



GENERAL PUBLIC SERVICE
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ARBITRATION AWARD

Panellist/s: Mr Martin Sambo _____
Case No.: GPBC220/2019 _____
Date of Award: 03 February 2021 _____

In the ARBITRATION between:

POPCRU obo RV YEKO

(Union / Applicant)

AND

DEPARTMENT OF CORRECTIONAL SERVICES

(Respondent)

Union/Applicant's representative: Mr Mofokeng MP _____

Union/Applicant's address: POPCRU _____

Union Official _____

Telephone: _____

Telefax: _____

Respondent's representative: Mr John Khambule _____

Respondent's address: DCS Vereeniging _____

Telephone: _____
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

This matter was scheduled for arbitration at 9h00am on 31 August 2020, 02 September 2020, at the offices of POPCRU, 21 Kruis Street in Johannesburg and on 25, 26 and 27 November 2020 at the offices of the Department of Correctional Services, 57 Lager Street in Vereeniging.

The employee party, Mr RV Yeko (hereinafter referred to as the Applicant), was represented by his union representative Mr MP Mofokeng. The employer party, Department of Correctional Services (hereinafter referred to as the Respondent), was represented by its Labour Relations Officer Mr John Khambule.

The proceedings were electronically recorded.

ISSUE TO BE DECIDED

I have to decide whether, in the circumstances detailed hereunder, the dismissal of the Applicant by the Respondent was both procedurally and substantively unfair.

BACKGROUND TO THE ISSUES

The Applicant Mr RV Yeko was employed by the Respondent on the on 31 July 1998 and was a Correctional Officer Grade1 at the time of his dismissal. The Respondent is a national government department responsible safe custody and rehabilitation of inmates.

The Respondent dismissed the Applicant on the 18 January 2019 for “misuse of state vehicle”. The Applicant was earning a monthly salary of R24 994.97 at the time of dismissal. The Applicant referred the dispute to Council, but could not be resolved through conciliation. The Applicant seeks retrospective reinstatement as a remedy.

The parties stated that they had no point *in limine* to raise. The parties submitted bundles A & B of documents. The Respondent called four witnesses whereas the Applicant called two witnesses for his case.

The Applicant indicated in opening that they are disputing both the procedure and substance of their dismissal. On the procedure the Applicant indicated that the process of investigation was flawed. On the substance the Applicant disputed that he breached the Respondent's rules as he did not commit misconduct. He also contended that the Respondent does not apply discipline consistently as it charged others formally and others informally and gave sanctions less than dismissal to other employees. For instance Mr Ramabodi a Parole Officer in Vereeniging was charged informally and got a Written Warning; Mr Radebe a nurse in Leeuwhof was charged informally and granted a Verbal Warning; and Mr Kutoane of Groenpunt was charged formally and granted a Written Warning. The Applicant further claimed that the sanction was too harsh.

ANALYSIS OF EVIDENCE AND ARGUMENTS

The Labour Relations Act 66 of 1995, as amended (LRA), provides in the Code of Good Practice (the Code): Dismissal in Schedule 8, Article 2(1) that a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure,... In this case the Applicant indicated that he is disputing both the reason and the process of his dismissal.

Process

On the procedure the Applicant indicated that the process of investigation was flawed in. In the testimony which he did not put to the initiator the Applicant claimed that the investigation of Mr Thwala was biased in that he omitted certain issues like trip sheets, he failed to determine what loss the state suffered and failed to check whether he was officially authorized. Mr Nqelani who was the presiding officer in the initial hearing testified for the Respondent that he confirmed all the procedures were followed while presiding. He further testified that the Applicant pleaded guilty but disputed other issues. Then the HR advisor advised that in the instance a plea of not guilty be entered. Then he gave the parties an opportunity to caucus again and on their return the Applicant still insisted on pleading guilty and did not raise issues anymore. He further testified that the parties did not put before him a plea bargain that Applicant will be given a final written warning should he plead guilty as it is claimed by the Applicant. The Applicant did not dispute this. I have during the cases indicated to the Applicant the procedural requirements that must be met as stated in Elizabeth Avril Home's judgment. In the case of **Elizabeth Avril Home for the Mentally Handicapped V CCMA & Others** it was held that procedural fairness refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. I consider this to be the minimum procedural points required in law and the Applicant did not dispute that. The above case law separates trivial procedural points from those required by law. The Applicant did not pursue his "flawed investigation" procedural point anymore nor did he dispute the PO's version on how the plea of guilty was arrived at. I therefore find nothing wrong with the way the Respondent handled this case.

Substance

On the substance the Applicant disputed that he breached the Respondent's rules.

Article 7 of the Code states that a person considering the fairness of a dismissal for misconduct must consider the following:

- 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 valid or reasonable rule or standard;
 - ii) the employee was aware, or could reasonably 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.

This case deals with the rule against:

(i) Misuse of state vehicle;

Was there a rule or standard?

The existence of this rules was not disputed by the Applicant during the case.

Was the rule or standards reasonable or valid? –

The validity or reasonability of the rules is not disputed by the Applicant.

Was the Applicant aware of the rules/standards or ought to have been aware of the rule/standard?

This was not disputed by the Applicant.

Has the Applicant has contravened the rule/s or standard? –

The Applicant has been charged for misuse of state vehicle. It is important to note that at the outset the Applicant conceded that he pleaded guilty to this charge but claims that he was incorrectly advised by the previous representative who passed on. The Respondent called 4 witnesses and the Applicant called three witnesses to prove their cases. Ms Ditoro Elizabeth Thloka testified for the Respondent that she is the manager of the Applicant and that on the 15th December 2017 the Applicant abused the state vehicle by taking trips to Sasolburg which were not authorized. She testified that Applicant's trip sheet was authorized to travel from Vereeniging to Orange Farm and that she also instructed him deliver documents to Groenpunt Prison. The Applicant however took several trips to Sasolburg which were not authorized. She further testified that the trust relationship has been broken since the Applicant was given a three months suspension without pay for a similar offence in 2013. She further testified that when the Applicant returned from leave she called him with Mr Mofokeng (the Applicant's supervisor) and Mr Maloka and informed the Applicant that he will no longer drive a state vehicle and that an investigation into his conduct will be conducted. She further testified that after Mr Maloka and Mofokeng left, the Applicant apologized to her about this offence. The Applicant disputes the apology, does not dispute that he took unauthorized trips to Sasolburg but seems to dispute the lawfulness of the instruction to take documents to Groenpunt. She disputes the Applicant's version that he rushed to Sasolburg because he got a call that the absconder was seen there. She states that the Applicant went there three times on the same date but at no stage did he inform his supervisor or ask for back up or ask for permission despite that he went back to the office.

Mr Tau Daniel Maloka testified for the Respondent that on the 30th December 2017 he was called with Mr Mofokeng and the Applicant to Ms Thloka's office. He was asked if he knew anything about the Applicant's trips to Sasolburg and he indicated that he does not. He further testified that Mr Mofokeng said he did not authorize the trips. He further testified that they were asked about Sasolburg as it was outside the jurisdiction of Vereeniging Comcor jurisdiction and that prior to going after an abconder outside the jurisdiction they have to liase with Sasolburg's officers to investigate or to get superiors' permission and to get another person to assist as one cannot go alone. Mr Nqelani who was the presiding officer also testified that the Applicant insisted on pleading guilty despite being given an opportunity to reflect on the plea. Mr Nqelani testified that the parties did not bring a plea bargain before him. The Initiator Mr Abel Thwala also testified for the Respondent that he did not enter into plea bargain with the Applicant as such is not allowed.

Mr Price Moeketsi testified for the Applicant that he is a previous colleague of the Applicant and on the day in question he saw the absconder in Sasolburg and called the Applicant to come and apprehend him. However he did not wait for the Applicant to arrive. He confirmed that they worked on pairs and not alone and that they should first get permission. He later claimed that they did not work according to policy in other instances due to shortage of staff. The Applicant claimed that on that day he went alone because he was not going to arrest and that if he spotted the absconder he was going to ask back from SAPS. However the Applicant did not put this version to the Respondent's witnesses.

The Applicant testified that he admits his trip sheet was not for Sasolburg when he went there but justifies it by saying that his trip sheet for that day was not for Groenpunt either but for Orange Farm and Johannesburg and that it was changed by an instruction of Ms Thlokwa. This cannot be a valid justification as the Applicant could not dispute that Ms Thlokwa is her manager who has authority to give such instruction. Further, the version of the Applicant and Mr Price Moeketsi does not corroborate as Mr Moeketsi does not in his testimony mention that he is in Sasolburg when he calls but the Applicant mentions that. Even if the versions would corroborate it does not change the fact that the Applicant did not have authority to go to Sasolburg and neither did he seek for it on occasions when he went back to Vereeniging. The Applicant's version of events at Sasolburg sounds improbable as he claimed that he writes issues in his pocket book but did not specify this version in his pocket book. He disputed having apologized to Ms Thlokwa in her office. The Applicant also disputed Mr Thwala's testimony that he was supposed to amend the trip sheet in terms of clause 19 of the Transport Procedure Manual. However the Applicant did not put this version to Mr Thwala when he was on the stand.

Mr Thabo Moledi testified that he was the Applicant's representative and that they had agreed with the initiator on plea bargain that the Applicant will plead guilty and then be given a Written Warning. He however concedes that such process is not allowed in the policy of the Respondent. He further conceded that they did not tell the presiding officer of the plea bargain as the Initiator was the one who was supposed to do so. He conceded that they did not submit the minutes of the pre-hearing meeting as it was a gentlemen's agreement.

Without going into the merits it is clear from the evidence before me that the Applicant has pleaded guilty to this charge voluntarily. On that basis alone it is clear that the Applicant has breached the rule. Secondly, the Applicant had gone back to office before returning to Sasolburg but did not ask for permission from his supervisor or manager and testified that he did not bother to call them on their phones as they were supposed to be in office. Thirdly the Applicant claimed in opening that he was misled by his representative who passed away to plead guilty, however he brought that representative to come and testify. Further, his representative conceded that the initiator asked for dismissal, but he did not object to insist that they had a plea bargain. He conceded that the alleged plea bargain was not put before the presiding officer. He further conceded that it was not correct for the Applicant to go to Sasolburg three times without permission. I find on a balance of probabilities that the Applicant did breach the rule.

Was the rule/s or standard/s consistently applied? –

The Applicant indicated that he is taking issues with the Respondent applying discipline consistently as it charged others formally and others informally and gave sanctions less than dismissal to other employees. For instance Mr Ramabodi a Parole Officer in Vereeniging was charged informally and got a Written Warning; Mr Radebe a nurse in

Leeuwhof was charged informally and granted a Verbal Warning; and Mr Kutoane of Groenpunt was charged formally and granted a Written Warning. The Respondent on the other hand called Mr Thamsanqa Abraham Nqelani who was the presiding officer who testified that the Applicant pleaded guilty where he had previously been found guilty of the same offence, given 3 months' suspension without pay, but did not learn his lesson and would abuse the resource which the Respondent depends upon. He argued that the sanction would stay forever in the Applicant's file unlike warnings which are valid for 3 months.

The Initiator Mr Thwala testified for the Respondent that he was an initiator also in the case of Kutoane whereby Mr Kutoane had a valid trip sheet but had caused damage to the state vehicle and paid for it, but that such was not abuse as in the case of the Applicant. He argues the cases are not similar.

It is clear that what made a difference between the case of the Applicant and those of others was that the Applicant had a previous similar offence. I therefore find that the Respondent was not inconsistent in the application of discipline.

Was dismissal an appropriate sanction? - Article 3(4) of the Code states that, "generally it is not appropriate to dismiss an employee for a first offence except if the conduct is of such serious nature and gravity that it makes a continued employment intolerable". The parties did address me on the Applicant's previous offence and it was clear that the repeated offence committed is so serious that it impact on the element of trust which is the basis of any relationship. The Respondent is entrusted with a duty to rehabilitate and keep offenders in safe custody which then requires correctional officers to be exemplary in their conduct. The Respondent entrusted the duty to protect the community from dangerous offenders or absconders to correctional officials and the conduct of the Applicant seriously damages that trust. The trust is further damaged by the Applicant's not learning from his mistakes.

From the circumstance outlined above I find the dismissal of the Applicant both procedurally and substantively fair.

AWARD

1. Application is dismissed
2. I make no order as to costs.



PANELLIST: MARTIN SAMBO
Date: 03 February 2021