. Premium agency was requested to produce proof and the agency provided proof that she claimed on the dates. He started working at the Dunoon hospital in 2020 and he received orientation from the applicant because she was the shift leader at the time, which included discussions on the process of overtime and how to record it in the books. (P.14 of Bundle A). He averred that an employee can only work overtime twice a month for the respondent and anything beyond that can be claimed from the agency. When you claim for overtime from the respondent, you must submit the attendance register and the duty roster. (P.12 & 13 of Bundle A). A control sheet is also completed. (P.14 of Bundle A). The manager or shift leader completes the overtime forms and hands it to the employee to check if the details are correct and the employee and the manager will sign. When the overtime form is given to the employee, he or she will look at the duty roster and the attendance register to

ascertain that they worked overtime on the given dates. The applicant worked overtime on 14 October 2020 according to the duty roster and attendance register. (P.12 of Bundle A). He contended that Ntshinga was correct to have given the applicant a claim form for the overtime that she worked, however, the applicant also completed the attendance register for working at the Premium agency on 14 October 2020. The applicant cannot claim from the agency and the respondent for working on the same day. She was aware that she was completing two forms because the date reflects on both forms. The payslips are also distributed to all the employees monthly and if not, it is placed in the admin building a week before or a week after pay day. When he started working in the acting manager position, he received extra money and he enquired from the admin building, and they informed him that it was his acting allowance. If the applicant signed both forms for the same date, then it was deliberate.

9. With reference to the second charge, the applicant once again signed for overtime. (P.18 of Bundle A). The applicant's name was on the duty roster for working overtime on 20 October 2020. (P. 19 of Bundle A). On that day she was supposed to be off. The applicant again signed the premium agency attendance register for working overtime on 20 October 2020. (P.22 of Bundle A). The applicant was therefore paid double for working overtime on 14 and 20 October 2020.
10. Under cross- examination he stated that he had nothing against the applicant, and she was a good nurse who did her clinical work well. Ntshinga committed the same transgression as the applicant, but she resigned in July 2021. He averred that when the applicant signs the claim form, there should be attachments that goes with it. Ntshinga dealt with everybody the same and when she gives them the claim form, she attaches the necessary documents to the claim form. For the two days overtime the applicant received R5173,20. Both the applicant and Ntshinga was at fault because if he was given a claim form, he would say that he already claimed for that. He stated that Ntshinga would not come to him and let him sign documents in a covid area and she would call him aside.
11. Under re-examination he stated that the applicant signs both the attendance register and the control sheets upon her arrival at work. If an employee works for premium, he or she will sign the attendance register for premium and the department's attendance register must not be filled in when you work for premium. The applicant worked as Ntshinga's second in charge and Ntshinga would not have benefited from completing the wrong forms for the applicant.
12. Ms Carmen Boltman (Boltman) testified for the respondent and stated that she works in the respondent's employee benefits section. She is familiar with the claim form for overtime and usually they will receive an overtime claim duty roster and an attendance register attached. The claim cannot be processed without those documents and the signatures of the employee who worked overtime and the supervisor. They look at the attendance register

and compare it with the duty roster. On the duty roster they check to see if the person was rostered to be on duty and if there is an OT (overtime) next to the person's name, they know that it is an overtime claim. Ntshinga approved the applicant's claim because that is her signature on the claim form. According to their records, the applicant was paid double for overtime because she claimed from premium agency and the respondent. The respondent overpaid the applicant. If you are overpaid, you must notify the line manager.

13. Under cross-examination she stated that she works at the substructure office where they do all the payments. If the applicant was booked to work for the agency, they would not receive the claim. The drivers bring it to them in packs from the facility and they go through it and check it. The supervisor attaches the relevant supporting documents.
14. Dr Laurentia Fillis (Fillis) testified for the respondent under oath and stated that she is the production dentist, and she was employed as the acting facility manager at Dunnon until 6 June 2022. The applicant's misconduct came to fore as allegations of misconduct at the facility. A whistle blower reported incidents of misconduct which they investigated. There was a group of employees who had received funds that they were not entitled to. Ntshinga was the operational manager of the unit and when the allegations came to the fore, Ntshinga resigned. The respondent suspended both Ntshinga and the applicant and investigated the case. Before they could charge Ntshinga she resigned. The applicant was a shift leader and a senior within the unit. The applicant committed fraud when she claimed twice from the agency and from the respondent. The facts indicate that the fraud was conducted in a group. The nature of the offence is gross and based on her knowledge justifies dismissal. The respondent pays the premium agency and therefore the money comes from the same source and therefore the applicant received double payments from the respondent. The trust relationship is destroyed and there is no lesser sanction that should be given to individuals who commit such transgressions. At the time of the incident, their overtime budget was depleted, and staff could not get paid and that impacted their morale and there were more repercussions. The applicant did not come to the employer to say that there was money that was overpaid to her. She would have known as soon as she received payment in her bank account or received her payslip. Ntshinga would not have any direct benefit by signing the applicant's claim form, but she assumes that she would approve it for some financial benefit for the applicant.
15. Under cross-examination she stated that Ntshinga resigned in June 2021. She did give an explanation as to why she is leaving, however, she cannot give any information as to why Ntshinga resigned. The behaviour of the applicant to claim double payment borderlines on abuse of power because you know how the system works and fraud has to do with manipulation of processes, and you have a duty to ensure that the space you are leading is aligned with the respondent. She averred that the budget for overtime was depleted, and this impacted on the

morale of the staff. The applicant manipulated overtime and agency claims because she claimed twice. She averred that it is not probable for a manager to ask an employee to sign in a clinical work area and the employee will most likely be called to an office. The applicant signed the attendance register for working overtime for the agency as well as the respondent on the same days. Ntshinga approved the overtime. Furthermore, the applicant had to verify the claim form before signing it to ensure that it is correct. Hlathana was disciplined for the same misconduct but there was a variation with her case. She can confirm that she is back at work. She was found guilty of attempting to claim double. The claim form did not reach the HR office and ended up with her and her manager. She is back at work.

Applicant's evidence

16. The applicant testified under oath and stated that she has been working for the respondent for six years as a professional nurse. She was a senior professional nurse. She did not attend her disciplinary hearing because she was admitted to hospital for depression. The respondent was aware of her admission. She has been suffering from depression since 2019. She has never been disciplined before and has not been accused of any form of misconduct. She pleaded guilty initially for signing the claim form without checking it. She was booked to work for the agency for those two days mentioned in charge 1 and charge 2. She did not claim twice. At the time that Ntshinga presented her with the claim form to sign, she was working in the covid isolation area, and she did not read the dates properly and she just signed. She signed because she trusted her manager that she did the claim properly. She conceded that she was not supposed to sign for the form because there were no supporting documents. She worked for the agency on those days, and she was not supposed to sign if she had checked the documents. She did not check the form because she was busy and did not have time to check and she just signed.
17. She contended that she signed the attendance register for the respondent on 14 and 20 October 2020 because you must sign it when you clock in and clock out. She was working for the agency on that day, but she signed on the register because you sign when you are in the unit, whether you are working for the agency or not. The control register they sign whether they are working for the agency or not. She became aware of the amount of R5173,20 for the first time when she received the suspension letter, last year. Nobody made her aware that she received extra money. She works overtime for the respondent on average three days per month. She admitted that she signed the attendance register of the agency on both relating to the charges and that her line manager signed too. Ntshinga approved that she worked that day for the agency.
18. She averred that when she works for premium agency she signs in a registered book and the manager just approves it and sends it away. When she works overtime for the respondent Ntshinga prints the claim form and

attaches a copy of the register and the duty roster. There were no documents attached to the forms that she signed. Ntshinga was supposed to attach the relevant documents to the claim form. She would pay back the money if she knew she was overpaid. She was never asked to pay the money back. She is not aware of any employee who was paid over and who paid the money back. She admitted that's he was not supposed to receive that amount. It was sister Ntshinga's mistake. Ntshinga told them that she resigned because she signed for the days that she did not work for the respondent. She worked with nurse Hlatana who is a nursing assistant. She became aware of the disciplinary hearing against Hlatana because she went to DENOSA's offices for assistance because she was dismissed for claiming twice from the respondent and the agency. She is back at Dunoon. She was reinstated by the appeal authority. She believes that her dismissal was not fair because they did not give her a chance to explain herself. She has been working for respondent for long time and she did not commit dishonesty. The lesson that she has learnt is that she must check her documents and not trust her line manager.

19. Under cross-examination she stated that as a senior professional nurse she must orientate people under her and see to it that the unit is running properly. Bomvana was not working under her, and she showed him how the unit ran. She orientated him in the unit clinically. The manager does the admin work. Ntshinga was her manager and she had to supervise the staff. As a manager she did the admin work in the unit and booking overtime was part of her duties as staff. Ntshinga was completing the claim forms and she gets the information from the registers. She signs the registers in the unit. Ntshinga was wrong to give her the claim forms without the supporting documents. She did not check properly if the documents were attached. When Ntshinga brought her the claim forms she only brought it without the documents. She did not check the days. Ntshinga was not supposed to complete the forms for her because she was working for agency. She was in the covid area when she signed the claim form. When she receives money for work done, it comes through to her phone as an SMS, whether from premium or the respondent. She later received her payslip, but she only realised at the hearing that there was money paid to her by the respondent. Sometimes they delay with the payslip.

ANALYSIS OF EVIDENCE AND ARGUMENT

20. Section 192(1) of the Act provides that an employee bears the onus of proving the existence of a dismissal, whilst subsection (2) requires the employer to prove the fairness thereof. In this matter it is not in dispute that the applicant was dismissed.

Substantive Fairness

21. In determining whether the applicant's dismissal was substantively fair, the factors listed in Schedule 8 of the Act under Item 7 of the Code of Good Practise: Dismissal is taken into account.
22. The applicant was charged with gross dishonesty in that it is alleged that she claimed overtime on 14 and 20 October 2020 from both the respondent and from Premium Agency for the same days in order to benefit double payments.
23. The case of the respondent is that the applicant was aware that she was claiming from both the agency and the respondent because she had signed the claim forms to be paid by the respondent and she had signed the attendance register of the agency to be paid by the agency for the same days, thereby causing her to be paid double for overtime on both 14 and 20 October 2022.
24. The case of the applicant is that she merely signed the respondent's claim form without paying to attention to the dates thereon. She further failed to check whether the supporting documents were attached to her claim form, and she blamed it on Ntshinga. The applicant's version is improbable because the dates indicated on the form is clearly stated and she signed the form about two weeks after having worked those overtime days. The applicant has failed to indicate which overtime days she thought she was signing for. To this end, I find that signing the overtime form could not have caused any sort of confusion. If she had worked overtime after 14 and 20 October 2020, it is likely that she would have stated that she thought she was signing for such and such a day, but she did not. What is more, the applicant was in a senior role at the hospital, and she was responsible for training and orientating staff. This places a more onerous burden on her to have checked that the dates on the claim form were correct and that the relevant documents were attached to the claim form.
25. The applicant's version that she was required to complete the attendance register of the respondent and premium is improbable, as her version was not corroborated by any other evidence. On the contrary, the respondent's witnesses testified that when you work overtime for the respondent you complete the attendance register of the respondent and when you work for the agency you complete the attendance register of the agency. The documentary evidence shows that the applicant signed the attendance register of the respondent on 14 and 20 October 2020 and it indicates that she worked overtime, as the letters OT is written thereon. Certainly, this would not be the case where she was working overtime for the agency, as it creates the false impression that she had worked overtime for the respondent. The applicant's version is implausible. The applicant could not explain why she had signed the respondent's claim form for overtime knowing that she had worked for the agency on 14 and 20 October 2020. Bearing this in mind, she should have checked to see whether the claim was correct.

26. It is common cause and the applicant conceded that she received double pay for the overtime days worked. Her version is that she never realised that she received double pay but admitted that she receives SMSs on her cell phone when money is deposited in her account. Once again, the applicant's version is improbable because a reasonable person would notice when an overpayment is made into his or her account. It is more likely the case that when money is paid into your bank account, you check the amount and where it comes from. It is therefore unlikely that she would not have realised that she was overpaid by the respondent. Moreover, she was suspended months after the incident and should by then have received her payslip. I am not convinced that she did not know that she was overpaid by the respondent.

Whether the respondent had applied discipline consistently

27. The applicant's case is that the respondent had applied discipline inconsistently in relation to the misconduct with which she was charged and dismissed, as another employee, Hlatana, allegedly also submitted a double claim for overtime. The respondent conceded that she tried to claim overtime, but that it did not reach the HR office and she received no money, unlike the applicant who had received an undue financial benefit. Hlatana's dismissal was therefore overturned by the respondent on appeal, and she was reinstated. I agree with the respondent that the merits of Hlatana's case varies to a certain extent when compared with the applicant's case, however, I agree with the applicant that the nature of the transgression is similar, as both transgressions involve elements of dishonesty. Inconsistency is a relevant consideration and a factor when determining whether dismissal had been the appropriate sanction. In *Bidserv Industrial Products (Pty) Ltd v CCMA and others [2017] ZALAC 4*, the court had the following to say at paragraph 31:

"This court sounded a warning on approaching the question of inconsistency in the application of discipline willy nilly without any measure of caution. Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss."

28. The Labour Court in *Eskom Holdings v Dennis and others* held that the ratio in the judgement of *SACCAWU and others v Irvin and Johnson Ltd* indicates that the following considerations apply to the determination of the issue of inconsistency: (1) Employees must be measured against the same standards (like for like comparison); (2) did the chairperson of the disciplinary enquiry conscientiously and honestly determine the misconduct; (3) The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious,

or induced by improper motives or by a discriminating management policy (in other words this conduct must be bona fide); and (4) a value judgement must always be exercised.

29. In *SACCAWU and others v Irvin and Johnson [1999] ZALAC 7* the Labour Appeal Court held at paragraph 29 as follows:

“ If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision.”

30. Moreover, in *Absa Bank Ltd v Naidu and others (2015) 36 ILJ 602 (LAC)* the court held as follows:

“However, it ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows: ‘[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.’”

31. When applying the principles set out in the above cases it is questionable whether the appeals authority had conscientiously determined the matter. I do not believe that they had carefully considered the matter before reaching their decision to reinstate Hlatana, as her conduct was tantamount to dishonesty, notwithstanding the fact that she had not received any money from the respondent. There is no evidence that the appeal chairperson exercised his or her discretion capriciously or that he or she had an improper motive not to dismiss the applicant's co-worker. What is clear is that the appeal chairperson failed to properly assess and appreciate the seriousness of the transgression of dishonesty. Their decision sends out the wrong message to the respondent's employees that if they submit fraudulent claims and get caught before receiving money from the respondent, they will remain in the respondent's employ. It encourages and opens the door for employee's to be dishonest. In view of the aforesaid, I am not bound by the appeal chairperson's decision because it would not necessarily mean unfairness towards the other employees who commit the same misconduct. What is more, in the *Bidserv Industrial Products*

Ltd case, the Labour Appeal Court held that “Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss.” That being said, inconsistency is not a decisive factor in determining whether a dismissal is fair or not and in the light of the above-mentioned considerations, I am not convinced that the applicant should benefit from a wrong decision.

32. In the light of the above-mentioned evidence, I find that the applicant was guilty of gross dishonesty when she claimed double payment from the respondent for overtime worked on 14 and 20 October 2020.
33. I find the applicant’s dismissal to be the appropriate sanction for the following reasons:
34. Theft or attempted theft is a very serious offence, as it also constitutes a criminal offence, and the respondent cannot be expected to tolerate such behaviour in the workplace. In ***Continental Oil Mills (Pty) Ltd v Singh NO & others (JR 2152/2010) [2013] ZALCJHB 30*** at paragraph, the Labour Court held that “Theft is so pernicious that it would annihilate the sustainability of the employment relationship”. In view of this case law, which is relevant to the case before me, it is clear that the trust relationship between the parties are broken down in cases of this nature.
35. In ***Impala Platinum Ltd v Jansen [2017] 4 BLLR 325 (LAC)*** the court held that the serious misconduct involving dishonesty self-evidently destroys the employment relationship. In this case the court held that the arbitrator correctly found that the employee’s misconduct (which involved dishonesty) went to the root of the employment relationship, and that no further evidence about the sustainability of an employment relationship was required. The evidence has shown that the applicant cannot be trusted and in view of this case law, which is relevant to the case before me, it is clear that the trust relationship between the parties is broken down in cases of this nature. It is clear from Le Roux’s evidence that she cannot trust the applicant because of the nature of the transgression. In the circumstances I cannot expect the respondent to put up with such behaviour from its employees.
36. The applicant showed no remorse and continuously shifted the blame to Ntshinga who she believed was responsible for the misconduct. This shows that progressive discipline would not be appropriate.
37. The above-mentioned factors far outweigh the applicant’s length of service and clean disciplinary record.

38. In the result, I find that the respondent has discharged the onus of proving that the applicant's dismissal is substantively fair on a balance of probabilities.

39. The applicant did not challenge the procedural fairness of her dismissal.

AWARD

40. The applicant's dismissal was both substantively and procedurally fair.

41. The applicant's claim for relief is dismissed.



.....
Janine Carelse