



GENERAL PUBLIC SERVICE
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ARBITRATION AWARD

Panelist: Jeffrey Nkuna
Case No.: GPBC 1923/2019
Date of Award: 20 OCTOBER 2020

In the ARBITRATION between:

PSA obo NEDOHE

(Union / Applicant)

And

Government Pension Administration Agency

(Respondent)

Union/Applicant's representative:

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative:

Respondent's address:

Telephone:

Telefax:

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION

1. This award is rendered in terms of section 138(7) of the Labour Relations Act, 66 of 1995 as amended (the LRA).
2. The dispute was referred for arbitration in terms of section 191(1) & 191(5) (a) of the Labour Relations Act 66 of 1995 as amended ("LRA"). The hearing was held on the 09 September 2020 in Polokwane and on the 13 and 14 October 2020 in Thohoyandou GPAA offices
3. The Applicant, **Aubrey Nedohe (Employee)** and was represented by **Mr M Mkhize**, an official from PSA, and the Respondent, **GPAA** was represented by **Mr V Vika**, its Labour Relations Office
4. Both Employee handed in bundle of documents which were marked "Employee's Bundle A", Employer B and Employee C It was agreed at the commencement of the proceedings that the documents are what they purport to be.
5. The arbitration proceedings were digital recorded and were finalized on the 14 October 2020.

BACKGROUND TO THE DISPUTE

6. The Applicant was employed by the Respondent from the 01 December 1985. He had worked for the Employer in various capacities until his dismissal. At the time of his dismissal on the 30 August 2020, he was employed as the Regional Manager of the Employer. He was charged with gross dishonesty and falsification of documents in that he transgressed the GPAA Performance Management Policy. This was by making false declaration when submitting a sub-ordinate "Performance review Documents. The Employee is challenging the procedural and substantive fairness of his dismissal. The relief sought by the Applicant is Re-instatement retrospectively with all his benefits.

BACKGROUND OF THE DISPUTE AND INTER LOCUTARY APPLICATIONS

7. This dispute was initially set down for arbitration on the 16 July 2020 and due to Covid related challenges, it was not proceeded with. However, as a way forward, parties agreed to have further engagements as regards the exchanging of documents and amendment of pre-arbitration meeting on the 06 July 2020. The detailed minutes forms part of the bundles of the documents
8. The matter was then set down Virtual for the 03 September 2020. However after being contacted telephonically by the parties that they were at the Employer's premises at Paul Kruger Street, Polokwane for the hearing. I then proceeded to the venue.

I then confirmed with the Council that the matter as per agreement by the parties, that since there was compliance with the Covid 19 regulations, these proceedings may proceed face to face. The matter was proceeded with were in the parties produced the signed pre-arbitration minutes previously signed by parties

9. I wish to set it on record that I was ready to proceed with arbitration and proceedings were accordingly recorded I then proceeded with the narrowing of issues However there were further amendments of the pre-arbitration minutes by the parties as per consensus on the initiative of the Employee Representative. The Employee was now also challenging the procedural fairness of the hearing. The challenge was on the basis that he chairperson failed to discharge his duties fairly. The Employer's representatives raised concern on the basis that the fact that the Employee's represantives was now also raising the issue of procedural fairness and this was omitted during the Pre-arbitration meeting, these made it necessary that the Chairperson of the Discipline hearing based in Eastern Cape must give evidence. The matter was then part heard only on the narrowing of issues and amendment of the pre-arbitration minutes. The matter was then postponed to 13 and 14 October 2020 at GPAA offices in Thohoyandou
10. On the 13 October 2020 the matter was proceeded with as the all parties confirmed that the witnesses are available The Employer led its first witness, Mr Godana and after the evidence in chief, the Employee made an application that it want to submit additional Bundle which was the Performance Appraisal which formed the basis of the charges which were faced by the Employee.. The Employer's represantives indicated that they cannot accept these documents as this will prejudice their case. I then requested the parties to address me on the issue of these bundle and adjourned the matter to allow the Respondent Representative to take some time and check the documents and to address me about the prejudice. After the resumption of the proceedings parties were then advised that I will ex tempore admit Employee 'C' in the interim. I also expressed my reservation on the production of these Bundle at such a late stage. However, I admitted the Bundle conditionally and I will in my award make an informed value judgment as regards to their relevancy and credibility. The Employer Representative put it on record that they proceed with the arbitration under protest and that they reserve their rights on the matter.
11. On the 14 when the proceedings were about to resume, the Employer's represantives made an application for my recusal on the basis that there is a reasonable apprehension of biasness on my side because when the matter was held on the 09 September 2020 , I was left behind with the Employee representative. Further submission was made that even on the previous day, I was left in the hearing room with the Employee an, the interpreter and his Representative. I submit that I also left the proceedings and never in anyway had discussed or had any intentions to discuss the case or any matter with Employee's Representative. It was also submitted that on the day of the virtual hearing, the date of the virtual hearing, I was called by the Employee's Representative in the presence that Employer's representative in the Employer's Regional offices in Polokwane. I also wish to put it on record due the number of challenges as regard to Virtual hearings, the Council provided the Representatives with Panelist contacts to facilitate connections. My Ruling was that the recusal issue 09 September 2020 are unfounded in that they are raised after we have already have the matter part heard and Employer has already led its first witness I then dismissed the application to recuse myself. The Employer decided to leave and I proceeded with the arbitration in the absence of the Employer.

ISSUES TO BE DECIDED

12. I am required to determine whether the Applicant's dismissal was procedurally and substantively fair or not. If so, to order the appropriate relief.

SURVEY OF EVIDENCE AND ARGUMENTS

Employer's evidence

13. The Employer's witness, Mr M M Godana, testified that he is employed as the Department of Public Works as the Deputy Director: Employee Relations. He testified that he knew Employee and he presided in his disciplinary hearing. The Employee was represented by an official of the PSA. When the matter was set down for the first time for the hearing, the Employee Representatives requested for postponement. The bases of postponement was to give an Employee Representatives an opportunity to consult with the witnesses. He further submitted that was done, despite the huge financial implications to the Employer as he was no more employed in the area where the hearing was conducted. The matter was then postponed and was held for a number of days. . Mr Godana testified that when the matter was proceeded for the first day, charges were read to the Employee and he pleaded not guilty to the main charge and also to the alternative charge
14. .The Employee further testified that before he proceeded with the hearing, he ensured himself whether the Employee was given proper notice to appear in the hearing as was required by the Policy. The first scheduled day the matter was postponed at the request of the Employee representative to enable him to consult with the Employee and witnesses. Then matter was then postponed to another day. .On the first day of hearing, first charge was read to the Employee and he pleaded not guilty. The Employee also pleaded not guilty to the alternatives charge. The witness further testified that it was only through the cross examination that the Employee started to make concessions by acknowledging that the signature which were in the documents was his and he mistakenly signed the document.
15. Mr Godana further testified that the charges were very serious nature. He further testified there was no situation were the Employee intended to plead not guilty as allegedly. The employee was consistently denying any wrong doing and he made concession during cross examination. The employee was represented by an official; of Union and there was no anytime were it was stated that the Employee would like to change. The witness further testified that he was seasoned labour relation expert who has chaired many hearings and there was never time when he can just lead evidence of the Employer's witnesses and then request the Employee to then plead to charges. That would have been serious misconduct on his side. He further testified that even if the Employee was misled in pleading not guilty, which is not true, that would not have made any differences. However he stated that even if the Employee has pleaded guilty that was not go to change the seriousness of the misconduct. If that was the case that would have been used for plea mitigation. He further testified that his finding were based on the evidence of the witnesses who gave evidence in the hearing.
16. During cross examination, Mr Godana clearly stated that he cannot make comments on the document which was part of the Employee Bundle "C". However what is important, is that the evidence which was before him was not contradicted and that was the bases of his findings and sanction as the chairperson. He further testified that the Employee was not committing this misconduct charged for the first time. He also testified the fact that he Employee did not have financial benefit did not change the charge. The essence of the charge was dishonesty and deceit on the conduct of the Employee. He further testified, in making the sanction he

has taken into consideration the position of the Employee and seriousness of the transgression. He further testified that in any event if there was during the Employee's examination any shred of evidence which in anyway was strengthening the case of the Employer, he would have accordingly advised the Employee of the consequences and stopped the proceedings for at least 10 minutes for the Employee to reconsider whether he still want to pursue his plea of guilty. That did not happen because the Employee was comfortable with his plea of not guilty. He further testified that there are no irregularities which may pointed out in the way he conducted that disciplinary hearing.

Employee's case

17. **The Employee, Aubrey Nedohe** testified that he was employed by the Employer until he was dismissed on the 30 August 2019. He further testified that before his dismissal he was employed as the Employer's regional manager in the Eastern Cape. He further testified that pleaded not guilty to both charges but acknowledged that he made a mistake to sign the wrong portion of the document. He further testified that performance appraisal form of the complainant in the matter, Ms Normalize was the source of the document which resulted in his dismissal. He further accepted that he acknowledged that he signed where he was not supposed to sign. The employee did not explain why there was the alteration of the score. He further testified that in this document, even his supervisor has signed that document. He further testified that the Chairperson lied that he admitted the signature during cross examination also signed and that he was not charged. He finally testified that he was not guilty any charges and that he want to be re-instated to his position

ANALYSIS OF THE EVIDENCE AND ARGUMENTS

18. Section 192 of the Labour Relations Act, 1995 as amended, provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Once the dismissal is established, the Employer must prove that the dismissal is fair. Dismissal is not in dispute in this case.
19. The Employee faced a charge of gross Dishonesty: *in that he transgressed the Performance Management Policy of the GPAA by engaging in an action that is in conflict and infringes on the execution of the official duties by making false declarations when submitting for one of his sub-ordinates, Ms Monakali's performance Review for the 2016/17 year under review*". It was also put that Employee knew and would have known it was wrongful. There was also an Alternative charge which alleged that: "He committed a misconduct in that, by his action or conduct, he performed acts which are prejudicial which are prejudicial to the discipline and efficiency of the administration of the GPAA, therefore putting the GPAA into disrepute". The Employee in the disciplinary hearing pleaded not guilty on the main charge and also the alternative charge. He was found guilty and was dismissed.
20. I am required to issue an award with brief reasons. I do not wish to offer an exhaustive survey of all the evidence and arguments presented at the arbitration hearing. I have had regard to everything presented to me, and what follows is a brief summary of the evidence relevant to my findings only.
21. The Employee the referred the unfair dismissal to the Council and he is challenging the procedural and substantive fairness. I wish to emphasise that the common issues were agreed by the parties in the Pre-Arbitration which was held on the 09 September 2020 and further amended. The minutes specifically state that the issue to be decided by the Panelist .I wish to put it on record that the minutes which were signed by the parties provided as follows: Paragraph 3 of Pre-Arbitration Minutes provided that 3.1 : ***Whether or not the sanction imposed by the Employer is appropriately applied". The Issues the Commissioner is required to decide***

were in paragraph 4 and 4.1 whether the or not the sanction imposed by the employer is appropriately applied."

22. On the 9 September 2020, the Employee Representative then requested to make an addition to the minutes that the Employee was also challenging the Procedural fairness on the conduct of the presiding officer of the disciplinary hearing and alleged that he was misled in pleading guilty and that he had all the intention to plead guilty. The Employer Respondent submitted that this was a new matter and the Employer will require to have the Presiding person to come to Limpopo to give evidence as he was from the Eastern Cape. There was then a consensus by the parties for the amendment to the Pre-arbitration minutes. However the rests of the terms of the terms the Pre- arbitration minutes including the above mention the issues of the challenging the substantive fairness remains the same. After finalization of the Pre-Arbitration minutes, the matter was then adjourned to the 13 and 14 October 2020.
23. The matter was then proceeded with on 13 October 2020. The Employer's witness Mr Godana gave evidence for the Employer. His testimony dealt both with the procedural and substantive fairness of the hearing. He testified that he was the chair of the hearing and that he followed thoroughly the procedures during the hearing. He confirmed that the notice of hearing was properly served and that on the first day of the hearing. Despite the fact that all the witnesses were available, including the witnesses who travelled faraway, the Employee was given a postponement on request. The Employee was represented by the PSA official, who requested a postponement to consult with witnesses.
24. Further testimony was that the postponement was granted even though it had serious financial implications to the Employer. The hearing was conducted on a number of days and Employee was represented throughout. The Employee's testimony is that he was challenging the procedural fairness in that he was misled and he intended to plead guilty. He further alleged that the Chairperson failed to discharge his duties to protect him. His version is that he admitted to have made a mistake to sign in a portion which was for the Employee. He argued that on those basis the Chairperson should have adjourned the proceedings and guide him.
25. There was further argument by the Employee that he only pleaded to the charges after the Employer's witnesses have led evidence. The Employee's version is problematic in that, he was represented by a union official who was expected to follow and understand the proceedings. The alleged accusation of pleading after the evidence of the Employer's witnesses is so serious that it is surprising that it was unchallenged during the hearing. There is no explanation why the chairperson was allowed to proceed with such irregularity. This kind of action cannot go unchallenged particularly when the Employee was holding management position and was also represented by the Union official.
26. There was also unchallenged evidence that the chairperson in the proceedings was an experienced labour relations practitioner and there was no logic or any reasonable explanation from the Employee, why the Chairperson could have deviated from the most crucial procedures of the disciplinary hearing. The Employer's witness was clear on that the Employee only conceded during cross examination that he signed the document. The Employee's further argument is that the Chairperson allowed the Employer's witnesses to lead evidence before he was allowed to plead. Evidence was led that even if the Employee was given an opportunity of pleading guilty to the charges, that would not have made any differences as the seriousness of the transgression. My analysis is that I am further persuaded that the alleged transgression was of the fundamental to in the key functions of the manager. My final analysis is that I am faced with contradictory versions between the presiding officer and the Employee.

27. The Employee has raised some serious alleged irregularities which happened in the presence of the Union official. There was no explanation why the union official was not called as a witness. The Employee is blaming the chairperson for everything. There is also the concerning issue that the challenging of the procedural fairness was not raised in the first minutes of the Pre- arbitration minutes. There is no reasonable explanation from the Employee why such information was not discussed with his Representative in their consultation before the holding of the Pre-arbitration meeting. The Employee even went to extent of saying that the chairperson was lying. There is no explanation why the chairperson could be lying. All these concerns raises the issues of credibility of the Employee as a witness. The allegations which are centered on the procedural fairness, if they were indeed proved correct that would have the serious implications to the outcome of the disciplinary hearing my analysis is that the Employer's witness did not contradict himself in a material regarding the manner in which the disciplinary hearing was conducted. My finding is that the Employer has on a balance of probabilities proved that the disciplinary hearing of the Employee was procedurally fair.
28. I wish to put it on record evidence in chief of Mr Godana, the Employee made an application to submit further bundle of documents. The Employee's argument was that this part of the bundle, also testified on it and it formed part of the basis of the charges in the Disciplinary hearing, but it was omitted in the bundle of documents submitted by the parties. The Employer vehemently opposed the application and argued that, despite the fact that Mr Godana made reference to part of the information in his disciplinary hearing report and evidence, the Employer would be seriously prejudiced as parties already had the pre-arbitration minutes which were amended and signed by the parties.
29. **Section 138 (1) of the Labour Relations Act 66 of 1995 (LRA)** provides that: -*"The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.*
30. "I accordingly, on the strength Section 138 (1) of LRA exercised my discretion and allowed that the Bundle "C" be admitted and was marked Employee Annexure "C ". However, I wish to emphasize that I put in on record I that I will gave the value judgment on the credibility the relevancy of the documents it was just unfortunate, that after I decided to dismiss the application for my recusal, the Employer Representative decided not to participate any further in the arbitration proceedings.
31. **Exxaro Coal (Pty) Ltd v Chipana and others (2019) 40 ILJ 2485 (LAC) at paragraph 35 the Court held that:** "Some formality is not anathema to arbitration proceedings in the CCMA. Section 138 does not ban all formality – it merely requires "minimal formality". In deciding on how much formality is permissible one must be careful not to sacrifice fairness on the altar of informality. Section 138 not only requires minimal formality, but also requires fairness and speed. An equitable balance must be struck so that none of these pre-eminent values are sacrificed. I have taken into consideration the objections of the admissibility of the Document by Employers Repesantive.
32. I have also taken into consideration that the Pre-arbitration meeting is binding contract between the parties. The Employer has further provided that there were timeframes in Pre-arbitration minutes **In Botha v S [2010] 2 ALL 116 (SCA)** the Court held

that in the absence of a challenge by the other party as to the authenticity of the documentary evidence, copies could be accepted on the principle of best evidence. In the present case the Employer has challenged the authenticity of the additional. I will not ignore the challenges raised by Employer's representative.

33. The Chairperson, of the hearing, Mr Godana testified on the procedure as well as the substantive fairness before the additional bundle was handed in. The Employer elected not to lead any evidence on that bundle. I have also taken of judicial notice that his additional bundle was only introduced after the testimony of the witness and the Employee could have made such an application earlier before the witness started with its evidence. I therefore submit that the evidence led in regard document will be treated with caution. I'm also have also taken notice of the fact that the Employee in evidence chief was not subjected to cross-examination.
34. I wish to point out that there was no reasonable explanation why the Bundle C was only submitted when the Employer's witness has already testified. The Employee could have submitted that earlier in the morning before the proceedings started. There was also no explanation this specific document was to be considered as central to the case of the Employee. The Pre minutes including the issues which were to be decided by the Arbitrator regarding the issues substantive fairness were around the appropriateness of the sanction. The authenticity of the document was also disputed by the Employer.
35. The witnesses who were in that document would only had to come if that was indeed given earlier to the Employee. I really could get any compelling reasons why such a document perceived to be so crucial could come to light so late. There has been number of sittings. The Employee decided to submit that very late in the proceedings. My value judgment to the document is that the Employee cannot rely solely to that document. My finding is that the Bundle was relevant. However, its admission does not necessarily mean that the Employee has no case to answer
36. Pre- arbitration minutes are the statutory provisions which are to make sure that the proceedings are narrowed in dealing with issues. My analysis is that the Bundle C although relevant, there was no reasonable explanation it was not included in the Pre-arbitration minutes which were emended and deal with the appropriateness of the sanction
37. The Employer led evidence that the Employee pleaded not guilty on the main charge and also on the alternative charge. Further evidence was led that the Employee made some concessions during the cross examination and admitted that indeed the signature found in the alleged documents are his. The Employer's evidence was based mainly on the disciplinary report which had the summary of the evidence given by the parties.
38. The Employee's testimony is that the charge was mainly on that, he falsified the signature which resulted in the manipulation of the scores. His testimony is that it was a genuine mistake from him. The Employee's concession is that document in question which was before the disciplinary hearing was the same as the document which was handed as Employee Bundle C. What is also crucial is that the Employee alleged that, during the hearing, he conceded that his intention was to plead not guilty. The question is if that was the case, to which charges, was he going to plead guilty to. This was not covered or explained in his evidence in chief. The charges which he was facing have already been mentioned in this award. The charges involved the deceit, dishonesty and putting the Employer in disregard.

39. In the present case as regards the issue of substantive fairness and the appropriate of the sanction I am faced with the versions of Mr Godana, who was the Employer presiding office in the disciplinary hearing and the Employee. I have already made my findings regarding the credibility of the Employee as a witness. My finding is that the Employee was correctly found guilty of the charge
40. The Employer bears the onus to prove on a balance of probabilities that the employees were dismissed for valid reasons and in dismissing them, it had followed a fair pre-dismissal procedure The next issue is whether dismissal was appropriate in the circumstances. **Item 3(4) of the Code of Good Practice contained in Schedule 8 of the Labour relations Act** provides that: "*Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable*"
41. ***In Vodacom (Pty) Ltd v Byrne NO and Others (2012) 33 ILJ 2705 (LC)*** paragraph 9, the Court held as follows: '*... the determination of the fairness of a dismissal required a commissioner to form a value judgment, one constrained by the fact that fairness requires the commissioner to have regard to the interests of both the employer and the worker and to achieve a balanced and equitable assessment of the fairness of the sanction*'
42. .The Employee held a very senior position. I am persuaded to come the conclusion that the employment relation has broken down irretrievably. The Employer presented evidence to prove the fairness of their dismissal. I therefore find that the dismissal was substantively and procedurally fair.

AWARD

43. The dismissal of the Applicant **Aubrey Nedohe (Employee)** by **Government Pensions Administration Agency (Employer)** was procedural and substantively fair
44. No order as to costs



Mr. Jeffrey Nkuna: GPSSBC **PANELIST**