

IN THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Case number: MPEM560-24

In the matter between

NOMKHOSI ZWANE

EMPLOYEE

AND

SARS – SA REVENUE SERVICES

EMPLOYER

Date of arbitration: 2 May 12 to 13 August and 18 to 19 November 2024

Date of submissions of heads of Arguments: 26 November 2024

Date of award :29 November 2024

ARBITRATION AWARD

COMMISSIONER: Solly Mashego

APPROVED

DETAILS OF THE HEARING AND REPRESENTATION

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1. The arbitration hearing was before me on 2 May, 12 to 13 August and 18 to 19 November 2024 at the Kempville Hall, Kempville in Piet Retief. The Applicant, Nomkhosi Zwane, was present and she was represented by Kobus Hyneke, an official from PSA. The Respondent was represented by its ER Specialist, Mahlakane Lekganyane.
2. The arbitration was partly held virtually because the Applicant's witness testified on Teams. Interpretation services were provided. The hearing was digitally recorded.

BACKGROUND TO THE ISSUE

3. The Applicant was employed as Operations Manager and her basic salary was R49, 517.70 per month. She commenced employment on 28 December 2000 and dismissed on 19 October 2023 for misconduct. The Respondent presented evidence of Sibusiso Hlongwa (Hlongwa). The Applicant testified in her case and called one witness, Sonya Cassidy.
4. It should be noted that the Applicant had at all times intended to call two witnesses to testify on Teams but the second witness, whom according to the Applicant was subpoenaed and required to testify virtually, was not available to testify and the Applicant, assisted by her representative, decided to close her case without the evidence of this witness.
5. The Applicant submitted bundle A. The Respondent submitted bundles R, R1 and R2. The following are common cause factors:
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 - 3.1 An email was dispatched to the Applicant and other employees of the Respondent. The email reads: *"Kindly be invited to attend a training session on Recruitment Success Factor to align ourselves with the Kosi Bay Border Post recruitment drive. The training session will take place on MS Team, and all have been given access to success factor tool to allow your good selves to navigate the tool."*
 - 3.2 The Applicant, together with other employees, attended training on 19 July 2021 from 11h30 to 12h30.

3.3 The training was about the process of navigating the success factor portal for selection and recruitment of job seekers. This success factor portal is a computerized system developed to replace the old manual processes.

3.4 The trainees were to be skilled on how to select, move and make comments of a successful job applicant for interview. This process was to be conducted on the system.

3.5 Among other attendees in the trainee were human resources personnel and panel members consisting of departmental managers.

3.6 The Applicant selected her husband's application, moved it and made comments justifying the shortlisting for interview. She commented that her husband worked in a law firm.

3.7 The Applicant's husband was not meeting the minimum requirements thus not qualifying for the position and this has been highlighted on the system.

3.8 The shortlisting was reversed after the training by a panel member and the actual recruitment process was conducted on 22 July 2021.

3.9 The Applicant did not participate in the actual recruitment process of 22 July 2021.

6. Due to her actions mentioned above, the Applicant was charged and dismissed for dishonesty and gross contravention of company policies.

7. According to the Respondent, the Applicant was not supposed to do the selection and moving of the candidate. It is alleged that she did not have permission but was merely on training and they were showed how to navigate the system. It is further alleged that in doing what she has done, which was not permitted, the Applicant should have declared being conflicted.

8. The Applicant disputes any wrongdoing. She insists that her conduct did not constitute misconduct because she was merely in a training and authorized to what she has done. She seeks reinstatement.

PRELIMINARY POINT

9. The Applicant's representative raised three preliminary points at start of arbitration on 12 August 2024.

1st preliminary point

10. This was about an undelivered subpoena of witness implying that the witness was not yet available. This aspect was resolved because the parties agreed that the witness would testify virtually. It should be noted that the Respondent offered to assist with release of the Applicant's witness to testify virtually.

2nd preliminary point

11. The Applicant submitted that despite requests, the Respondent did not provide her with certain important information about delegation of authority and Personal Development Program policies despite same being requested.
12. In response, the required information was clarified and Respondent undertook to provide the information before evidence was led. It should be noted that this information was indeed handed to Applicant before evidence was led.

3rd preliminary point

13. The third point raised is about splitting of charges. As mentioned above, the Applicant was charged with two acts of misconduct arising from the same incident. The Applicant's representative raised several decided cases and his contention is that the Applicant should have been preferred with one charge.
14. In his answer, the Respondent's representative denied splitting of charges. He submitted that the conduct of the Applicant was in contravention of the Respondent's policies and her action was dishonest, hence the two charges.

4th preliminary point

15. It was submitted on behalf of the Applicant that the Applicant should be reinstated to her position without listening to the merits of the case because the Respondent has contravened timelines which unjustifiably delayed the prosecuting of the case against the Applicant.
16. Regarding delay, it is common cause that the conduct complained of took place on 19 July 2021 and the Respondent was aware of the conduct within the same month it happened, to be precise the Respondent was aware of the conduct on the same day of the training. However, the Applicant was issued with charges on 27 June 2023, disciplinary hearing held on 27 July 2023 and eventually dismissed on 19 October 2023.
17. The Applicant's representative argued several case authorities where courts, in some of instances, went on to declare dismissal unfair due to the unreasonable delay in initiating and finalizing disciplinary processes. He argued; "justice delayed is justice denied" and further maintained that the Applicant was prejudiced by the extreme delay of 799 days before deciding to lay charges against the Applicant.
18. The Respondent justified the delay by arguing that for a disciplinary process to be initiated, the conduct complained of must be investigated and a decision whether to take disciplinary actions is taken at the national level. He added that the reasons for delaying processes was due to the Nugent Commission which, inter alia, made some damning findings and remarks on matters of disciplinary processes where employees were merely accused and/or dismissed without merits.

The ex tempore ruling

19. It should be noted that the Applicant requested that I make a ruling on last two preliminary points before merits are ventilated and the request was opposed by the Respondent.
20. Having heard the submissions, I ruled that arbitration would proceed and my reasons would be incorporated in this award.

ISSUE TO BE DETERMINED

21. The Applicant challenged fairness of her dismissal. About procedure, the Applicant submitted that her dismissal is unfair because the Respondent contravened disciplinary procedures.
22. About reason for dismissal, it is submitted that there was no misconduct that took place implying that the reason for dismissal is unfair, hence I am also asked to determine whether the dismissal is substantively fair or not.
23. I am further required to determine the appropriate remedy because the Applicant requested to be reinstated and compensated.

ANALYSIS OF EVIDENCE AND ARGUMENTS

24. Section 192 of the Labour Relations Act 66 of 1995 (LRA) states:

- (1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.*
- (2) If existence of dismissal is established, the employer must prove that the dismissal is fair.*

25. As mentioned *supra*, termination of the Applicant's contract of employment is a result of misconduct. Section 188 of the LRA provides:

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*
 - (a) that the reason for dismissal is a fair reason-*
 - (i) related to the employee's conduct or capacity; or*
 - (ii) based on the employer's operational requirements; and*
 - (b) that the dismissal was effected in accordance with a fair procedure.*
- (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.*

26. It is important to deal with the preliminary points first. There are two preliminary points that need to be entertained, which are the alleged splitting of charges and the delay. The delay is split into two, namely: delay contravening the disciplinary code and the unreasonable delay.

27. The charges laid against the Applicant are neither duplicated nor split. The conduct complained of is alleged contravention of policies and it could also constitute a dishonest act or an act containing dishonest elements. In essence, these are two different acts of misconduct arising from the same incident. It is the duty of the Respondent to prove that two misconducts as alleged exists.

28. I will address the delay subject. At start of arbitration, this aspect of delay was raised as preliminary point to be determined separately before evidence was led. However, having dealt with all preliminary points and when starting with narrowing of the issues in this matter, the Applicant's representative raised the same aspect about delay as a procedural defect alleging that the Respondent flouted its own disciplinary code and procedures incorporated in the collective agreement concluded by the Respondent and the union.

29. There is no evidence suggesting that the employer flouted its own procedures because the disciplinary policy is silent in respect of time frames for instituting disciplinary proceedings. What the policy regulates are timeframes for precautionary suspensions but silent where an employee is not suspended. It is therefore my finding that the Respondent did not flout the disciplinary code and procedure, the process preceding dismissal was not unfair.

30. Besides the above alleged flouting of the Respondent's own disciplinary procedures, it has not been an issue of concern that the Respondent flouted the procedure as stipulated in item 4 of the Code of Good Practice (Code) which states;

"Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision".

31. I turn to the alleged unreasonable delay. Notwithstanding that the delay in prosecuting the matter is excessive, the Respondent provided plausible reason for the delay.

32. Now I turn to the reason for dismissal, that is the question whether the Applicant contravened the Respondent's policies or not. It is worth mentioning that the Applicant was in a training when she navigated the success portal. She did not participate in the recruitment process.

33. Item 7 of schedule 8 of the Code provides that - any person 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 a rule or standard was contravened, whether or not -

- (i) the rule was a valid or reasonable rule or 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.

34. According to Hlongwa, who is employed by the Respondent as Human Resources Manager, the Applicant intentionally and dishonestly moved his husband's application, who did not meet minimum requirement, from screening to approved list. There is no dispute that this conduct could constitute misconduct because it is contravention of policies. The Applicant maintains that her conduct does not constitute misconduct because she was in a training and not participating in a recruitment process.

35. In addressing this conundrum, I am at peace with the argument that an employee can be dismissed for misconduct whilst in training provided such person has committed some misconduct. However, in this matter, the purpose of the training was to skill the trainee (Applicant) with knowledge on how to use the recruitment portal on the system. What the Applicant attended to was not training cum recruitment process but, as mentioned above, it was merely a training to skill trainees for the up-coming recruitment drive. However, despite the process on 19 July 2021 being a training, the Respondent insists that the training was performed on a live portal and the Applicant did not have authority to move the items on the portal.

36. It is common cause that the Applicant was selected to be trained on how to navigate the success portal so that she would be able to participate in a recruitment drive where job seekers would be recruited. Having heard evidence, I am persuaded to accept that the Applicant was given access to navigate the portal which implies that she was allowed to move items on the portal by selecting, shortlisting and giving comments where necessary for shortlisting. I note that this was only a training and not the recruitment process itself.
37. The email instructing the Applicant to participate in the training is clear. It informed the Applicant that she is given access to navigate the portal so that she would be able to do same when the actual recruitment process takes place later. Below I address the question whether the Applicant was given access, whether she was authorized to move and whether the portal was live or not.
38. Unlike the Applicant, Hlongwa is not a credible witness because of the contradictions he gave during his testimony. In his examination in chief, Hlongwa said that the Applicant was not given access to the tool or portal but access was to be given after the training. This testimony is in conflict with the email that gave Applicant access to the portal so that she could navigate the portal during her training. I note that Hlongwa later conceded that access was given.
39. Again, in his examination in chief and re-examination, Hlongwa said the Applicant was not authorized to move items during the training but afterwards, during cross examination, he conceded that the Applicant could move items and further said that the Applicant was only allowed to make certain moves and prohibited from what she has done.
40. The issue whether the portal is live was placed in dispute. I have already mentioned that Hlongwa is not a not credible witness, hence I approach his evidence with caution and attach little weight. Regardless of whether the portal was live or not, it appears from Hlongwa's evidence that anything done during training would have been reversed. I say this because in his testimony when cross-examined, Hlongwa said that they would have corrected the process if a qualifying candidate (job applicant) was selected during the training.
41. I accept the Applicant's evidence that she selected her husband's name due to its familiarity and started navigating the portal. Considering Hlongwa's version there would have been some correction on movements done during the training, the moves done by the Applicant could not have any bearing on the actual recruitment because it would have been reversed as

it was done in this instance. I therefore tend to align myself with the Applicant's contention that if she had done something wrong, it has nothing to do with recruitment processes, but it could be failing as a trainee for not adhering to training instructions.

42. Had the Applicant done similar things after the training or during the subsequent actual recruitment process where she would have been a panel member of the recruitment team, I would have probably arrived at a different conclusion because misconduct would have taken place unlike in what took place in the training on 19 July 2021 where she was in training acquainting herself on how to navigate the portal. The purpose of the training was not to conduct the actual selection but to train candidates on how to move or navigate and write comments were necessary.
43. The Applicant did not commit the alleged offence. She did not breach any recruitment policies because she was not in a panel of recruiters performing recruitment duties nor was she recruiting her husband. She was not recruiting during the training. She did not cheat during the training and she was not dishonest as alleged, hence I find her dismissal unfair.
44. I have noted that Hlongwa's written statements or affidavit dated 9 February 2023 (pages 20 to 23 "R") mentions that the conduct complained of was performed shortly after the training. When confronted with a question about this statement on his affidavit, he said that his statement was wrong and that it was mistake.
45. It could not be mistake because in his evidence he said the Applicant moved the items even after they were corrected by the authorized panel members. This version contradicts the assertion that he made mistake in his statement about the Applicant making the selection after the training. I further note that this allegation about navigating portal after training was also indicated as issue in dispute in the pre-arbitration minutes before removed by agreement.
46. It is plausible that decision to conduct disciplinary hearing was influenced by this unfounded allegation of moving the CV after the training. I tend to accept the Applicant's version and argument that she has been disciplined because of her persistent complaints she raised against her line manager.
47. In view of the afore, the Respondent has failed to show that the reason for dismissal is fair, therefore I find dismissal substantively unfair.

48. I will turn to remedy. The Applicant requested to be reinstated and compensated. These are two separate remedies and cannot be awarded at the same time. Section 194 of the LRA provides; *Remedies for unfair dismissal and unfair labour practice*

(1) *If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-*

- (a) *order the employer to reinstate the employee from any date not earlier than the date of dismissal;*
- (b) *order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or*
- (c) *order the employer to pay compensation to the employee.*

(2) *The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-*

- (a) *the employee does not wish to be reinstated or re-employed;*
- (b) *the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
- (c) *it is not reasonably practicable for the employer to reinstate or re-employ the employee; or*
- (d) *the dismissal is unfair only because the employer did not follow a fair procedure.*

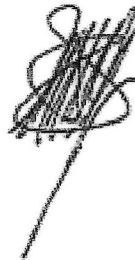
49. The Applicant requested to be reinstated and in view of my finding that dismissal is substantively unfair because the Applicant did not commit the misconduct as alleged, I find no reason not to reinstate with backpay to put her in a position she would have been had it not been for the unfair dismissal.

50. The Applicant must be paid arrear salary in the amount of R643, 730.10 (Six Hundred and Forty-Three Thousand Seven Hundred and Thirty Rand and Ten Cents) calculated as follows:
 $R49, 517.70 \times 13 = R643, 730.10.$

51. In the premises, I therefore make the following award:

AWARD

1. The preliminary points raised by the Applicant are dismissed.
2. The dismissal of the Applicant (Nomkhozi Zwane) is procedurally fair and substantively unfair.
3. The Respondent (SARS) is ordered to reinstate the Applicant (Nomkhozi Zwane) to her position on same terms and conditions that existed before dismissal.
4. The Respondent (SARS) is further ordered to pay the Applicant (Nomkhozi Zwane) R643, 730. 10 on or before 20 December 2024.
5. The Applicant (Nomkhozi Zwane) must report for duty on 9 December 2024.



Commissioner: Solly Mashego

Signature: _____

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