AWARD

Panellist/s: Annelie Bevan
Case No.: GPBC 1675/2016
Date of Award: 14 July 2017

In the ARBITRATION between:

PSA obo PHAKEDI O O
(Union / Applicant)

and

DEPARTMENT OF PUBLIC WORKS
(Respondent)

Union/Applicant's representative: Mr D Makolomakwa of (PSA)
Union/Applicant's address: _____

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Telephone: 018-381 9600
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Respondent's representative: Mr Rakgoale (Labour Relations official)
Respondent's address: _____

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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration into the abovementioned alleged unfair dismissal dispute in terms of section 191(1) of the Labour Relations Act, No 66 of 1995 ("LRA") was set down to be heard at 9h00 on 8 June 2017 at the offices of the Respondent, in Schweizer-Reneke.
2. Both parties were present. The Respondent was represented by Mr Rakgoale, a labour relations official and the Applicant was represented by Mr D Makolomakwa of the PSA.
3. The parties agreed at the beginning of the proceedings that the only issue to be determined is whether or not the sanction of dismissal was fair and therefore it can be argued on paper. The Respondent to file its arguments on/before 23 June 2017, the Applicant to anwer on/before 30 June 2017 and the Respondent to reply on/before 7 July 2017.

ISSUE TO BE DECIDED

4. I am to determine whether to dismissal of the Applicant was substantively fair or not, and the appropriate relief if necessary.

BACKGROUND TO THE MATTER

5. The Applicant was appointed on 16 January 1994 and became Roads Foreman/Supervisor in February 2012. The Applicant earned a gross salary of R13 314.25 per month at the time of his dismissal on 26 February 2016.
6. The Applicant then referred an unfair dismissal dispute to the Council. The matter was unsuccessfully conciliated and a certificate of non-resolution was issued on 27 September 2016 and the matter was set down for arbitration on 13 February 2017 on which date the parties attended to a pre-arbitration meeting, also indicating the need for a Tswana interpreter. The matter was then by agreement postponed to 8 June 2017.
7. On 13 February 2017, the parties agreed that the following issues were common cause:
   7.1 The Applicant was charged with two counts of misconduct and found guilty on charge 1.
   7.2 Charge 1 read as follows: "you are charged with misconduct in terms of Annexure A of the Code which read as follows: 'Sale of government scrap metal and financial gain thereof (fraud)' in that between 24/07/2014 and 03/09/2014 you sold government scrap metals at Christiana and Delareyville. You received cash to the value of R18 256.60 and used the cash on your good self as detailed below (14 transaction captured in column in charge sheet.).
   7.3 The Applicant agrees that he sold scrap metal during the period in question.

7.4 The Applicant has a clean disciplinary record.

7.5 The Applicant is married with two children. The Applicant is still unemployed. He is financially responsible for his mother as well.

7.6 The parties agree that the dismissal was procedurally fair.

7.7 The rule against fraud is valid and reasonable.

8. The parties also agreed in the pre-arbitration minutes that the following issues are in dispute:

8.1 The existence of the rule is in dispute.

8.2 Whether or not the Applicant was aware of the rule or not.

8.3 Whether or not the Applicant sold the scrap metal during the period in question out of his own accord and for his own benefit, or whether or not he did it on instruction of his supervisor.

8.4 Whether or not dismissal is not the appropriate sanction.

8.5 Whether or not the Respondent is consistent in applying the rule and/or the sanction; especially in connection with action taken against the Applicant's supervisor during that time.

9. The parties handed in a combined bundle of documents, marked "A".

10. The Applicant is seeking retrospective reinstatement with back pay, and issuing an alternative sanction to dismissal.

11. On 8 June 2017 the Applicant indicated at the beginning of the proceedings that the only issues in dispute that is being persued by the Applicant at this stage is:

11.1 Whether or not the sanction of dismissal is appropriate; and

11.2 Whether or not the Respondent is consistent in applying the rule and/or the sanction.

SUBMISSIONS OF THE PARTIES

The Respondent's case:

12. The Respondent did not submit any arguments by 23 June 2017**.**

The Applicant's case:

13. The Respondent failed to provide the Applicant with any submissions to answer to, which left the Applicant with no option but to submit his version in the absence of the Respondent's version.

14. The Applicant claimed that the dismissal was procedurally fair.

15. It is clear that the Applicant was substantively found guilty on the charge based mainly on the evidence of Mr Abram Masibi (see Annexure C of the bundle).

16. However, none of the other officials implicated in Mr Masibi's statement were disciplined, only the Applicant was charged and dismissed. The Applicant's manager was also never charged or dismissed.

17. In the matter of ***De Beers Consolidated Mines Ltd v CCMA &*** Others the Labour Appeal Court found that long service may be a weighty consideration and it is especially relevant to determine whether or not the employee is likely to repeat the misconduct.

18. The Applicant has many years of service with the Respondent, with a clean disciplinary record before this incident. The Applicant noticed and recognized that his actions have serious repercussions and he is remorseful of it and will never repeat it.

19. The misconduct centered on the handling of state funds, which fell outside the scope of his duties and for which he was no trained.

The Respondent's replying arguments:

20. In the Respondent's arguments submitted it claimed that the Applicant had to submit on 23 June, the Respondent to respond on 30 June and the Applicant to reply on 7 July 2017.

21. The Respondent contends that the sanction of dismissal is fair and appropriate because *firstly*, the misconduct committed by the Applicant is very serious in its nature; *secondly,* that the Applicant held a position of trust that he abused; *thirdly,* that the Applicant had 22 years of service with the Respondent and should have known better; *fourthly*, that the Applicant did not show any sign of remorse; *fifthly,* it is evident that should the Respondent continue to have employees like the Applicant in its employ, it has potential of collapsing; *sixthly*, the Applicant by his actions has failed to lead by example; *seventhly*, the Applicant knew or was reasonably aware of the rule and *lastly,* that the employment relationship has irretrievably broken down.

22. In ***City of Cape Town v SALGBC & Others [2011] 5 BLLR 504 (LC)*****,** an Employee was dismissed for gross dishonesty after discovery that 9 years earlier she had presented a fake Namibian driver's licence to South African authorities for conversion. The Arbitrator found that employee had indeed obtained licence by fraud, municipality entitled to discipline her but ruled that dismissal was too harsh a penalty because the fraud was not committed in workplace and did not relate to employee's duties and because the municipality had not considered whether a lesser sanction might be appropriate and further because the offence committed 9 years earlier. The Municipality contended that finding on sanction was unreasonable as employee has persisted with false defense, had properly been found guilty of gross dishonesty and had held a senior position which demanded "impeccable" honesty.

23. In setting the award aside and holding that the employee's dismissal was fair, the court held that:

    23.1 When it comes to deciding on appropriateness of a sanction, it is not function of Arbitrators to merely rubber stamp employer's decisions.

    23.2 However, arbitrators are not called to decide afresh what should be done.

    23.3 Issue was whether commissioner had arrived at a reasonable decision on sanction.

    23.4 Question was whether dishonest conduct of employee impacted on relationship with employer.

23.5 Mutual trust is an essential element of employment relationship, Courts have generally held that dishonest conduct destroys employment relationship even if employees concerned have long service and clean disciplinary records.

23.6 Employee had been grossly dishonest and committed a criminal offence, she deceived the State and had persisted with false claims during investigation, disciplinary hearing and under oath at Arbitration.

23.7 Employer (as an organ of State) is entitled to require utmost trust in employees, especially those ones entrusted with public funds as the Applicant had been.

23.8 Employee showed no remorse, the fact that the Fraud had been perpetrated a long period before did not serve as a mitigating factor because employee had continued to benefit from her fraud.

24. In ***Theewaterskloof Municipality v South African Local Government Municipality (Western Cape Division) & Others (966/2008) {2010} ZALC 69; (2010) 31 ILJ 2475 (LC); {2010} 11 BLLR 1216 (LC) (14 May 2010)***, the Labour Court was called upon to determine whether a Municipal Manager was fairly dismissed for receiving a transport allowance (which he knew was not entitled to), spending the money and then offering to pay it in derisory month instilments of R10-00 per month. The court held that:

24.1 the employee had not been dishonest in the conventional sense as he did not try and conceal the fact that he had received the money and spent it.

24.2 outright dishonesty is only one manifestation of the broader principle on which the employment relationship rests.

24.3 principle was one of trustworthiness.

24.4 the Municipality was fairly entitled to expect the employee at the level of a manager to act in its best interests and to promote its operational requirements.

24.5 The employee's conduct in receiving money that he was not entitled to and spending this money, was inconsistent with the trust that has to be maintained within an employment relationship.

24.6 to make matters worse, the Municipality had not simply dismissed the employee but had offered him an opportunity to repay the money at an acceptable rate. However, the employee had come up with a ridiculous repayment offer of R10-00 per month and had then resorted to outright defiance and resistance to repay the money at a reasonable rate. The Court, found that this constituted lack of remorse which expressed itself as defiance, an outright rejection of the employer's authority and a complete disregard of its operational requirements.

24.7 the employment relationship had been compromised because the employee had opportunistically seized on the Municipality's mistake to indulge in a spending spree with money he knew was not due to him and this was then exacerbated by his refusal to repay his employer for its obvious mistake.

24.8 an Arbitrator is not given power to decide afresh what he/she would consider to be an appropriate sanction but must simply decide "whether the employer did was fair".

25. While this does not mean that an Arbitrator must defer to the decision of the employer, the Arbitrator is required only to decide whether the employer's decision to dismiss is fair.

26. The aforesaid cases have, to some extent, re-affirmed a number of age old principle in our law, namely the fact that trust is an important ingredient of the employment relationship, that Arbitrators are not at large to simply set aside an employer's decision to dismiss but must look carefully at that decision and assess whether the decision is fair or not, and that offences involving dishonesty are generally destructive to an employment relationship.

27. In ***Mphigalale v Safety and Security Sectoral Bargaining Council & 2 Others JR 2028/09 (unreported) Labour Court handed down on 07/12/2011***, Savage AJ made reference to Conradie JA in ***De Beer's Consolidated Mines Ltd v Commission For Conciliation, Mediation & Arbitration & Others (JR 1583/09) {2010} ZALC 234 (22January 2010)*** wherein it was stated:

"*A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a simple operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium over minor theft; it has everything to do with the operational requirements of the employer's enterprise*". The judge went on to state that: "{18} *This 'sensible operational response to risk management 'is one which must be undertaken fairly. In determining whether a decision to dismiss is fair, a commissioner must take cognizance of the fact that the discretion to dismiss lies primarily with the employer and interference with the sanction imposed should not lightly be contemplated, with a measure of deference afforded to the sanction imposed by the employer. The Code of Good Practice: Dismissal establishes a guideline to test the fairness of a dismissal, which includes consideration as to whether 'the rule of standard has been consistently applied by the employer'. As a general rule, fairness requires that like cases be dealt with alike, whether in the consistent enforcement of a rule or in the imposition of a penalty……."*

28. In ***SACCAWU & Others v Irvin & Johnson (Pty) Ltd (1999) 20 ILJ 1957 (LAC)***, Conradie JA found that:

'The best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of discretion in each individual case. 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 other employees. It would not mean that there was unfairness towards other employees. It would no more mean 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… A wrong decision can only be unfair if it is capricious, or induced by improper motives, or worse, by a discriminating management policy.'

29. The rule regarding discipline in the workplace in the Respondent in particular at Schweizer-Reneke Sub-District Office is consistently applied for the following reasons:
    29.1 Mr. Ephraim Chubisi who is mentioned in this matter served as supervisor to Mr. Abram Phage Masibi who was the Respondent's witness during the Disciplinary Hearing of the Applicant.
    29.2 Mr. Goitseone Patrick Molebalwa was a subordinate of the Applicant also testified as the Respondent's witness during the Disciplinary Hearing of the Applicant.
    29.3 Mr. E.M Mabe who is the Respondent's Administration Clerk based at Schweizer-Reneke Sub-District Office has allegedly been linked to wrong doing regarding the same matter of selling of scrap metal of the department. He is being disciplined for the same offence and such proceedings resumed on the 05th of June 2017 and the 26th of June 2017 respectively. Proceedings were however postponed to afford the Presiding Officer the opportunity to make a ruling on preliminary issues raised by his representative.
30. It is vividly clear that the Applicant was defiant in his actions for failing to make an undertaking of refunding the employer the money he took from the department unduly. Truly and unequivocally speaking, the Chairperson of the Disciplinary Hearing was left with no option other than to dismiss the Applicant who did not want to take responsibility for his actions.
31. The Respondent firmly believes that based on the record and evidence presented during the disciplinary enquiry, the records of which have been exchanged between the parties and the Council, there is no other sanction that a reasonable decision maker could have arrived at besides that of dismissal as pronounced by the presiding officer .
32. The Applicant's personal circumstances; his service; his unblemished disciplinary record; his lack of remorse; the nature of his job (position) and circumstances under which the misconduct was committed; is not a case where progressive discipline should be applied. If the Council does not hold as such, what message would such leniency send to others? See *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (CCT19/16) [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC)*
33. In the premises, it is the Respondent's humble plea that the Panelist return the following ruling:
    33.1 that the Applicant's application that the sanction of dismissal imposed by the Respondent was unfair be dismissed;
    33.2 that the Applicant's dismissal was fair: and that
    33.3 no order is made as to costs.

ANALYSIS

34. I intend to offer brief reasons in my analysis as per Section 138 (7) of the *LRA* as amended, which provides that, *"Within 14 days of the conclusion of the arbitration proceedings – the commissioner must issue an arbitration award with brief reasons".*

35. Section 192(2) of the Act provides that once the existence of a dismissal is established, the Respondent must prove that the dismissal is procedurally and substantively fair. In light of the fact that the Respondent bore the onus to prove that the dismissal was fair, it was decided that it should submit its arguments on 23 June 2017, the Applicant to answer on 30 June 2017 and the Respondent to reply on 7 July 2017.

Procedural Fairness

36. It was agreed between the parties that the dismissal is procedurally fair. I therefore find that the dismissal was procedurally fair.

Substantive Fairness

37. I was required to determine whether or not the dismissal was substantively fair in relation to the charge mentioned above.

38. In analyzing the evidence presented I have taken into account Item 7 of the Code of Good Practice: Dismissals in the LRA, as well as the CCMA Guidelines on Misconduct Arbitrations.

39. The Applicant was found guilty on one charge of misconduct, relating to fraud involving an amount of R16 000.00. The Applicant conceded that he was correctly found guilty of the misconduct, but averred that the sanction imposed was too harsh especially in light of the fact that the Respondent is not consistent in applying discipline and the sanction.

40. In the pre-arbitration minutes agreed to on 13 February 2017, the issue of consistency was limited to whether or not the Applicant's supervisor, Mr Mayedwa (see page 11 of Annexure D) was disciplined and/or sanctioned in the same manner as the Applicant. This was done in compliance with the Labour Appeal Court's decision in ***National Union of Mineworkers on behalf of Botsane v Anglo Platinum (Rustenburg Section) (2014) 35 ILJ 2406 (LAC)*** where the court stated that inconsistency should be averred openly and unequivocally so that the employer is put on proper and fair terms to address it.

41. *Grogan, J* in his book *Dismissal [2013:p151]* defines contemporaneous inconsistency as when two or more employees engage in the same or similar conduct at roughly the same time, but only one or some of them are disciplined, or where different penalties are imposed. Fairness dictates that like cases should be treated alike.

42. In ***SACCAWU & others v Irvin & Johnson (Pty) Ltd (1999) 20 IL 2302 (LAC)*** it was held that 'parity' is simply a general principle of fairness and that it should not be applied rigidly. "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 to the other employees."

43. Why the Applicant referred specifically to his supervisor when allegations relating to inconsistency was made remains a mystery as the Applicant's evidence in the disciplinary hearing as captured in the Chairperson's report (Annexure D, page 11) clearly indicated that his supervisor, Mr Mayedwa was evicted from his office and that the Applicant could therefore not hand the money of the scrap metal over to him. This is a clear indication that the Applicant's supervisor could not have been involved in the same misconduct as the Applicant.

44. The Respondent further clarified the issue relating to inconsistency by stating that another employee (Mr E M Mabe) implicated in the same fraudulent transactions were charged and the disciplinary hearing is still ongoing.

45. The decision in the ***Irvin & Johnson-case*** must be understood within its context, where a plurality of disciplinary events took place as a result of the violent demonstrations during an illegal strike. This is clearly distinguishable from the ***SRV Mills Services (Pty) Ltd v CCMA & others (2004) 25 ILJ 135 (LC)*** case where the facts are stark: two employees were together throughout an event that led to them being absent from the same shift, neither of them reported their situation to management; one was found guilty and the other not; the first was tried promptly, the other was not. The judge then linked these facts to the perception of bias and commented: 'It is for this reason that the explanation for the differentiation is essential, if the different outcomes are both to survive.'

46. I do find it quite disturbing that the disciplinary matter of E M Mabe is still ongoing, whilst the hearing of the Applicant was finalized and his dismissal was effective in February 2016. More than 16 months later, the disciplinary hearing of another official who was implicated in the same misconduct during the same time is not yet finalized. It might be indicative of a perception of bias as found in the ***SRV Mills Services (Pty) Ltd-case.*** However, it was not consistency in relation to E M Mabe that was challenged by the Applicant, but that of Mr Mayedwa. Even if the matter of Mr E M Mabe could be considered in relation to consistency, I am not convinced that consistency can sufficiently mitigate against the seriousness of the offence. The matter of E M Mabe is also not finalized yet, and it might well be that E M Mabe is met with the same fate as the Applicant due to the seriousness of the alleged misconduct, if found guilty.

47. In light of all the above, I find that the dismissal of the Applicant was substantively fair.

48. In ***County Fair Foods (Pty) Ltd v CCMA & others (1999) 20 ILJ 1701 (LAC)*** the Labour Appeal Court found that "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 non-compliance will be visited. Interference therewith is only justified in the case of unreasonableness and unfairness." If the Respondent has thus decided that when an employee is found guilty of reporting for duty under the influence of alcohol, the appropriate sanction is dismissal, it is not for an arbitrator to interfere with this workplace standard, unless it is unreasonable and unfair.

49. In ***Sidumo v Rustenburg Platinum Mines Ltd (2007) 28 ILJ 2405 (CC)*** the Constitutional Court has now ruled that commissioners do not have the power to decide independently on penalties for workplace delinquency. 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.

50. The court in ***Sidumo*** listed the following factors which need to be considered to determine whether dismissal is the appropriate sanction:

50.1 Whether the sanction was in accordance with the employer's disciplinary code:

No evidence or submissions were made in this regard, but gross dishonesty and fraud is usually met with the sanction of dismissal, even for a first offence.

50.2 Would a lesser sanction have served the purpose?

The Code of Good Practice: Dismissal states clearly that dismissal is the "ultimate sanction". It should therefore not be imposed if a lesser penalty would serve the purpose. The Labour Appeal Court had however observed in ***De Beers Consolidated Mines Ltd v CCMA & others (2000) 21 ILJ 1051 (LAC)*** that "Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise."

In this case, the Respondent argued that the Applicant was in the position of supervisor since 2012 and he therefore should have been aware of the rules relating to cash transactions, coupled with the fact that as a supervisor he should have led by example. The Applicant proposed a lesser sanction, but did not provide any arguments in support thereof.

50.3 The gravity of the offence

The more serious an offence, the more likely it is that an employer will consider dismissal to be appropriate. It is evident from a reading of case law that the courts have found repeatedly that serious acts of misconduct, such as dishonesty, would render factors such as length of service and a clean disciplinary record irrelevant in determining the appropriate sanction to be applied as the Court places a high premium on honesty in the workplace. (see ***Toyota South Africa Motors (Pty) Ltd v Radebe & others [2000] 3 BLLR 243 (LAC)*** and ***Hulett Aluminium (Pty) Ltd v MEIBV & others [2008] 3 BLLR 241 (LC)***).

50.4 The employee's disciplinary record

The Applicant had a clean disciplinary record.

50.5 The basis on which the employee challenged the dismissal;

The Applicant challenged the substantive fairness of the dismissal, by way of a challenging consistency.

50.6 The effect of dismissal on the employee; and

The Applicant testified that he is the bread winner of the family and he is still unemployed.

50.7 Long-service record.

The Applicant worked for the Respondent for 22 years. Long service of the Applicant should have been a deterring factor in this kind of misconduct as he should have known better.

51. Although I would have liked to believe that a person with so many years of experience should be given a second chance, I cannot fault the chairperson of the disciplinary hearing for deciding on the sanction of dismissal. The public sector is rife with corruption and dishonesty and misconduct of this nature cannot be met with a lesser sanction than that of dismissal.

52. The decision of the chairperson of the disciplinary hearing is therefore not at variance with a decision that I would have come to that it necessitates any interference.

AWARD

53. I find that the dismissal was procedurally fair and substantively fair.

54. The case is dismissed.

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PANELIST: ANNELIE BEVAN