



ARBITRATION AWARD

Panelist: Mr. Khuduga Tlale
Case No.: GPBC1842/2018
Date of Award: 23 July 2020

In the ARBITRATION between:

PSA OBO RJ MOGOTSI
(Union / Applicant)

And

OFFICE OF THE CHIEF JUSTICE
(Respondent)

Union/Applicant's representative: Mr. Clement Fandie
Union/Applicant's address: P.O. Box 7673
BLOEMFONTEIN
9300
Telephone: 051 403 1300
Telefax: 051 403 1315/19

Respondent's representative: Ms. S Sifunda
Respondent's address: N/A
Telephone: 010 – 493 2530
Telefax: N/A



ARBITRATION AWARD

Details of hearing and representation

1. The arbitration hearing between PSA obo RJ Mogotsi ("Applicant") and Office of the Chief Justice ("Respondent") was held on 10 January 2020 and concluded on 06 July 2020 at the Free State High Court in Bloemfontein. The Applicant appeared in person and Mr. C Fandie, union official, represented him, and Ms. S Sifunda, Labour Relations Officer represented the Respondent.
2. These proceedings were digitally recorded. The parties agreed to submit written argument on Monday, 13 July 2020.

Issue to be decided

3. The issue to be decided is whether the Applicant's disciplinary action short of dismissal was both procedurally and substantively fair.

Background to the issue

4. The Applicant is employed by the Respondent as a Secretary to Judge Lekale. He was charged with three counts of misconduct, found guilty and the sanction of a final written warning and two months' suspension from work without pay was imposed on him with effect from 01 August 2018 to 30 September 2018. The Applicant was earning R23 762, 47, per month, which is paid into his bank account.
5. The Applicant referred this alleged unfair labour practice dispute to the Council. This matter remained unresolved at conciliation. A certificate of non-resolution was issued and this dispute was then referred for an arbitration. The parties submitted bundle of documents that were marked bundle "A" and "R".

Summary of Evidence



Applicant

First Witness: Mr. Reetsang Jacob Mogotsi

6. The witness testified under oath that he was an Applicant in this matter. On 19 June 2016, they were working at Harrismith Circuit Court and the Respondent booked him an accommodation from 16 to 20 June 2014 as per documents "R3 & R7". The Court adjourned at 11h30 on 19 June 2014. He was instructed by Judge Lekale to assist him with his work and he continued working until knock off time. Judge Lekale wrote a letter confirming that he requested him to stay behind on 19 June 2014 as per document "A3-A5".
7. He did not receive an instruction from the court manager to return to the office. He drove from Harrismith to Bloemfontein at around 09h00 on 20 June 2014 and he was still on duty. He did not attend the general staff meeting on 21 January 2014. There was no instruction given in that meeting that they must return to their respective offices when the Court adjourned. He was not aware of any instruction given to him on 26 March 2013. He did not check out in the morning of the 19 June 2014, because he had no knowledge that the Court would adjourned earlier.
8. The other two employees he worked with at Harrismith Circuit Court were not charged by the Respondent. All three of them did not return to the office on 19 June 2014. He was the only employee who was charged with misconduct. The Respondent instituted disciplinary action against him after a year. The Respondent was aware of the alleged misconduct on 22 September 2014 and the disciplinary enquiry was held during the year 2017, three years after the alleged misconduct.
9. Under cross-examination he stated that the letter from Judge Lekale was signed on 07 March 2017 as per document "R67-R69". The HR official received a letter from Judge Lekale and they forwarded it to the Respondent head office. He denied the allegation to say that Judge Lekale signed the letter after having second thoughts. He confirmed that on 19 June 2014, he stayed behind at Harrismith with the instruction of Judge Lekale in order to assist him with his administration work. He has no tangible evidence to prove that he assisted Judge Lekale with his administration work on the day in question.



10. He was aware of the Respondent cost cutting measures as per document “R25”. He did not attend the staff meeting on 03 October 2014. He was not aware of the instruction given at the staff meeting as per document “R14-R17”. He left Harrismith on 20 June 2014 at around 09h00 and it took three and half-hours’ to drive from Harrismith to Bloemfontein. The reason he arrived at the office at 14h00 was because he dropped the luggage of his colleagues at their respective homes. He confirmed that he did not inform the court manager that he dropped the luggage of his colleagues at their respective homes.
11. He was not aware that he must inform the court manager but he only became aware of informing her after the incident. The notice of the disciplinary enquiry was signed on 30 November 2015 for the enquiry to be held on 14 December 2015. He confirmed that the enquiry commenced on 14 December 2015 not during the year 2017. He denied the allegation to say that the disciplinary action against him was instituted within the reasonable period.
12. Under re-examination he stated that the contents of the letters as per documents “A3-A5” and “R65-R67” are the same, even though the other one was not signed. He made a mistake by saying the disciplinary action was instituted during the year 2017 instead of 14 December 2015. The alleged misconduct took place on 19 June 2014 and the Respondent took months’ before instituting disciplinary action.

Second Witness: Ms. Keababona Gabisile Mocumie

13. The witness testified under oath that she was working for the Respondent and she left their employment during July 2017. On 19 June 2014, she worked with the Applicant at Harrismith Circuit Court and they travelled with the Respondent vehicle. On 19 June 2014, the Court adjourned at 11h30 but they did not return to the workplace because the Judge gave the Applicant some work to do and he finished late. There was an instruction to say that if they finished their work at 15h00, they must not drive back home. The Applicant finished his work at around knock off time on the day in question. She and Mr. Hadebe were not be charged with misconduct even though they committed the same acts of misconduct.
14. Under cross-examination she stated that she was not present when the Judge gave the Applicant work to do. She was not present when the Applicant phoned the court manager about the work the Judge



gave him. The Applicant told him that he phoned the court manager. She confirmed that the Applicant completed his work at around knock off time. She confirmed that there was a rule that says that if the Circuit Court adjourned early, they must return home and the Applicant ought to have known about that rule.

15. Under re-examination she stated that the Applicant should have been aware of the rule because it was mentioned during the staff meeting. The court manager once said to her that she wanted to teach the Applicant a lesson because he has a tendency of not returning to the office after the Circuit Court adjournment. The court manager seems to have personal issue with the Applicant.

Respondent

First Witness: Mr. Solo Johannes Makhonjwa

16. The witness testified under oath that he was the presiding officer during the enquiry against the Applicant. The outcome report of the enquiry was as per document "R39-R51". The issue of the delay to institute disciplinary action against the Applicant was not raised during the enquiry. He found the Applicant guilty as charged on all the charges as per document "R49".
17. Under cross-examination he stated that he analyzed the charges holistically not individually. He denied the allegation to say that his analysis was only dealing with charge relating to instruction.

Second Witness: Ms. Vuyiswa Ntwasa

18. The witness testified under oath that the Respondent employed her as the court manager. On 19 June 2014, the Harrismith Circuit Court adjourned at 11h30. The Applicant was supposed to return to the office but he failed to do so. He only returned to the office on 20 June 2014 at 14h00. He also included the date of the 20 June 2014 in his S&T claim as if he was working on the said date and his claim was corrected. The employees were informed during the general staff meetings to save costs. They were informed that when the Circuit Court adjourned early, they must return to office as per document "R14-R25". All the employees where informed about the National Treasury cost cutting measures as per



document “R59-R66”. Other employees complied with the instruction. The Applicant was supposed to return on 19 June 2014 after the Circuit Court adjourned at 11h30.

19. If an employee was not part of the meeting, he/she has the responsibility to keep him/her updated with the decisions of the meeting. The Applicant did not inform her that he will not return back. She only became aware of the incident when the S&T claim was sent to her. Even Judge Lekale did not inform her that he requested the Applicant to assist him with his administration work. She did not receive any letter from Judge Lekale regarding the incident of the 19 June 2014 as per document “R65-R69”.
20. It was not true that she only instituted disciplinary action against the Applicant when he lodged a grievance relating to his S&T claim. The delay to institute disciplinary action against the Applicant was because she was on an annual leave and also working at the Circuit Courts. Ms. Mocumie was served with an audi alteram partem letter and she responded and Mr. Hadebe was not the Respondent employee. Other employees were charged with the same offence and the Applicant was previously given verbally warning regarding the same offence. This was the second offence against the Applicant. The disciplinary action was implemented fairly to all employees.
21. On 20 June 2014, the Applicant did not report his whereabouts and he only reported for duty at 14h00. Even on his arrival at the office, he failed to inform her the reason he reported for duty at 14h00. The Judges were not responsible for the administrative duties of the Secretaries. It was the responsibility of the employee to inform her as the court manager if the Judge gave him/her other work to do. The Applicant did not inform her that Judge Lekale instructed him to stay behind in order to assist him with his administration work. The Applicant failed to comply with the instruction and to comply with the National Treasury directives.
22. The interpreter, Mr. Hadebe was under the establishment of the Magistrate Court that was the reason he was not charged. She maintained that each case treated by its own merits. Ms. Mocumie was served with an audi alteram partem letter as per document “R70-R71” and she responded. Ms. Mocumie confirmed that the Court adjourned at 11h30 on 19 June 2014 but they had to wait for the Applicant because he was assisting the Judge. The disciplinary action was instituted against the Applicant



because of his tendency of not returning to the workplace after the Court adjournment. Ms. Mocumie was not charged.

23. Under cross-examination she stated that the Applicant failed to prove that he assisted the Judge with administration duties. Ms. Mocumie's case was different from the Applicant. She maintained that the Applicant has a tendency of not returning to the workplace after the Court adjourned and he was previously warned. It was the first offence of Ms. Mocumie and she was given a verbal warning. Each disciplinary action needed to be recorded but verbal warning could be issued against an employee.
24. Few weeks prior to the 19 June 2014, the Applicant did not come back to the workplace after Court adjournment and he was given verbal warning. She confirmed that there were no records of progressive discipline against the Applicant and Ms. Mocumie. She has a problem with the letter allegedly written by Judge Lekale because no actual duties were mentioned. The Applicant report to administration but he failed to report to her office that he was assisting the Judge.
25. She wanted to know which duties the Applicant assisted Judge Lekale. The Judge did not assign the Applicant additional tasks. No additional tasks could take the Applicant from 11h30 to 15h00. The Applicant duties at Harrismith ended on 19 June 2014 at 11h30 and he was supposed to return home immediately. What was the Applicant doing after the Judge left the premises? She has no authority to ask the Judge whether he gave the Applicant additional work. Even the Judge did not inform her about giving the Applicant additional work after the Court adjourned. The Applicant has the responsibility to inform her of any additional work given by the Judge. The Applicant failed to explain why he reported for duty at 14h00 on 19 June 2014.
26. The secretary of the Judge was there as the support service, nothing else. The document "R67-R69" was the letter from Judge Lekale. She confirmed that on 19 June 2014, the Applicant was not given an instruction to return to the workplace. The employees were informed during the staff meeting that, if the Court adjourned early, they must return to their workplace. The employees were informed that if the Court adjourned after 15h00, they would drive back the following morning as per document "R16". What would be the reason for the employees to remain behind at Harrismith after finishing working at 11h30? It was the responsibility of each employee to update himself or herself with the decision taken at the



meeting. The Applicant knew in May 2014 that when the Court adjourns early he must return to his workplace.

27. Under re-examination she stated that the court manager was responsible for all administration. The Applicant failed to inform her as his supervisor that the Court adjourned at 11h30 and the Judge gave him tasks to do. It was the Applicant responsibility to inform her.

Arguments

Applicant

28. The Applicant representative submitted that the Respondent applied the rule inconsistently when they applied different treatment between the Applicant and other two employees. There was no justifiable reason for the Respondent to delay to institute disciplinary action against the Applicant. The Applicant was not aware of the instruction issued by the court manager during the staff meeting, therefore, he was not aware of the said rule.
29. The Applicant version was corroborated by Ms. Mocumie and he was not absent on Friday, 20 June 2014. It was clear that the Applicant suffered unfair labour practice in the hands of the Respondent.

Respondent

30. The Respondent representative submitted that the Applicant was not treated unfairly as alleged. The Applicant was charged in terms of the disciplinary code for his wrongful behavior or conduct. The letter written by Judge Lekale was disputed by the Respondent because the letter was written two years after the incident and it raises the authenticity of it. The general rule of admissibility of documentary evidence states that, when a document is used it must be authenticated.
31. The Applicant conveniently stated that he could not recall what administrative duties he had to perform for the Judge after the Court had adjourned. It is the duty of every employee to report to their supervisor their whereabouts. The evidence of Ms. Mocumie was doubtful and questionable. Ms. Mocumie further



testified that she was aware of the rule that if a Circuit Court adjourns early, they should return to the office and the Applicant was also aware of the rule. The delay to charge him was due to Circuit Courts, investigations, sick leave and annual leave. Ms. Mocumie was served with an audi alteram letter. Formal disciplinary action against Ms. Mocumie was not taken because each case is treated on its own merits.

32. The Applicant was the driver of the Respondent vehicle, which means that the responsibility of transporting other employees to and from office was dependent on him. The other employees were ready to return until he informed them that they will not be returning to the office because he was doing work for Judge Lekale. The other two employees did not do anything wrong because they had relied on the Applicant to have informed the court manager about their whereabouts.
33. The Applicant and the Judge did not make any attempt to try to contact the court manager about the adjournment of the Circuit Court. It is not possible that the Applicant could remain behind after the Court had adjourned early because he cannot type. The finding and the sanction imposed to the Applicant was correct.

Analysis of Evidence and Arguments

Introduction

34. Section 186(2)(b) of the Labour Relations Act, ("the Act"), states that 'unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving – unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.
35. The issue that I have to determine is whether the Respondent acted fairly towards the Applicant when they found him guilty of alleged misconduct and imposing a sanction of a two months' suspension from work without pay and final written warning. The Applicant bears the onus to prove that the Respondent conduct constituted an unfair labour practice and in discharging the onus, the Applicant called two witnesses.

The following are brief reasons for the award:



Procedural fairness

Whether the Respondent waive their right to charge?

36. It was the Applicant's version that the Respondent was aware of the alleged misconduct against him on 22 September 2014 but they instituted disciplinary action against him on 30 November 2015. The enquiry was held on 14 December 2015. The disciplinary action against him was not instituted within the reasonable period.
37. Sub-clause 2.4(b) of the disciplinary code and procedure for the public service states that the employer must ensure that employees are timeously informed of allegations of misconduct made against them. Not every deviation or defect is material and disciplinary proceedings are not intended to be equal to formalistic criminal matters. See **Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others (2006) 9 BLLR 833 (LC)** and the later decision in **Nitrophoska (Pty) Ltd v CCMA & Others (2011) 8 BLLR 765 (LC)**. The court noted that the schedule was intended to do away with the strict procedural requirements imposed by courts and arbitrators under the 1956 LRA.
38. The Applicant did not lead evidence on how this non-compliance with the code prejudiced him. The sole test was whether he had had an opportunity to state his case. Since he had been afforded an ample opportunity to do so, the proceedings satisfied the requirements of the LRA. The Applicant was in any event not prejudiced as he was at liberty to present his case during the disciplinary procedures and arbitration proceedings. I find the Respondent complied with a fair procedure before instituting disciplinary action against the Applicant.

Substantive fairness

Whether the Applicant failed to comply with the cost cutting measures?

39. The Applicant was charged for failing to comply with, or contravened an Act, regulation or legal obligation and more specific the "Cost Cutting Measures" in the National Treasury Instruction 01 of 2013/2014 by



failing to inform his supervisor or any member of management timeously to cancel the booking with Travelling with Flair, (TWF), causing the Department unnecessary costs and expenditure. The Applicant denied the allegation.

40. It is common cause that the Applicant was authorized to work at Harrismith Circuit Court from 16 to 20 June 2014. The Applicant was booked an accommodation at Mountain View Inn from 16 to 20 June 2014. It was the Applicant undisputed evidence that he was not aware that the Court would adjourn at 11h30 on 19 June 2014. The Applicant and other two employees stay over and they checked out on 20 June 2014.
41. It is a well-known practice that the check-in and out at the hotels and guesthouses are between 14h00 and 10h00 respectively. The Respondent did not lead evidence to prove that if the Applicant should have checked out after 11h30, the Respondent would have been charged lower rate. I accordingly find the Applicant did not commit any act of misconduct.

Whether the Judge gave the Applicant additional work?

42. It was the Applicant version that the Court adjourned at 11h30 on 19 June 2014 and Judge Lekale gave him an administration work to do. He completed the Judge tasks before knock off time. This version was corroborated by Ms. Mocumie, the person who was with him in Harrismith on the day in question.
43. The Respondent is obliged to defend challenges on the substantive and procedural fairness, if it wishes to avoid a negative outcome. I do not agree with the Respondent witness, Ms. Ntwasa that she has no authority to ask Judge Lekale whether he gave the Applicant an additional work at Harrismith Circuit Court. The Respondent should have investigated this matter thoroughly, especially after the other two employees confirmed that Judge Lekale gave the Applicant work to do but they failed to do so.
44. There was no evidence led during the proceedings to prove that Ms. Mocumie and Mr. Hadebe were ready to leave Harrismith after the Court adjourned at 11h30. It was the Respondent version that it was not possible that the Applicant could remain behind after Court had adjourned early because he cannot type.



45. This version was not put to the Applicant when he gave evidence, to give him an opportunity to respond. Therefore, this version was untested and cannot carry weight. In **NUM and another v CCMA and others (2018) 3 BLLR 267 (LAC)**, the Court set aside an award where the Commissioner found for the employee on facts that were not put to employer's witnesses. It was held: "[14] from the record, it is apparent that the Labour Court correctly determined that the allegation of racial abuse had not been put to the employer's witnesses in cross-examination. The purpose of a proper cross-examination is to place a one sided version, which often results from examination-in-chief, into proper perspective by eliciting facts which place a different complexion on the matter, or by demonstrating that the witness is untruthful. In eliciting from an opposing witness facts which are beneficial to the case of the cross-examiner's client and to put such client's opposing and contradictory version to the witness, the decision-maker is placed in a position which permits evidence to be properly and appropriately assessed. Since key aspects of the employee's case were not put to the employer's witnesses in cross-examination and had not been canvassed in the evidence of those witnesses in chief, their version on such aspects was not placed before the Commissioner. The result was that the Commissioner was unable to determine the issue before him in the manner required".
46. Ms Sifunda, Labour Relations Officer, and cannot be said to be illiterate, or an uneducated person. One of her main duties is to represent his employer's in arbitration proceedings and she does this frequently. She therefore knows she should put her employer's version to the Applicant. This leaves me in a position where I have not heard the Respondent's version regarding the said allegation.
47. The standard of proof was that of a balance of probabilities. Proof that the employee actually committed the offence charged presupposes a proper investigation of the allegation against the employee, and the presentation of evidence that links the employee with the offence. Proof on balance of probabilities means that the evidence points more probable to the conclusion that the employee committed the alleged misconduct, than to his innocence. However, a mere suspicion of guilt does not satisfy the test of proof on a balance of probabilities. I, therefore, find the Respondent failed to prove that the Applicant committed misconduct.

Whether Judge Lekale's letter was authentic?



48. It was the Applicant's version that Judge Lekale, the person who allegedly given him additional administration work to do, confirmed the same in writing as per document "A3-A5". It is worth noting that this letter was drafted after the disciplinary enquiry against the Applicant was completed. It, therefore, raise its authenticity, why it was only drafted and submitted after two years of the alleged misconduct.
49. The general rule is that the party wishing to rely on the contents of a document should produce the original document if the document is in dispute. The oral or other corroborating evidence is needed to prove the authenticity and accuracy of the contents of documents in dispute. In order to prove the authenticity of a document and to ensure that any such document is admitted as evidence, a witness will have to testify about the document and the document will usually not simply be admitted on face value.
50. In **Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO (2006) 27 ILJ 1675 (LC)**, the court held that the original document on which a charge of dishonesty has been premised was not produced before the commissioner. The bundle of documents did, however, contain a copy of the document and had been admitted in evidence. Although the company adopted a narrow approach in arguing that the document had not been placed in dispute and had been admitted in evidence by the employee, the commissioner was held not to have misdirected himself in finding that the original document should have been produced.
51. In this matter, the Applicant was required to call Judge Lekale to come to the proceedings and to prove the correctness of the contents of his alleged letter. The Applicant failed to do so and this letter is not admitted as evidence.

Whether the Applicant failed to carry instruction?

52. The Applicant was charged for failing to carry out a lawful order or routine instruction without just or reasonable cause in that he ignored a direct instruction from the Court Manager by failing to inform the Court Manager (as his direct supervisor) or any member of management at the Free State High Court of his intention not to return to the office (Bloemfontein) on Thursday the 19/06/2014 from Harrismith Circuit Court. The Applicant denied the allegation.



53. It was Ms. Mocumie's testimony that there was an instruction to say that if they finished their work at 15h00, they must not drive back home. The Applicant told her that he phoned the court manager that the Court adjourned early but Judge gave him additional. Ms. Mocumie confirmed that there was a rule that states that if the Circuit Court adjourn early, they must return back home and the Applicant ought to have known about that rule. This evidence was not disputed by the Applicant.
54. It was clear that the Applicant has the knowledge of the rule and he failed to comply with the rule. I accordingly find the Applicant did commit an act of misconduct when he failed to inform his supervisor that the Court adjourned early and the Judge gave him additional work to do.

Whether the Applicant absented himself from work?

55. The Applicant was charged for absent or repeated absent from work without reason or permission by failing to report for duty at the office (Bloemfontein) on Friday 20/06/2014 and only reported for duty at 14h00. The Applicant denied the allegation.
56. According to John Grogan in his work: Dismissal Juta & Co 2004 at page 108: "The elements of the offence of absenteeism are that the employee must have been absent from work at a time when the employee was contractually obliged to render service. Some disciplinary codes add a further element to the offence- employees must have failed to inform the employer immediately of the reason for the absence".
57. In general, employees have a fundamental duty to render service and their employers have a commensurate right to expect them to do so. This flows from the very contract of employment itself. In order to be able to discharge this fundamental duty an employee must be in attendance at the agreed workplace during agreed times and if they failed to be so in attendance the onus is on them to provide an explanation for their absence.
58. In this matter, the Applicant was charged for reporting at workplace at 14h00 on 20 June 2014. The onus was on the Applicant to provide reasonable explanation for reporting late at work on the day in question. It is common cause that the Applicant arrived at the workplace at 14h00. It was the Applicant's undisputed



evidence that they left Harrismith on Friday, 20 June 2014 at around 09h00 and it took them three and half-hours' to drive from Harrismith to Bloemfontein. The reason he arrived at the office at 14h00 was because he dropped the luggage of his colleagues at their respective homes.

59. I do not agree with the Respondent's version to say that, there was no valid reason for the Applicant's to report late at work. The Applicant has a valid reason for reporting late at work. The Applicant's conduct was justifiable and reasonable. I therefore, concluded that the Applicant did not breach the Respondent's rule.
60. The only issue that the Applicant failed to do, was to inform his supervisor the reason he reported at work at 14h00.

Whether the Respondent acted inconsistently?

61. It was the Applicant version that the other two employees he worked with at Harrismith was not charged by the Respondent. All three of them did not return to the workplace on 19 June 2014 and they reported for duty on Friday, 20 June 2014 at 14h00. He was the only employee who was charged with misconduct.
62. In **Southern Sun Hotel Interests (Pty) Ltd v CCMA & others (2009) 11 BLLR 1128 LC** Judge Van Niekerk summarized the legal principles of relating to consistency as follows:

"The legal principles applicable to consistency in the exercise of discipline are set out in item 7(b)(iii) of the Code of Good Practice: Dismissal establishes as a guideline for testing the fairness of a dismissal for misconduct whether "the rule or standard has been consistently applied by the employer". This is often referred to as the "parity principle", a basic tenet of fairness that requires like cases to be treated alike. The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed



by the employee used as a comparator (see, for example, *Gcwensha v CCMA & others* (2006) 3 BLLR 234 (LAC) at paragraphs (37)-(38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant (see *Shoprite Checkers (Pty) Ltd v CCMA & others* (2001) 7 BLLR 840 (LC) at paragraph (3). Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.”

63. In determining the fairness, the question is whether other employees who engaged in similar misconduct were treated in the same way. So unless the Respondent can rationally justify treating one employee differently, it must act consistently.
64. It was the Respondent version that Ms. Mocumie was served with an audi alteram partem letter and she responded and Mr. Hadebe was not the Respondent employee. Other employees were charged with the same offence and the Applicant was previously given verbally warning regarding the same offence. This was the second offence against the Applicant. The disciplinary action was implemented fairly to all employees.
65. The Respondent failed to provide the proceedings with the disciplinary records of the Applicant in order to verify whether or not he has previous warnings when comparing with Ms. Mocumie. Each employee was required to inform their supervisor when the court adjourned early and the reason, if any, of not returning back on the same day. The Respondent also failed to provide the proceedings with the disciplinary records of Ms. Mocumie to verify whether or not she was given verbal warning for the same offence she committed with the Applicant. Ms. Mocumie also did not inform the court manager that the Court adjourned at 11h30 but they will come the following day because Judge Lekale gave the Applicant tasks to do. Ms. Mocumie was also guilty of the same conduct like the Applicant.
66. The Respondent failed to justify different treatment when applying the rule. I, accordingly find the Respondent did not apply the rule consistently.



Whether the sanction was fair?

67. The essence of insubordination is that the employee refuses, without good reason, to follow a reasonable or lawful instruction issued by the employer. Insubordination constitutes a direct challenge to the authority of the person issuing the instruction and this challenge must be deliberate and of a serious nature. There is a duty on an employee, arising from the contract of employment, to show respect to the employer and insubordination amounts to a breach of this duty.
68. In this matter, the Applicant failed to inform his supervisor that the Court adjourned at 11h30 and the Judge gave him an additional work to do, therefore, he will not return to his workplace as required. The Respondent instruction was reasonable and lawful. The Applicant was aware of the Respondent's rule and he breached the rule.
69. The Applicant conduct was regarded as a serious offence. Even though insubordination is a serious offence, the Applicant has a valid and justifiable reason to remain in Harrismith on 19 June 2014. The Applicant is a senior employee to Ms. Mocumie and he should have showed leadership but failed to do so. I, therefore, find the sanction of a final written warning is fair and appropriate in this instance.

Conclusion

70. In these circumstances, I find the Applicant proved that he suffered an unfair labour practice against the Respondent.

Remedy

71. The Respondent found the Applicant guilty of misconduct and imposed a sanction of a final written warning and two months' suspension from work without pay. The Respondent's conduct, constituted an unfair labour practice. I will therefore order the Respondent to reimburse the Applicant the imposed two months suspension without pay to the total amount of **R47 524, 94**. The final written warning will be in place for failing to comply with the lawful instruction.



Award

72. The Applicant, Reetsang Jacob Mogotsi, proved that he suffered an unfair labour practice relating to a disciplinary action short of dismissal in the hands of the Respondent.
73. The Respondent, Office of the Chief Justice, is ordered to reimburse the Applicant the total amount of R47 524, 94, this being the sanction of two months' suspension from work without pay that was imposed on him. The reimbursement must be paid into the Applicant bank account, the details of which are known to the Respondent, by no later than 30 September 2020.

Signature: _____

Panellist: Khuduga Tlale