GPSSBC
General Public Service Sectoral Bargaining Council

ARBITRATION AWARD

Case Number: GPBC758/2016
Commissioner: E Maree
Date of Award: 27 February 2017

In the **ARBITRATION** between

PSA obo D Tshilowa; R. Chetty & E Bezuidenhout
(Union / Applicant)

And

Department of Home Affairs
(Respondent)

Union/Applicant's representative: Ms. O. Mashigo
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Respondent's representative: Mr. S. Tsai
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DETAILS OF HEARING AND REPRESENTATION

1The matter was set down as arbitration on the 14th of December 2016 at the premises of the Council situated at 250 Basden Avenue Lyttleton, Centurion.

2. The applicant was represented by Ms. O Mashigo an official from PSA while the respondent was represented by Mr. S. Tswai Deputy Director: Labour Relations.

3. It was common cause that the only issue to be determined is consistency and it was agreed to submit written arguments in terms of an agreed time line between the parties and that all arguments were to be submitted on or before the 11th of February 2017 to the council and myself at the e-mail and/or fax number provided.

4 On the **13th of February 2017** the applicant's arguments were received. At the date of this award the respondent submitted **no arguments**.

ISSUES TO BE DECIDED

5. Whether the respondent acted inconsistently when the applicants were sanctioned?

BACKGROUND TO THE ISSUE

6. The applicants were found guilty subsequent to a hearing on charges of insubordination and sanctioned with a final written warning and one months' unpaid suspension.

SURVEY OF AND ARGUMENTS

It is not my intention for purposes of this award to reflect verbatim the arguments/submissions/evidence that was made on record. I will only reflect the salient points of each party's arguments/submissions/evidence in so far as it has a bearing on the issue in dispute. Evidence was recorded manually and electronically.

iARGUMENTS

APPLICANTS' ARGUMENTS

7. The applicants were employed at the respondents' Brakpan offices and were found guilty of insubordination in that they have failed to comply with working hours.

8. It was argued that although the applicants have been given an instruction regarding the new working hours they have not received a roster indicating such.

9. Employees at Benoni and Centurion however, were found not guilty for the same offence as they had not received the new duty roster. The Centurion employees have not received an instruction regarding the new working hours whereas the Benoni employees have.

10. The case of the Benoni employees who were found not guilty is similar to that of the applicants as they had not received the roster but only an instruction regarding the new working hours.

11. It was argued that the duty rosters were to be drawn up by the supervisor to guide the employees regarding the hours/shifts they were supposed to work. On the days in question 23 – 25 March 2015 the applicants were at work as is clear from the attendance register, showing that if there was a roster with new working hours they would have observed it.

12. The same chairperson presided over the case of the applicants during July 2015 and the one in Benoni during September 2015. It is clear that he then found the employees not guilty as he realised - after the applicant's case = he cannot find them guilty if there is no duty roster.

RESPONDENT'S ARGUMENTS

13. No arguments were received on behalf of the respondent.

ANALYSIS OF EVIDENCE AND ARGUMENT

14. In terms of section 192[1] of the Labour Relations Act 66 of 1995, the onus is on an applicant to establish the existence of the dismissal which in casu was common cause as was the procedural fairness thereof.

15. In terms of section 192[2], the respondent only has to show that the dismissal was substantively fair.

16 The LRA, in schedule 8, sets out the guidelines for a fair dismissal. Item 7 specifically refers to misconduct and states as follows:

"Any person who is determining whether a dismissal for misconduct is unfair should consider -

[a] whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

[b] if a rule or standard was contravened whether or not-

[i] the rule was a valid or reasonable rule or standard;

[ii] the employee was aware, or could reasonably be expected to have been aware of the rule or standard;

[iii] the rule or standard has been consistently applied by the employer and;

[iv] dismissal was an appropriate sanction for the contravention of the rule or standard. "

17. At the outset of the arbitration the common cause and disputed issues were narrowed down and the only issue raised was that of consistency [Schedule 8 item 7[b][iii].

WAS THE RULE OR STANDARD CONSISTENTLY APPLIED?

18. It is generally speaking per se unfair to treat employees who had committed similar offences, differently. It is also unfair as the inconsistent application of rules creates discord in the workplace.

19. The principle of 'parity' however, should be applied with caution. It might be that an employee who deserves dismissal, benefits from the fact that another employee had not been dismissed for the same offence.

20. It was confirmed in SACCAWU & others v Irvin & Johnson [Pty] Ltd [1999] 20 ILJ 2302 [LAC] that the 'parity' principle is **a** general guideline of fairness and that it should not be applied rigidly.

22. The court specifically stated at 2313C-J '' Some inconsistency is the price to be paid for flexibility**,** which requires the exercise of a discretion in each individual case'' and further: '' 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 there was unfairness to the other employees. It would mean no more than 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'

23. It was held that where there is a number of employees who have committed the same misconduct the best that can be hoped for is reasonable consistency. In a case of a plurality of dismissals a wrong decision can only be unfair if it is capricious, or induced by improper motives or worse by discriminatory management policy

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24. The applicants argued that the respondent acted inconsistently in that they were found guilty and sanctioned whilst other employees at other branches were not found guilty. They stated that the case that was similar to theirs was that of Benoni where the employees also received an instruction but no roster, whereas in Centurion they have not received an instruction or roster.

25. Having considered the arguments as well as the documents pertaining to the hearings of the applicants and the employees at the Centurion and Benoni offices, it seems that the crucial facts presented in each case was mostly similar in that no rosters existed relating to the new working hours and although the Benoni employees also received an instruction as did the applicants they were found not guilty.

26. There is nothing in the case of the applicants if compared to that of the Centurion and especially the Benoni employees to warrant a finding of guilt as the crucial circumstances were the same.

27. Based on this the respondent acted inconsistent and the finding of guilt and concomitant sanction of final written warning and unpaid suspension unfair.

AWARD

28. I therefore make the following award:

The respondent, the DEPARTMENT OF HOME AFFAIRS is ordered to :

28.1. Uplift and remove the final written warnings imposed on the applicant's D Tshilowa; R. Chetty & E Bezuidenhout;

1.

28.2. Pay the applicants D Tshilowa; R. Chetty & E Bezuidenhout each the equivalent of one months' remuneration not paid due to the unpaid suspension;

28.3. The upliftment of the final written warning and the payment of the remuneration to be effected within fourteen [14] days from the date this award is served on the respondent''.

DATED AT PRETORIA ON THIS 27th DAY OF FEBRUARY 2017

COUNCIL COMMISSIONER
E MAREE