



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panelist/s: **SILAS RAMUSHOWANA**
Case No.: **GPBC 2423/2016**
Date of Award: **01 SEPTEMBER 2020**

In the ARBITRATION between:

PSA obo B SEBOTSA

(Union / Applicant)

and

DEPARTMENT OF POLICE, ROADS AND TRANSPORT

(Respondent)

Union/Applicant's representative: Mr N Cloete-an official from PSA

Union/Applicant's address: Private Bag x
Bloemfontein

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Respondent's representative: Mr J Lebea-Attorney

Respondent's address: P O Box 2148
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

- [1] This is the award in the arbitration between Mr B Sebotsa (the Applicant) and Department of Police, Roads and Transport (the Respondent).
- [2] The arbitration was held under the auspices of the GPSSBC in terms of section 191 (1) [191(5)(a)] of the Labour Relations Act 66 of 1995, as amended (the Act), and the award is issued in terms of section 138 (7) of the Act, and GPSSBC.
- [3] The arbitration hearing was heard on various dates and was concluded on the 7th of August 2020, at the departmental offices in Bloemfontein.
- [4] The Applicant appeared in person and was represented by Mr N Cloete, an official from PSA whilst Mr J Lebea, an attorney represented the Respondent. Parties agreed that most of the issues which are covered at the disciplinary hearing are common cause and therefore there was not need to tender oral evidence as they will argue legal/ technical issues as below. After the applicant stated his case, parties agreed to submit heads of arguments to the council 17th of August 2020 and if there will be a need for further reply thus would be extended the party concerned.

ISSUE TO BE DECIDED:

- [5] I am required to determine whether or not the Applicant's dismissal was substantively (appropriateness of the sanction) and procedurally fair (external chairperson and initiator)

in the circumstances if I find that it was unfair, I must determine and grant appropriate relief in terms of section 193 of the Act.

BACKGROUND TO THE MATTER:

- [6] It is common cause that the Applicant was an employee of the Respondent, as an Assistant Director since March 2005 until his dismissal for alleged misconducts on the 22nd of August 2016. He was charged with 4 charges and pleaded guilty on charges 1 and 2 and pleaded not guilty on charges 3 and 4. The issue to be decided is whether the dismissal was substantively fair or not based on the appropriateness of the sanction. The applicant further argued that external chairperson and initiator were not the right people to run the hearing as it was not in terms of the provisions of the Council's resolutions.
- [7] The Respondent's case is that the Applicant breached serious rules as charged and dismissal is an appropriate sanction for the transgressions; I should uphold the decision of the disciplinary inquiry to dismiss the Applicant for the transgressions.
- [8] It is therefore upon the Respondent to prove, on the balance of probabilities, that the dismissal as a sanction was appropriate.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence and Arguments

The Respondent's Version:

- [9] Mr J Lebea made submissions on behalf of the respondent in that the applicant was charged with 3 charges of misconduct being : charge 1: gross dishonesty arising from various fraudulent travelling claims relating to odometer readings of his motor vehicle, whether

monthly limit of R2000,00 had been exceeded or not in order to increase or exaggerate the amount of the claims, charge 2 relating to the employee's breach or contravention of the subsidized motor transport policy of 2003 which was issued by the National Department of Transport under Transport No 5 of 2003. Charge 3 pertaining to the allegations of sexual harassment of Ms. Moremi. The applicant pleaded guilty to the first charge and the second charge and not guilty to charge 3. The applicant was found guilty of the charges by the deceased chairperson, Mr J Mthembu and was dismissed. The respondent submitted that the procedural defect raised by the applicant in that the chairperson and the initiator were external was also raised at the disciplinary hearing and they were dismissed. The employer had raised fears in using internal personnel as the employee was a member of the Free State Provincial executive committee of the War Veterans Association. In Clauses 7,3 (b) and (b) of the Disciplinary Code and Procedures for the Public Service provides as follows:

"the chair of the hearing must be appointed by the employer and be an employee on the higher grade than the representative of the employer. There is no exclusion of the of external personnel to chair the hearing and clause 7.3 (c) allows for the appointment of external persons as chairpersons of the disciplinary hearings conducted under the auspices of the council as arbitrator by arbitrator.

In addressing the harshness of the sanction, the respondent submitted that Item 3(4) and (5) of Schedule 8 of LRA 66 of 1995 as amended provides:

"(4)Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes continued employment relationship intolerable, examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or willful damage to the property of the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 186.

(5) when deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances, including length of service, previous disciplinary record and personal circumstances),

[10] Further that the employee should be given an opportunity to give evidence in mitigation. It is the respondent submission that the charges against the applicant were extremely serious as it relates to financial misconduct in terms of the PFMA and the applicant exposed the respondent to financial loss and risk. The charges attracted a sanction of dismissal. The respondent submitted that employee's personal circumstance was taken care of on the fact that he had long service, clean disciplinary record. The respondent was consistent in the application of the rule. The respondent prays that the dismissal of the applicant be upheld.

The arguments were supported by case law and authorities.

The Applicant's Version:

[11] The applicant through the representative, Mr N Cloete submitted that the chairperson of the disciplinary hearing failed to consider the mitigating circumstances as presented by the applicant. The chairperson should have considered long service remorse shown and the clean disciplinary record. The applicant submitted that he did not have any disciplinary record as he was the first offender. He had 11 years and 6 months and therefore it warranted abstemious consideration on the part of the employer in order to determine appropriate sanction. The applicant pleaded guilty and that is a sign enough to show remorse and he has accepted the consequences of his misconduct. He accepted that he was willing to correct his wrong doing. The respondent should have applied corrective discipline instead of punitive. The applicant was not even suspended after the respondent learned of his wrong doing to show that the misconduct was not such to tarnish employment relationship.

[12] He prays that the sanction of dismissal be set aside and be reinstated to his position.

The case of the applicant was supported by Case Law as well.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[13] The applicant in this case is challenging both the procedure and the substance of his dismissal and had pleaded guilty at the initial hearing; but it should be noted that the applicant did not address the commissioner on the procedural defect as was the issue initially, the only dispute as to substance relates to the appropriateness of the sanction. The respondent party in terms of **s192 (2) of the Labour Relations Act 66 of 1995 as amended (LRA)** bears the onus of proving that the dismissal of the employee was for a fair reason and it was done in accordance with a fair procedure. In dealing with the fairness of the dismissal of the applicant, I am required to have regard to the guidelines for dismissal contained in the LRA Schedule 8 Code of Good Practice Item 8 and 9. In this dispute all of the above is not in dispute, the only issue here is the harshness and the appropriateness of the dismissal as a sanction and that the wrong executive authority executed the termination. It was common cause that the applicant in this case had a senior post was responsible for state funds as per PFMA. It was also common cause that the allegations against the applicant were serious and he pleaded guilty at the hearing he is now aware that he has wrong employer and pleads for lighter sanction. There were no procedural irregularities argued and established by the applicant in this case.

[14] In the case of **MEC, Department of Health and Social Development Sectorial Bargaining Council and Others [2016]** where senior managers were involved in misconduct of using an emergency air wing aeroplane to travel in an unauthorised trip to

a soccer team, the employer had engaged in a plea bargaining with others and other were subsequently dismissed. The court had found that entering into a plea bargaining was nothing unpopular or unfair. In this case the employee pleaded guilty on charges of financial misconducts. It is trite law that an employee has the duty to promote the interest of his employer's business and to uphold the good name as well as the reputation. In **NUMSA AND OTHERS VS DUNLOP (PTY) LTD AND OTHERS, LAC DA16/2016**, the principle of derivative misconduct was restated and the duty of good faith towards the employer was emphasised. It was demonstrated that the applicant was very much aware of the rules and he contravenes them as he pleaded guilty at the internal hearing.

[15] I am guided by Item 3 (5) of the Code of Schedule 8 of the LRA which reads as follows:

“When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.”

[16] The Constitutional Court in **Sidumo & Others v Rustenburg Platinum Mines Ltd [2007] 28 ILJ 2405 (CC)** has reinforced the guideline in the Code. It was held that Commissioners must consider the following factors: The importance of the rule and the employer's reasons for dismissal as well as the basis of the of the employee's challenge to the dismissal: the harm caused by the employee's conduct; the extent to which additional training and instruction may result in the employee not repeating the misconduct; the effect of dismissal on the employee and service record of the employee. In the case of **Blitz Printers V CCMA & 1 Other (JR 1782/2012)**, the issue of remorse was considered especially that the employee took responsibility of his action and in this case the applicant took full responsibility of his action and demonstrated that he was remorseful applicant in this case was a senior employee and had a long service and he had no bad disciplinary record. In **De Beer Consolidated Mines Ltd v CCMA and Others**, the issue of long service was entertained on the basis that it determines

whether the employee may be likely to repeat the offences. It is therefore my conclusion that the respondent failed to consider all of the above and the sanction was harsh as it was not intended to correct the applicant. In this regard an alternative sanction coupled with the payback of the state funds would have been appropriate.

[17] In the circumstances I find that the Respondent failed to discharge its onus on the balance of probabilities, that the sanction of dismissal imposed was just and equitable. I find that dismissal is an inappropriate sanction for the transgressions. As to what relief would be appropriate, the applicant seeks reinstatement. Section 193(2) of the LRA provides that if a dismissal was not for fair reason, reinstatement is mandatory unless the employee does not wish to be reinstated; reinstatement would be intolerable or impracticable. In this case the applicant pleaded for retrospective reinstatement. The applicant has been out of work for numbers of years and lost some income. Due to the fact that the applicant was dismissed for financial misconduct it will be unfair to order reinstatement with full backpay given the circumstance and the fact that it is now four years after the dismissal. I therefore order reinstatement without compensation as below.

[18] For the reasons given above, I find it fair and appropriate to award as follows:

AWARD:

[19] The dismissal was inappropriate sanction in the circumstances. The applicant must be issued with a Final Written Warning valid for 6 months.

[20] The respondent is ordered to reinstate the applicant to his original position with effect from the date of dismissal, without back payment. The respondent is ordered to allow the applicant to report for duty within 14 days on receipt of this award,

[21] No order as to costs.

Thus done and signed at Gauteng, Centurion

A handwritten signature in black ink, appearing to read 'S Ramushwana', written over a horizontal line.

Name: SILAS RAMUSHOWANA
(GPSSBC) Arbitrator