



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 664 8132
Web: <http://www.gpssbc.org.za>

ARBITRATION AWARD

Panellist/s: **Michael Marawu** _____
Case No.: **GPBC 52/2020** _____
Date of Award: **18 October 2020** _____

In the ARBITRATION between:

NEHAWU obo Magula, N _____
(Union / Applicant)

and

Department of Home Affairs – Western Cape _____
(Respondent)

Union/Applicant's representative: Mr M Cagwe (NEHAWU Official) _____
Union/Applicant's address: PO Box _____
Cape Town _____
8000 _____
Telephone: (021) 948 4397 _____
Telefax: (021) 948 3972 _____

Respondent's representative: Ms C Le-Roux (ASD: Labour Relations) _____
Respondent's address: 56 Barrack Street _____
Cape Town _____
8000 _____
Telephone: (021) 468 4520 _____
Telefax / Email: carol-ann.leroux@dha.gov.za _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was held at the premises of the department of Home Affairs in Cape Town on 03 August and concluded 05 October 2020. The applicant was represented by a trade union (NEHAWU) official Mr Makhaya Cagwe and the Department by Ms Carol-Ann Le Roux (ASD: Labour Relations). The arbitration proceedings were digitally recorded.

ISSUE TO BE DECIDED:

2. I must determine whether the Applicant's dismissal was substantively and/or procedurally fair.

BACKGROUND TO THE MATTER:

3. The Applicant was employed with the Respondent as an **Administration Clerk** for five (05) years.
4. It is alleged that the Applicant was unfairly dismissed by the Respondent in September 2019.

SURVEY OF EVIDENCE AND ARGUMENT:

Respondent's:

5. **Ms Carol-An Le Roux (ASD: Labour Relations)** submitted aggravating circumstances on behalf of the department of Home Affairs, as the Applicant presented only mitigating factors and only challenged dismissal sanction in this regard. The department was of the view that the Applicant's actions with her accomplices in the fraudulent issuing of birth certificates and passports to foreigners, compromised the department's values and security.
6. She was an Administration Clerk who was based at Gugulethu Hospital, and pleaded guilty for fraudulent registration of births of twelve (12) foreign nationals, which documents were used for further fraudulent activities within the department of Home Affairs.
7. The Applicant stated during her disciplinary enquiry that she committed the fraudulent activities, due to financial gain. The disciplinary hearing presiding officer weighed the Applicant's mitigating circumstances against the severity of the offence committed, and ultimately determined dismissal to be appropriate sanction in this regard.

8. Trust relationship has been irretrievably broken down between the department and the Applicant; she cannot continue working for the department, in the circumstances.

Applicant's:

9. **Ms Nosipho Magula** is the applicant in this matter and she testified that she has been an Administration Clerk with the department for a period of about five years. She admitted to committing the fraudulent activities she was accused of and was very remorseful for her shameful conduct in this regard. She could not deny that she was under financial pressure and did what she was found guilty of, due to financial gain.
10. She needed money for a number of reasons, including to support her family and her thirteen months' old baby. She is in dire financial constraints and in genuine need of her job. She is enjoying good relationship with her colleagues and immediate superiors.
11. She has no previous disciplinary record for the entire period of five years she has been working for the Respondent and would not allow her temptation to get the better of her again. The Applicant is seeking retrospective reinstatement.
12. The Applicant's trade union official also submitted that the Applicant was truly remorseful; she did not deny anything but pleaded guilty to display her sincere remorse. She has even been called by her previous colleagues checking if she would come back and her previous manager provided a character testimonial letter in, in the circumstances.

ANALYSIS OF EVIDENCE AND ARGUMENT:

13. It is common cause that the Applicant was dismissed by the Respondent in September 2019. Therefore the main issue to be decided is whether the Applicant's dismissal was procedurally and/or substantively fair. In dealing with this issue, it is critical to consider section 192 of the LRA, which states the following:
"(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.
14. In proving substantive fairness, the Respondent presented one allegation that the Applicant was dismissed on, which related to the alleged fraudulent act (misconduct) relating to the fraudulent registration of twelve (12) births of foreign nationals over a period of 30 months. The applicant did not deny allegation against her, but pleaded for mercy citing personal and mitigating circumstances she had to contend with.
15. The Applicant's mitigating factors presented were quite significant in nature, and ranged from her personal need for financial and employment security, including the material support she has to provide to her thirteen months old baby and family members. She had a clean disciplinary record over a period of five years.

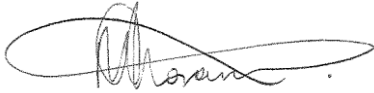
16. She understood the severity of the offence committed and was also not aware of any other individual(s) that received a lesser sanction than dismissal within the department or elsewhere, having committed a similar or same offence. The Respondent on the other hand presented a strong argument against the reinstatement of the Applicant, citing irreparable damage caused by the Applicant on trust relationship between herself and the department of Home Affairs.
17. There was no precedent within the department or any other Government's institution, where such a serious offence had been pardoned or sought to be rehabilitated before. I therefore could not find any compelling circumstances or valid grounds that could outweigh department's genuine concerns, in the circumstances.
18. When assessing the validity or fairness of the sanction imposed (dismissal) by the employer, I have to be guided by the salient principles laid down by the courts. In **Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC)** the Constitutional Court held that fairness requires a balancing of the interest of the employer and employee parties.
19. In **Fidelity Cash Management Service v Commission for Conciliation Mediation and Arbitration & others (2008) 29 ILJ 964 (LAC)** the Labour Appeal Court held that in considering the totality of circumstances the commissioner would have to answer the question whether dismissal was in all of the circumstances a fair sanction. In answering that question he or she would have to use his or her own sense of fairness.
20. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be *mala fide*. He or she is required to make a decision or finding that is reasonable.
21. Having considered the evidence I am of the view that there is no legal basis to interfere with the sanction of dismissal. I accordingly find the dismissal of the Applicant to be substantively fair.
22. No issues pertaining to procedural unfairness had been placed before the arbitrator and as such I find the dismissal of the Applicant to be procedurally fair.
23. With regard to all the factors presented above and guiding legal principles, it is my considered opinion that the employee's dismissal was both procedurally and substantively fair.

AWARD:

24. The dismissal of **Nosipho Magula** was both procedurally and substantively fair.

25. The referral is accordingly dismissed and the employee is not entitled to any relief.

26. No order as to cost is made.

A handwritten signature in black ink, appearing to read 'Michael Marawu', with a large, sweeping loop at the end.

Michael Marawu

Name:

GPSSBC Arbitrator