



ARBITRATION AWARD

Panelist: Wayne Paul _____
Case No.: GPBC2414/2018 _____
Date of Award: 16 August 2020 _____

In the ARBITRATION between:

PSA obo SI Khuzwayo

(Union / Applicant)

And

Department of Correctional Services

(Respondent)

Union/Applicant's representative: L Naidu - PSA _____

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

Respondent's representative: M.I Setlhodi – Department of Correctional Services. _____

Respondent's address: _____

Telephone: _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. Mr L Naidu from the PSA represented the Applicant and Mr M Setlhodi, the Respondent's representative, represented the Respondent.
2. The Applicant referred a dispute in terms of Section 191(5)a of the Labour Relations Act 66 of 1995 as amended.
3. The case concluded on 17 July 2020 with closing arguments pending.

ISSUE TO BE DECIDED:

4. I am required to determine whether or not the Respondent successfully established that the employment relationship was irrevocably broken, thereby justifying the dismissal.
5. The relief sought by the applicant is reinstatement.

BACKGROUND TO THE MATTER:

The following is common cause.

6. The alleged incident occurred 27 December 2016.
7. At the time of his dismissal on 24 April 2018 the Applicant was employed as a correctional officer with 12 years' service and earned approximately R260000.00 per annum.
8. The applicant had an unblemished disciplinary record up until the incident.

The Applicant was charged as follows

9. ***It is alleged that on 27 December 2016 whilst officially on duty at Qalakhusha Correctional Centre between the hours 07:00 to 16:00 you, without authority brought a FM radio into the Correctional Centre which was handed to sentenced offender Bongani Dlamini in Unit 15B. It is further alleged that you received an amount of fifty Rand (R50.00) in exchange for offender Bongani Dlamini receiving the radio.***
10. ***Allegation 1 Main Charge: Fails to comply with, or contravenes an Act, Regulation or legal obligation read in conjunction with chapter 119(1) (a), (b) and (2) of the Correctional Services Act 111 of 1998.***
11. ***Breaching of internal security measures.***

In dispute

12. The allegations are disputed by the Applicant.
13. The Applicant disputes admitting guilt.
14. Mr. Naidu, the Applicant's representative submits that he agreed to plead guilty on behalf of the Applicant as a settlement to bring the matter to a close, however the chairperson of the enquiry ignored the agreement and dismissed the Applicant thereby taking Naidu by surprise.

SUMMARY OF EVIDENCE AND ARGUMENT

Respondent's case

15. S. Buthelezi, the Head of the Correctional Centre prior to the incident, testified that he was appointed on 4 January 2017 to investigate the incident.
16. The Applicant denied knowing anything about the radio and refused to write a statement.
17. The Applicant was booked at the hospital however the incident occurred at unit 15B.
18. The offender involved in the incident gave Buthelezi the Applicant's cell number to investigate the incident and identified the picture of the radio.
19. It was put to Buthelezi during cross examination that the Applicant worked continuously from the date of the incident of 28 December 2016 until his dismissal on 24 April 2018.
20. N Bonangani, a senior officer level 4 working at unit 16B testified that some offenders were assaulted whilst fighting over a radio brought in by the Applicant.
21. This evidence was derived from the 2 offenders who were injured.
22. Under cross- examination Bonangani conceded that the Applicant was not seen at entry control carrying a parcel and that offenders make false allegations against members.
23. After the incident the Applicant was moved to work at the front gate then returned to work in unit 16 B.
24. Bonangani worked with the Applicant for approximately 3 months without any issues from the Applicant.
25. S Yaka, the Head of Prison testified that a breach of conduct resulted in a breach in the trust relationship and that nothing should be allowed into the prison over December.
26. Yaka confirmed that the Applicant continued working for 1year and 8 months after the incident.

Applicant's Case

27. Mr. S Khuzwayo, the Applicant in this dispute, testified that he was working at the hospital serving breakfast and took an offender to the kitchen.

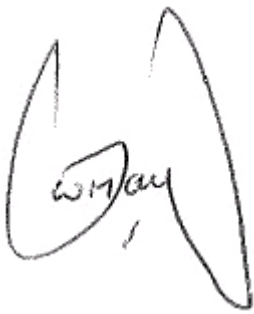
28. On his way back he saw 2 offenders walking without an escort.
29. The Applicant continued working at the same area where the alleged incident occurred.
30. The Applicant disputes the allegations against him and testified that he agreed prior to the hearing to admit to the incident and receive 1 month suspension from work to have the case removed from hanging over his head for such a long time.

ANALYSIS OF THE EVIDENCE AND ARGUEMENTS

31. The Respondent's case is that the Applicant had committed a serious offence and by doing so had rendered the employment relationship intolerable and irrevocably broken.
32. The thrust of the Respondent's case is that the Applicant had admitted to the incident during the disciplinary hearing.
33. The evidence of S Buthelezi, who investigated the alleged incident, produced no evidence that even on the balance of probabilities implicated the Applicant, other than the unsubstantiated testimony that an offender had provided him with the Applicant's cell number.
34. Bonangani, the Respondent's second witness, conceded that offenders sometime make false allegations against members.
35. Although reference was made to photographs of a radio and cell phone, no evidence was lead to establish that the Applicant had in fact brought the items into the prison.
36. Mr. S Yaka, the Head of the Prison, testified that a breach of the rules resulted in a breach of the trust relationship.
37. For as much as such a statement could be correct in certain circumstance, it is not a blanket approach to all cases of misconduct and he provided no evidence suggestive of the alleged destroyed trust relationship.
38. Even if the chairperson acted upon the Applicant's admission of guilt, it appears that the Applicant's long and unblemished record of service played no part in the appropriateness of the sanction.
39. The Respondent permitted the Applicant to work for approximately 1 year and 8 months after the incident.
40. It cannot therefore be argued that the Respondent no longer trusted the Applicant following the alleged incident.
41. I am satisfied that the Respondent failed to establish that the employment relationship between itself and the Applicant was irretrievably broken.
42. Consequently it is my finding that the dismissal of the Applicant was substantively unfair.
43. I am reinstating the applicant, however the reinstatement is not retrospective due to the controversy of the admission of guilt.

AWARD:

44. The Respondent, The Department of Correctional Services, is ordered to reinstate the Applicant, SI Khuzwayo, on terms no less favorable than those that governed the employment relationship prior to the dismissal.
45. The reinstatement is to take affect within 7 days from the date of receipt of this award and is not retrospective to the date of dismissal.
46. The Applicant, SI Khuzwayo is directed to present himself for duty within 7 days of him becoming aware of this award.

A handwritten signature in black ink, appearing to read 'Wayne', enclosed within a large, stylized, handwritten letter 'W'.

Name: Wayne Paul Arbitrator