



ARBITRATION AWARD

Panellist/s: Selolong Mosoma
Case No.: GPBC2116/2019
Date of Award: 10 February 2021

In the ARBITRATION between:

NEHAWU obo T.I Hlalele
(Union / Applicant)

and

Department of Home Affairs
(Respondent)

Union/Applicant's representative: P Mofokeng
Union/Applicant's address: NEHAWU
Telephone: 0518752546/0814790949
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Respondent's representative: Pule Tikane
Respondent's address: Department of Home Affairs
Telephone: 0124064139/0823174385
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration into the abovementioned alleged unfair dismissal dispute referred to the Council in terms of section 191 of Labour Relations Act 66 of 1995 (the Act) was conducted on the 01 December 2020 at the offices of the respondent in Ladybrand.
2. The employee party, Mr. T I Hlalele (hereinafter referred to as applicant), was represented by his union official of National Health and Allied Workers Union Mr. P Mofokeng. The employer party, Department of Home Affairs (hereinafter referred as the respondent), was represented by its Labour Relations Officer Mr. P Tikane.
3. The proceedings were conducted in English and Sesotho interpreter was provided for both applicant and respondent witness.
4. The applicant submitted a bundle of documents annexed bundle "A" for the applicant and the respondent submitted a compact disc containing the video footage.
5. Video footage was used as part of evidence during the proceedings.
6. The proceedings were digitally recorded.

ISSUE TO BE DECIDED:

7. It must be decided whether the dismissal of the applicant was substantively fair in respect of breaching workplace rule, and the sanction of dismissal and its appropriateness in the specific case. If the dismissal is found not to have been fair, the appropriate relief must be decided upon. The applicant sought retrospective reinstatement.

BACKGROUND TO THE MATTER:

8. The applicant had been engaged by the respondent (National Department of Home Affairs) on the 03 June 2013 and served, at the time of his dismissal, as Immigration Officer and earning monthly salary of R17 300.00 . The applicant alleged that he was unfairly dismissed by the respondent on the 15 October 2019. The charges against the applicant were as follows.
 - a) Charge 01: It was alleged that he committed an act of misconduct in that on or about the 10 January 2015 at or near Maseru Bridge Port of Entry, you endorsed an entry stamp number 363 and issued

Temporary Residence Permits on the following passports which belongs to Lesotho Nationals, whereas they did not present themselves before you as prescribed.

1) Rantho Nthethe Joseph. Passport number RB 216467

2) Mahola Alina Thabang. Passport number RA 447908

b) Charge 02: It is alleged that you committed an act of misconduct in that on or about 10 January 2015 at or near Maseru Port of Entry, you failed to capture the movement of the following travelers on the Movement Control System as prescribed.

1) Rantho Nthethe Joseph Passport RB 216467

2) Mahola Alina Thabang Passport RA 447908

9. The applicant was found guilty to all two charges and was cumulatively dismissed on all two charges.

10. The applicant referred the matter to the Council on the 22 October 2019 and remained unresolved during Conciliation.

11. Prior to the commencement of the arbitration, applicant submitted a bundle of documents. The documents were agreed by the parties to be what they purported to be.

12. The applicant challenged substantive fairness of his dismissal and sought retrospective reinstatement as a relief.

13. On the other hand, the respondent sought as remedy, that the matter be dismissed.

SURVEY OF EVIDENCE AND ARGUMENT:

14. The provisions of section 138 of Labour Relations Act 66 of 1995 as amended, enjoins me to issue the arbitration award with brief reasons. I intend in this award to focus only on the issues that I perceive to be pertinent to the issues that were disputed by the parties.

RESPONDENT'S SUBMISSION

15. The first witness of the respondent; **Mr M.I Mohlomi** testified that he is currently working for South African Police Services under Crime Intelligence Unit. He testified that he was approached to come and work as an undercover agent at Maseru Border Post. Mr Mohlomi testified that he was approached by Mr Koortman to carry out a specific assignment at the Border Post. He testified that he resumed with his assignment on or around December 2014 and his role was to gather evidence pertaining corruption activities which were taking place at the Border Post. He stated that the assignment was terminated on or around October 2016.

16. He stated that he was given passport of Lesotho Nationals who overstayed their days in South Africa. He further stated that he would also carry money with him because the Immigration Officers normally charge R300.00 to extend the number of days.

17. He testified that he would approach Immigration Officers with the passport of Lesotho Nationals who overstayed their days in South Africa so that they can extend the days for him in exchange for money.
18. He testified that he was fitted with a hidden camera which its sole purpose was to capture every transactions and activities that he will be doing with Immigration Officer.
19. He indicated that after every transaction he would go and report to Mr Koortman with all relevant evidence and passports that have been stamped by the Immigration Officers.
20. He stated that he met the applicant on the 10 January 2015 and he had two passports of Lesotho Nationals who overstayed their days in South Africa. He testified that on the day in question the applicant was working at the Border Post but on the side of Lesotho.
21. He further stated that upon entering the Border Post, he requested to speak to the applicant and explained to him that he was in possession of two Lesotho Nationals Passports which overstayed their days in South Africa.
22. Mr. Mohlomi testified that after explaining his predicament to the applicant, the applicant then went to fetch the stamps so that he can stamp the two passports. He further stated that after the applicant has stamped the two passports, he went with both passports to Mr Koortman.
23. He stated that a permission to entrap a criminal was sought and granted by the Magistrate.
24. He indicated that Immigration Officers normally hides their employee numbers on their official stamps when extending the days of passports of Lesotho Nationals who overstayed their days in South Africa,
25. He further testified that he gave the applicant money after affixing stamp on the two passports of Lesotho Nationals who overstayed their days in South Africa.
26. Under **cross-examination** he confirmed the process of section 252A of Criminal Procedure Act and its elements. He further confirmed that money should not be used to tempt a person or criminal.
27. When asked why the transaction between him and applicant was not captured by the hidden camera more especially where the applicant stamps the passports and receiving money from him, he stated that the hidden camera was fitted on him and it could not capture what was in front of him.
28. A question was posed to him about the practice by Immigration Officers to hide their numbers on officials stamps and also whether he saw the applicant hiding his employee number on the stamp, he stated that the hiding of numbers is something he observed while he was busy with his assignment and he physically witnessed the applicant removing a paper from his official stamp. When asked if he can show that part on the footage, he indicated that it does not show on the video footage, but he saw him removing a paper from his official stamp.
29. When asked whether the applicant was aware that he is been recorded on hidden a camera, he stated that the applicant was not aware.

30. Lastly, when asked whether he knows the applicant's stamp number, he stated he does not know the applicant's stamp number. He further stated that his assignment was to collect evidence and transactions that took place through negotiations and actions, so the camera was just to capture the incidents.
31. Second witness of the respondent; **Mr. Patrick Mabaso** testified that he is currently working for South African Police Services under Technical Support Unit. He stated that his role was to assist the undercover agent with the recording devices. He further stated that he modified the recording device, fitted the undercover agent with the recording device, trained the undercover agent on how to active and deactivate the device.
32. He indicated that after conclusion of daily transaction the undercover agent will submit the devices to him and will download them into a compact disc.
33. Under Cross-examination he stated that he does not listen or test if the recording has sound or not.
34. When asked whether he was aware that the video footage did not have sound, he stated that his role was to download not to watch the footage.

APPLICANT'S SUBMISSION

35. Mr. Thabo Israel Hlalele is the applicant in this matter and testified as follows under oath.
36. He testified that he was employed by the respondent on the 03 June 2013 as an Immigration Officer.
37. He stated that on the 10 January 2015, he was posted at the arrival side of the Border Gate. He indicated that while working he was approached by a gentleman who was on the queue, he then went outside the office to hear what his problem is. He testified that the gentleman asked him if it was a must for person who has overstayed his days to come to the border physically, I order for his/her passport days to be extended. He stated that he told him that it's a must for a person be there at the border post in order for his/her passport days to be extended except in exceptional circumstances when a person is hospitalised.
38. He submitted that after talking to the gentleman he went back to his post and continued helping other people.
39. He stated that he never stamped any passports of someone who was never physical there at the border post. He further stated that the stamp used in both passports number RB 216467 and RA 447908 it's not his official stamp that he was given by the respondent.
40. He testified that when his official stamp was confiscated after the incident there was no indication or report that he has tampered with his official stamp.
41. He submitted that he has never used any paper to conceal the numbers on his official stamp.
42. He stated that he has never received money from anyone and also that he did not capture the said passports because they were not given to him.
43. He further stated that no transaction in a form of exchanging money and stamping of passports took place between him and Mr. Mohlomi.

44. Under **cross-examination** he denied partaking in any corruption activities or entered into any transaction with Mr. Mohlomi.
45. When asked whether it was possible that the hidden camera could not capture him when he stamped the passports, he stated that he did not know anything about the camera.
46. A question was posed to the applicant whether it was possible that the computer monitor might have obscured the hidden camera, he stated he did not know anything about the camera.
47. When asked whether he recognised the two documents on page 57 and 58 of bundle 'A', he indicated that it's a movement form of people and its normally dealt with or handled by superiors.

SUBMISSION OF ARGUMENTS:

48. Both parties requested to submit written closing arguments and submission of both parties were carefully considered. I will not repeat what was said by the parties, as the contents basically mirror what was put to the parties during the leading of evidence and cross-examination.

ANALYSIS OF EVIDENCE AND ARGUMENT:

49. In this matter, the respondent dismissed the applicant on the basis that it viewed him as having been guilty of the two charges preferred against him, namely.
 - a) Charge 01: It was alleged that he committed an act of misconduct in that on or about the 10 January 2015 at or near Maseru Bridge Port of Entry, you endorsed an entry stamp number 363 and issued Temporary Residence Permits on the following passports which belongs to Lesotho Nationals, whereas they did not present themselves before you as prescribed.
 - 3) Rantho Nthethe Joseph. Passport number RB 216467
 - 4) Mahola Alina Thabang. Passport number RA 447908
 - b) Charge 02: It is alleged that you committed an act of misconduct in that on or about 10 January 2015 at or near Maseru Port of Entry, you failed to capture the movement of the following travelers on the Movement Control System as prescribed.
 - 3) Rantho Nthethe Joseph Passport RB 216467
 - 4) Mahola Alina Thabang Passport RA 447908
50. It sought to discharge the onus of proving that the dismissal was substantively fair, through documentary evidence, video footage and two witnesses.

51. Section 188 (1) of the LRA requires a dismissal to be for a fair reason and effected in accordance with a fair procedure.
52. Section 185 (a) says every employee has right not to be unfairly dismissed.
53. It is common cause that the breach of workplace rule and appropriateness of the sanction are in dispute.
54. In terms of item 7 of schedule 8 of LRA, Act 66 of 1995 as amended (the Act), any person who is determining whether a dismissal for misconduct is fair should consider-
 - a) Whether or not the employee contravened the rule or standard regulating conduct in, or of relevance to, the workplace, whether or not-
 - i) The rule was a valid or reasonable rule or standard.
 - ii) The employee is 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 with an appropriate sanction for the contravention of the rule or standard.
55. Where dismissal is proven or agreed, the onus to prove the fairness of a dismissal (on balance of probabilities) rest with the respondent party in terms of section 192 (2) of the LRA. The parties in this matter had, through pre-arbitration minutes, agreed that only certain specific issues were in dispute under substantive fairness. I will therefore only deal with these issues.
56. Substantive fairness- did the applicant breach any workplace rule
57. The applicant was subsequently dismissed as the respondent was of the view that he breached a workplace rule.
58. It is the applicant's contention that he has never breached any workplace rule because he did not endorse any passport of a person who has overstayed his days in South Africa without the person being physically present at the Border Post. It is further the applicant's contention he did not breach any workplace rule by failing to capture the said passports on the Movement Control System because they were never presented before or given to him.
59. The respondent relied on a video footage, one witness and documentary evidence to prove its case.
60. The crux of the respondent's case was solely rested on the video footage.
61. It is trite law that an employer who has obtained video footage of employee committing an offence and who wishes to use such video footage as evidence in support of its case against the employee may so provide that the video submitted into evidence is clear to view, the audio is clear to hear, the footage is authentic.
62. It is common cause that the authenticity of the video footage is not in dispute.
63. In this case, it was common cause that the video footage was obtained through undercover agent who was on assignment or project to catch Immigration Officers who were engaging in corrupt activities at the Border Post.

64. The respondent's obtained a video footage as part of its evidence of the applicant committing an offence at the workplace and it relied on that footage to support its case. The sole purpose of embarking on such assignment by the respondent was to catch Immigration Officers who were conducting corrupt activities at the Border Post. It is further the evidence of the respondent that before embarking on such assignment permission was sought and granted by the Court in terms of section 252A of Criminal Procedure Act.
65. The purpose of the assignment and usage of hidden cameras was to capture each and every transaction that were taking place between the Immigration Officers at the Border Post and ordinary citizens of Lesotho who overstayed their days in South Africa.
66. It is common cause that the Immigration Officers were not aware of the respondent's assignment or project to catch any of them who engages in corrupt activities. The witness of the respondent, Mr. Mohlomi went to the Border Post on the 10 January 2015, fitted with hidden camera on him and the purpose was to capture every transaction that he will be entering into with the Immigration Officers at the Border Post. The intention of the fitted hidden device was to capture exchanging of money and also endorsement of overstayed passports of Lesotho Nationals.
67. The video footage is not clear in terms of view and audio more especially where the alleged transactions took place. It became clear during the proceedings that the hidden camera did not capture most important aspects of the alleged transactions. The witness openly admitted that the fitted camera could capture what was in front of him.
68. As the undercover agent, failed to capture the critical aspects of each and every transaction that he entered into (especially considering the fact that he was trained on how to activate and deactivate the device). He had a duty to make double sure that both the view and audio of the footage are clear. He however did not ensure that or check if that the device will capture both the view and audio properly and simply hoped that it will capture clearly.
69. In as much as I want to regard Mr. Mohlomi as credible and reliable witness, I struggle to find nexus between his testimony and what was captured or shown on the video footage. This I say, because the video footage is not clear in terms of view and audio. The lack of clear view and audio of the footage does not accord with his testimony.
70. Such failures to ensure that the video footage view and audio are clear have an impact of the reliability of the video footage as part of the evidence. I am mindful of the fact that the authenticity of the video footage is not in dispute, however, it is my considered view that the video footage cannot be relied on because of the poor quality of audio and view. This I say, because there was no corroboration between the evidence of Mr. Mohlomi and the video footage.
71. While I note the evidence of Mr. Mohlomi regarding the applicant receiving money in exchange for endorsing the two passports which overstayed their days in south Africa, it is important to mention that nowhere in the

footage where the applicant was seen receiving or taking money from Mr. Mohlomi. I am inclined to reject the respondent argument.

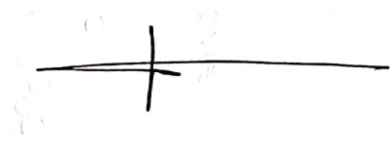
72. On the issue of applicant's failure to capture the two passports on Movement Control System, I am satisfied that the supplicant has demonstrated that the reason he did not capture the two passports is because they were never given to him. This contention has also not been challenged by the respondent.
73. Lastly, the respondent argued that the stamp used to endorse the two passports belongs to the applicant even though the middle number is not visible. This contention was rejected by the applicant that the stamp used to endorse the two passports does not belong to him and his official stamp has been confiscated by South African Police Services and it was not tampered with when confiscated. The contention which also remained unchallenged by the respondent that the stamp used does not belong to him. The explanation given by the applicant is more probable than that of the respondent.
74. In light of the above, I am satisfied that the applicant has proven on balance of probabilities that his dismissal was substantively unfair.
75. In so far as the appropriateness of the sanction of dismissal is concerned, I do not think it's necessary for me to deal with the issue of the appropriateness of the sanction of dismissal.
76. I am satisfied that the dismissal of the applicant is substantively unfair.

REMEDY

77. The applicant sought retrospective reinstatement as a relief, In terms of section 193 (1) (a) of LRA as amended, I am empowered to order the respondent to reinstate the applicant as a primary relief.
78. It is therefore my finding that the dismissal of the applicant is substantively unfair, and I make the following award.
79. It is my finding that the dismissal of the applicant was substantively unfair, and I make the following award.
80. The applicant earned a gross monthly salary of R 17 371.50 at the time of his dismissal.
81. The respondent, Department of Home Affairs, is ordered to re-instate the applicant, Mr. Hlalele into its employ on terms and conditions no less favorable to his than those that governed the employment relationship immediately prior to his dismissal.
82. The applicant earned a gross salary of R 17 371.50 at the time of his dismissal. The back pay should be calculated with his gross monthly salary during the time of the dispute at the Council.
83. The applicant was dismissed on the 15 October 2019 and back pay should be (R 17 371.50 x 15 months = R260 572,50)

AWARD:

84. The respondent, Department of Home Affairs, is ordered to re-instate the applicant, Mr. Hlalele T into its employ on terms and conditions no less favorable to his than those that governed the employment relationship immediately prior to his dismissal.
85. The re-instatement in the preceding paragraph is effective from 08 March 2021.
86. The respondent is ordered to pay to Mr. Hlalele as a back pay, the amount of R 260 572,50.
87. The respondent is ordered to pay the amount referred to in paragraph 85 to Mr. Hlalele no later than 26 February 2021.
88. Mr. Hlalele is to tender his services to the respondent by no later than the 08 March 2021.
89. The amount mentioned in terms of paragraph 85 above must be paid directly to the applicant's bank account already known to the respondent by no later than the 26 March 2021.

A handwritten signature in black ink, consisting of a horizontal line with a vertical stroke intersecting it, and some additional scribbles to the left.

Name:

(Council name) Arbitrator