



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

DEFAULT AWARD

Case Number: GPBC 2282/2019
Commissioner: Elaine Moleko
Date of Ruling: 14 July 2020

In the matter between

Ambrose Mchunu

(Applicant)

and

Department of Correctional Services

(Respondent)

Union/Applicant's representative: Self

Applicant's address: P O Box 3128
Boksburg
1460

Telephone: 0822670992

Telefax: 011 898 3836

E-mail:

Respondent's representative: Absent

Respondent's address: Private Bag x 54
Boksburg
1460

Telephone:	011 898 3700
Telefax:	011 898 3836
E-Mail:	None

Details of application and representation

1. The matter was scheduled for arbitration on 10 July 2020. The Applicant attended and represented himself. There was no appearance on behalf of the Respondent. The Council file showed that the Respondent had been properly served and notified to attend a hearing, on 09 June 2020 via facsimile to fax no 012 436 4539. The matter accordingly proceeded in the Respondent absence, as per section 138 (5) of the Labour Relations Act (the Act).

2. Section 138(5) of the Act provides that:

“If a party to the dispute fails to appear in person or to be represented at the arbitration hearing proceedings, and that party –

- (a) had referred the dispute to the Commission, the commissioner may dismiss the matter; or*
- (b) had not referred the dispute to the Commission, the commissioner may –*
 - (i) continue with the arbitration proceedings in the absence of that party; or*
 - (ii) adjourn the arbitration proceedings to a later date”.*

3. In exercising the discretion conferred on me by section 138(5) of the Act, I must have regard to sub-rule 31(1) of the Rules of the GPSSBC which provides that –

“A commissioner must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of sub-rule (1)”. Sub-rule (1) is a restatement of section 138(5) of the Act.

Issue to be decided

4. I have to decide whether the dismissal of the Applicant was substantively and procedurally fair or unfair. If I find that the dismissal was unfair, I must determine the appropriate relief.

Background to the dispute

5. The Applicant was employed by the Respondent on 27 July 1998 as a Correctional Officer at Grade 2. He was dismissed on 07 October 2019 for acts of misconduct. At the time of his alleged dismissal he was earning R23 929, 50 per month.

6. The Applicant stated that his alleged dismissal was both substantively and procedurally unfair and he sought reinstatement.

Survey of the parties' submissions and arguments

The Applicant's case

7. The Applicant, Ambrose Mchunu, testified that on 05 April 2019 he had a blocked drain in his house at the quarters. As usual he took a team of plumbers to his house to fix the problem.
8. While working, the EST Team arrived and alleged that there were offenders in his garage. They searched the garage but did not find anyone, then they searched they performed body search on offenders but found nothing.
9. They then showed him a yellow bucket wrapped with a plastic bag from Checkers store which he was convinced they brought it. The bucket contained a green plant inside which they alleged it was dagga.
10. They handcuffed the offenders and reported that they found dagga in the Applicant's yard. Shortly thereafter the Supervisor arrived and searched the yard without a search warrant.
11. When the Applicant requested a search warrant he was informed that there is no need for a search warrant because the house belongs to the state.
12. Another Officer who was guiding the search dogs advised the Correctional Officers that they found nothing in the yard and also in the house. The Supervisor insisted thereafter that they want to do the searching for the second time. While the Officers were busy searching the house the Applicant was taken to the office of a Senior Manager, Ms.Mabena's.
13. The Applicant was told to wait outside Ms.Mabena's office because she was busy with another person. Shortly thereafter, the Applicant was informed that he can go back home Ms. Mabena will meet him there, but she never arrived. At home the Officers were busy searching and they alleged to have found the two bank packets of a green plant that they alleged was dagga under the mattress. The alleged dagga weighed 5.2kg.
14. The Applicant submitted that he was arrested immediately and charged later charged for being in possession of dagga.
15. An internal disciplinary hearing was held where the Applicant submitted that he was not afforded an opportunity for representation as his representative was thrown out of the hearing at the time he requested some additional documents and a postponement.

16. He submitted that when his representative was chased out of the hearing by the Chairperson, he could not proceed with a hearing as he lacks knowledge and the skill to present a case. He stated that he was also not afforded an opportunity to cross-question the Respondent witnesses. He then left the hearing and the Chairperson proceeded with the hearing in his absence.
17. He submitted that he was never advised or warned about the disadvantages of leaving his disciplinary hearing. He was later called by the Human Resources personnel who informed him that he was dismissed and requested him to go to the HR Department to sign the dismissal letter.
18. He submitted that he lodged an appeal and the Chairperson of the appeal also confirmed his dismissal.

Analysis of submissions and arguments

19. In determining the fairness of dismissal, I am guided by section 188 (1) (a) and (b) of the Act, which states that a dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity or the employer's operational requirements and that it was effected in accordance with a fair procedure.
20. Furthermore, section 192 (2) of the Act states that if the existence of the dismissal is established, the employer bears the onus to prove that the dismissal was fair. The Act also provide the relevant guidelines the procedural and substantive fairness in the Code of Good Practice: Dismissal, Schedule 8.
21. According to section 185 of the Act every employee has the right not to be unfairly dismissed and not to be subjected to unfair labour practice.
22. I am required to consider the Applicant's version on a balance of probabilities even though I only have the Applicant's uncontested version before me.
23. In determining whether the dismissal was for a fair reason the arbitrator must take into account the guidelines provided for in cases of misconduct that are found in item 7, Schedule 8 of the Code of Good Practice: Dismissal.
24. The Applicant is challenging the procedural and substantive fairness of his dismissal.
25. The Respondent dismissed the Applicant in his absence. It is my view that for a hearing to be procedurally fair, the employee should be afforded an opportunity to be represented. In this case the employee was refused an alternative representation, which was his right. The reasons why the Applicant shopsteward was thrown out is improper because in my view, when he requested more information which was relevant for the hearing it is unfair to throw him out. The reasons for asking postponement was not submitted but the Chairperson should have advised the representative if he grant or deny postponement instead of throwing him out. I am of the view that, the Chairperson acted unlawfully and unfair.

26. The Applicant is a lay person who has no skill to deal with the litigation or hearing processes, before he left the arbitration process it is also my view that the Chairperson should have warned him of the consequences of abandoning his case. But to me it seems that the Respondent took advantage of the situation and used it as an opportunity to dismiss the Applicant.
27. It was submitted that at Conciliation, even thereafter, that the Applicant and his Representative made several requests for a transcript of a disciplinary hearing from the Respondent but they failed to provide a copy thereof. It would be fair for the Applicant to be given a transcript so that he can understand the reasons which led to his dismissal, in order for him to properly argue the unfairness of his dismissal. Failure to provide such record would probably mean that either the procedure was not followed correctly after the Applicant left the hearing or that the reasons for dismissal are not justifiable hence such record is not available.
28. The substantive fairness of the dismissal generally entails a two –fold inquiry, the first is to establish why the Respondent dismissed the Applicant and secondly the adequacy of that reason. The substantive fairness is assessed according to a number of criteria. These are set out in item 7 of the Code of Good Practice: Dismissal. This reads: *Any person who is determining whether a dismissal for misconduct is unfair should consider :*
- (a) *Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace, and*
 - (b) *If the rule or standard was contravened, whether or not-*
 - (i) *The rule was valid or reasonable standard*
 - (ii) *The employee was 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 was an appropriate sanction for the contravention of the rule or standard*
 - (c) *Proof of offence*
29. Paragraph (a) of item 7 requires the employer to prove, on balance of probabilities, that the employee was actually guilty of misconduct. This involves proving that a rule existed, and that the employee actually broke that rule. The existence of the rule may be proved by reference to the employee's contract, or to an applicable collective agreement or disciplinary code. However, the rule need not exist in written form, it is generally assumed that certain conduct is calculated to destroy the employment relationship, whether or not it is expressly prohibited in a contract or disciplinary code, and that the employee knew or should have known that the conduct could lead to dismissal.
30. The Applicant was dismissed for two packets of dagga which is alleged to be found in his house. The Applicant categorically denied having knowledge of dagga. He further submitted that after the dogs sniffed there was nothing was found and this was also confirmed by an Officer who supervised the dogs.

31. There was a period when the Applicant was taken away from the house to Ms. Maseko's office, and nobody was watching the officers who remained in the house and this raises doubts in my mind. The authenticity of the search performed by the Officers while the Applicant left the house is in question.
32. It remains a predicament as to how can the dogs not find anything but Officers find dagga. I am persuaded to believe the Applicant that the dagga was put by the same Officers who were in the house.
33. It is undefined why would they first claim that there were offenders in the Applicant's garage and when they find that there's no one, they then searched the offenders that demonstrate how desperate they were to arrest the Applicant hence they were fishing.
34. The second issue is that even though the house belongs to a State, it is still lawful for the Officers to produce a search warrant to the Applicant before they searched his house, if this right was never retracted in any contract.
35. Based on the evidence before me, it is probable that the dagga found in the Applicant house may have been placed there by the same Correctional officers who remained in the house because there was no valid reason why he in the first place went to Ms. Maseko's office.
36. To prove that he was being removed for a malicious purpose, the same Ms. Maseko who instructed that the Applicant be taken back home because she will meet the Applicant at his house never show up, and subsequently the Applicant was arrested.
37. The Respondent failed to answer his phone earlier before the arbitration process start and failed to appear for the arbitration process to defend their case, I have no option but to accept the Applicant evidence.
38. It is therefore my considered view that there are no justifiable reasons to dismiss the Applicant because the Respondent did not give any valid reasons why he dismissed the Applicant.
39. The Applicant sought reinstatement as a relief for his unfair dismissal. In determining the appropriate relief, I have taken into account the Applicant's length of service at the Respondent. The Applicant worked for the Respondent for twenty two years. I have also noted that the dismissal was procedurally and substantively unfair. I accordingly order the Respondent to reinstate the Applicant retrospectively with no loss of salary and benefits. The Respondent should therefore pay the Applicant a back pay in the sum of **R23 929, 50 (monthly salary) x 10 months = R 239 295, 00 (Two hundred and thirty nine thousand, two hundred and ninety five rand).**

40. I accordingly make the following finding.

Award

I find that

41. The dismissal of the Applicant, Ambrose Mchunu, by the Respondent, Correctional Services, was procedurally and substantively unfair.
42. The Respondent, Department of Correctional Services, is ordered to retrospectively reinstate the Applicant, Ambrose Mchunu, back to his original position of a Correctional Officer with effect from 07 August 2020.
43. The Respondent, Department of Correctional Services, is ordered to pay the Applicant, Ambrose Mchunu, back pay, ***in the sum of R239 295, 00 (Two hundred and thirty nine thousand, two hundred and ninety five rand)***.
44. The Respondent, Department of Correctional services, is order to reinstate the Applicant with no loss of benefits retrospectively.
45. The Respondent is ordered to pay the abovementioned back pay within fourteen days after they received the award.

Commissioner
Elaine Moleko