



ARBITRATION AWARD

Panellist/s: P M NGAKO
Case No.: GPBC1112/2018
Date of Award: 13 OCTOBER 2020

In the ARBITRATION between:

PSA OBO M E MOCHE

(Union / Applicant)

and

DEPARTMENT OF HOME AFFAIRS

(Respondent)

Union/Applicant's representative: JOSEPH MASHIGO

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

Respondent's representative: STEPHEN TSIE

Respondent's address: _____

Telephone: _____

Telefax: _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

- 1.1 This matter was set down before me on the 5th of July 2019 at the office of the GPSSBC 260 Basden Avenue Lyttelton, Centurion and on the 30th of September 2020 and the 1st of October 2020 at Department of Home Affairs 230 Johannes Ramokhoase Street, Pretoria. Appearing before me was the applicant who was represented by Joseph Mashigo an official from the trade union PSA. The respondent was represented by Stephen Tsie an employee in the employment of the respondent. The respondent submitted a bundle marked bundle "R", while the applicant submitted a bundle marked bundle "A"

ISSUE TO BE DECIDED:

- 2.1 I am required to determine whether the dismissal of the applicant was substantively fair.

BACKGROUND TO THE MATTER:

- 3.1 Applicant was employed by the respondent as (RSDO) Refugee Status Determination Officer
- 3.2 Applicant was employed by the respondent in 2005
- 3.3 Applicant attended a disciplinary inquiry; consequent to the disciplinary inquiry applicant was dismissed
- 3.4 Applicant was charged and found guilty on the following allegations:

Allegation 1

It is alleged you committed an act of gross negligence in that on or about 31 October 2011 at or near the TIRRO Refugee Reception Centre, you re-interviewed and re adjudicated granted status of Mr Fedile Ngandu Kasonga, File number: JHBCOG752271008, Congolese national whilst his application was rejected as Manifestly Unfounded

Allegation 2

It is alleged that you committed an act of gross negligence in that on or about 8 July 2011 at or near the TIRRO Refugee Reception Centre, you re-interviewed and adjudicated granted

status of Mr Patrick Lusala Kapinga, File number: PTACOG00860209, a Congolese national whilst his application was rejected as unfounded

SURVEY OF EVIDENCE AND ARGUMENT:

RESPONDENT'S CASE

- 4.1 The respondent led the evidence of **THIVHAFUNI MBEVHANA** who after being affirmed testified as follows: he is employed by the respondent as Operations Manager at Desmond Tutu Refugee Centre. He testified that the applicant re-adjudicated and interviewed Kapinga in 2011 and when it came to their attention they verified through the system NIS at page 47 of bundle "R". That the applicant was grossly negligent in that when a client comes through the centre he has either a permit if is lost an affidavit and it clearly stated that the client came to collect the decision and the applicant should have checked the decision and would have found that and RSDO has rejected the client's application. It was his evidence that what the applicant did went to the file of the client and it showed him the client was rejected, he circumvented the system by changing the status as rejected, thereby the system allowed her to edit the decision of RSDO Mabena as her decision and this can be seen the date that appears on her notes which she forgot to change is the same date RSDO Mabena rejected the clients application
- 4.2 In relation to allegation 1 it was his evidence that the applicant changed the status of this client she re-interviewed this client and re-adjudicated while his application was rejected as manifestly unfounded, at page 13 of bundle R and it shows the application of the client was rejected as manifestly unfounded and it was before the scra for review, applicant changed the decision granted the client status and on 27 November 2011 it states that collect decision. It was his decision that the applicant set aside the decision as rejected to granted. It was his evidence that on both files the applicant had information from the permit the client brings that allows him entry into centre; the system also will have informed both clients their applications were rejected. As result applicant cannot be trusted and the relationship between her and the respondent has irretrievably broken down.

- 4.3 Under cross examination he conceded that when clients comes at the centre, they start at RRO section where the RRO manager will conduct quality control before the file is handed to RSDO manager who will allocate the files to RSDO officers, it was his evidence that there was abnormality in relation to the file in allegation 2 how it reached the applicant. He insisted that the applicant processed the application of the client on allegation 2 was aware that her application was rejected this could be found in the permit which state "collect the decision" and the system when she punches the file of the client would have told her his application has been rejected.
- 4.4 He conceded that there are instances where in the permit states "collect a decision" when the client had not been interviewed, he insisted that even if the applicant had no access to the information on the system he should have gone to her supervisor to verify the status of the clients.
- 4.5 In relation to allegation 1 it was his evidence that the original file to this client could not be found it was shredded, he denied that this file came through the normal route; he denied that the RSDO does quality control on the file before a decision is issued

APPLICANT'S CASE

MPHO ELLEN MOCHE

- 5.1 Applicant **MPHO ELLEN MOCHE** after being sworn in testified on her behalf as follows: she was employed by the respondent as RSDO from 2008 and she occupied this position until she was dismissed. It was her evidence as RSDO here duties were to interview adjudicate and make a decision guided by the refugee act. In relation to allegation two, it was her evidence that she was not negligent in that when the client comes at the centre, goes to the RRO section with a permit or affidavit, and the file of the client is retrieved then the RRO manager does quality control and determine what the client qualifies for, then file that needs to go to RSDO are given to RSDO manager who also before he/she allocates it to RSDO's does quality check, and then the file is allocated to an RSDO.

- 5.2 It was her evidence the file of Kapinga she received it from her manager, it was her evidence that when the file states “collect the decision” does not mean that and RSDO has been allocated the file and decision is pending, even RRO’s will write collect a decision although the file has not been adjudicated upon. It was her evidence after being allocated the file, she will punch the file number on the system, and what is visible to her, is the names, date of birth, and it does not show her the history of the file. The signature is signed manually on the adjudication report. It was here evidence that a date is generated by the system itself, and you see the date after you have printed the report. He conceded that dates does not correspond, in her report at page 38 of bundle R, and that is why when the manager signed put the correct date; she disputed that the decision can be edited as it is locked after being saved
- 5.3 In relation to allegation two it was her evidence that she did not act negligently as the file was allocated to her by her manager, and she interviewed the client and made a decision. It was her evidence that she worked on the file because it was allocated to her, and on the system it did not show that an RSDO worked on the file.
- 5.4 Under cross examination it was here evidence that RSDO’s relies on supervisors to do quality check on the files and when working on the file, they rely on what is in the file and in the system. She insisted that when she worked on the file, she did not see that it was rejected as they don’t have access to the information on the system. It was her evidence that when her supervisor signed her report at page 35 she was signing that approval granted, when she does quality check she corrects you and she disputed that the file is a duplicate file. She reiterated that when the file say “Collect a decision” it does not always mean there is a decision from an RSDO, she gave an example that while Mabena had not taken a decision, the file stated “collect a decision”

- 6.1 The second witness called by the applicant was **KGOLOFELO MOTLOUNG** who after being duly sworn in testified as follows: she is employed by the respondent as RSDO since June 2008. She confirmed the evidence of the applicant that after you have adjudicated the file, the manager does quality assurance and if he/she agrees is then that you could issue the decision, and this is done before you issue the decision. It was her evidence if the file says "collect a decision" you go to the system interview notes and if there are no notes you interview the as the client has never been interviewed, you issue a new decision. She confirmed that RSDO does not have access to client's history only managers do and it was rolled out around 2011/2012. She confirmed the evidence of the applicant that you can't edit a report of another RSDO once it has been saved on the system
- 6.2 Under cross examination she reiterated that you can't change a report of another RSDO once a decision has taken place and it has been saved on the system, she conceded that the file of Kapinga was a duplicate, and confirmed that the same RSDO who adjudicates the file is the one who takes the decision.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- 7.1 The applicant was charged on two allegations and both relating to granting a status to Fedile Ngadu Kasonga on the 1st allegation and the 2nd allegation Patrick Lusala while the files were already attended to by other RSDO's and dismissed their applications. The applicant does not dispute that she granted the status to both clients. What she denies is was aware that their applications had already been dismissed by fellow RSDO's. It is the contention of the applicant that before clients reaches her, they start at the RRO section and the RRO manager does quality check before is given to RSDO manager and it is allocated to RSDO to assess and adjudicate over the file, while it is the contention of the respondent that these files did not follow the normal route. It is the evidence of the applicant that there was nothing on the screen that informed her that decision had already been taken on the files.

7.2 The applicant does not dispute that when a client comes at the centre comes with a temporary permit similar to the one for Patrick Kapinga at page 44 of bundle “R” and it clearly states “collect decision”, according to the respondent’s witness applicant when he saw the condition “collect decision” should not have worked on the file; should have referred the file to her supervisor to ensure that there was no decision. It is however the applicant’s contention that he was under no obligation to go to her supervisor to enable her to check whether there was a decision or not as there was no decision on the screen, her duty was to assess and adjudicate the file; and the fact that the temporary permit said “collect decision” it does not always mean there was a decision on the file. I agree with the applicant from her bundle, and the respondent bundle, a permit will state “collect decision” when an RSDO has not been allocated the file. It is however my view that taking into consideration that applicant was aware that the term is used loosely; it was her fiduciary duty as an RSDO to ensure that before processing the file allocated to her she should have satisfied herself there is no decision already taken before by another RSDO. Failure by the applicant to satisfy herself that no decision has been taken before processing both files which is her fiduciary duty this amounts to gross negligence on the part of the applicant on both allegations.

7.3 It is the evidence of the respondent, that the applicant when she opened the files of both clients, the system informed her the applications were dismissed, she then circumvented the decision taken by the RSDO’s before her, she changed the decision from not granted to granted and then changed the notes of the RSDO who dismissed the case and granted the status. On balance of probabilities, I believe the version of the respondent witness that applicant tampered with decision that has already been taken on the two files by editing the decisions. The reason for my view is because the date that appears at page 38 of bundle “R” of 3/11/2010 is the date in which RSDO Mabena took a decision dismissing the client application, while the applicant took the decision on the 08/07/2011. As a result I am satisfied on balance of probabilities that the respondent has proven that the applicant when she granted the status to Fedile Ngandu Kasonga, and Patrick Lusala Kapinga on the first and second allegation, was aware that their applications were dismissed, because she changed

the status on both files as granted. As result applicant on balance of probabilities is found guilty on both allegations of gross negligence.

- 7.4 I have found the applicant guilty on both allegations of gross negligence. Acting Judge Moshoana as he then was in LA Crashers (PTY) Ltd and CCMA and others Case no JR1676/14 delivered 8 March 2017 at para 5 held:

“In Quest Flexible Staffing Solutions (Pty) Ltd v Abram Legoabe, the Labour Appeal Court clarified the issue thus:

“In Sidumo, the Constitutional Court held that a Commissioner is not empowered to establish afresh what the appropriate sanction is, but rather to decide whether the employer’s decision to dismiss is fair. In making this determination, the commissioner should not defer to the decision of the employer but should weigh up all the relevant factors, including the importance of the rule that has been breached, the reason the employer imposed the sanction of dismissal, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee, and the employee’s service record. These factors are, however not considered by the Constitutional Court to be an exhaustive list. Hence other relevant factors that may warrant consideration in assessing the fairness of a sanction include the seriousness of the misconduct, the effect of such conduct on the continuation of the employment relationship, the nature of the job and the circumstances of the infringement. . . .

In addition, the appellant regarded seriously disrespectful conduct, of the nature committed by the respondent, as an offence that warranted dismissal on the first occasion. Its code of conduct provides as much. In failing or refusing to demonstrate any acceptance of wrongdoing or remorse, the respondent rendered the continued employment relationship with the appellant intolerable and undermined the applicability of corrective or progressive discipline.”

7.5 Taking into consideration the seriousness of the allegations applicant has been found guilty on, and taking into the consideration the principles set down in the above case, that I can interfere with the decision of the employer if the decision is unfair. It is my view that the sanction imposed by the respondent on the applicant was fair, and as result there is no justifiable reason for me reason to interfere with the sanction imposed on the applicant as result I have come to the following decision

AWARD:

- 8.1 I find the dismissal of the applicant was substantively fair;
- 8.2 The decision of the respondent to dismiss the applicant is hereby confirmed
- 8.3 There is no order as to costs

A handwritten signature in black ink, appearing to be 'PM NGAKO', written over a horizontal line.

Name: PM NGAKO

(GPSSBC) Arbitrator