IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL HELD AT CENTURION

Case No. GPBC1577/2016

In the matter between

PSA obo H MANGENA   **Applicant**

And

DEPARTMENT OF LABOUR   **Respondent**

ARBITRATION AWARD

---

1. Details of hearing and representation

1.1   This award is rendered in accordance with the provisions of Section 138 (7) of the Labour Relations Act, 66 of 1995 (the Act).

1.2   The hearings took place at the General Public Service Sectoral Bargaining Council Offices, Centurion on 02 August 2019, 02-03 September 2019 and 02-03 December 2019 at 9:00AM.

1.3   The applicant, **H. Mangena** was represented by Paul Thoto from Public Servants Association of South Africa (PSA), while the respondent, **Department of Labour** was represented by Ramulisa N, its Chief Personnel Officer.

1.4   The proceedings were digitally voice recorded and conducted in English.

2. Issues to be decided

2.1   The dispute was about the applicant's alleged unfair dismissal related to misconduct.

2.2   I must decide whether or not the dismissal of the applicant was both

procedurally and substantively fair. If the dismissal is unfair, I must determine an appropriate relief.

3. Background to the dispute and common cause issues.

3.1 The applicant was employed by the respondent on 01 June 2006. She was employed as a Senior Administration Clerk (salary level 5), earning a salary of R14 255.75 per month. She was charged with misconduct of creation of fictitious Unemployment Insurance (UI) in respect of forty five (45) various beneficiaries. Subsequent to that, she was dismissed on 29 July 2016.

3.2 She is challenging the procedural and substantive fairness of her dismissal.

3.3 The relief sought by the applicant is re-instatement, alternatively compensation to the amount of R4m.

4. Survey of the respondent's evidence and argument.

The respondent handed in bundle of documents marked **'BUNDLE A**. Six witnesses testified for the respondent. **Mary Moetsela** testified under oath and in English that:

4.1 She never claimed Unemployment Insurance Fund (UIF) benefits. She was testifying in respect of allegations 12, 13, 39, 40, 41 and 45. She knew DT Molobetsi. She gave DT Molobetsi's bank details to the applicant. She sent a copy of Identification Document (ID) to the applicant through Whatsup. In 2012 her friend, Thapelo Mangena (applicant's younger sister) came to her and told her about the UIF benefits. Thapelo Mangena told her that her (Thapelo) sister, the applicant wanted her (witness) to open an account, of which she agreed. Her account details were given to her friend and the following day she got notification that there was money in her account. Thapelo indicated to her that, depending on the amount, she would tell her (witness) how much to take and give Thapelo the balance. After about six months later she met with the applicant, when she was

going to give her (applicant) the money which was paid into her (witness) account on that month. The applicant told her that there would be no more money to be deposited into her account any longer. However, two months later, Thapelo contacted her again and told her that the applicant would want to deposit money into her bank account again. Then big sums of money, which she could not remember the figures were deposited into her Nedbank account. She would be told to take R5 000.00 from the sum of moneys deposited into her account. She would normally got into the bank and increase the withdrawal limit to R20 000.00. After that she would withdraw R20 000.00, take R5 000.00 from it and give R15 000.00 difference to Thapelo. Thapelo would take along money and her bank card. There was Tsepiso whom she knew through the applicant, who also deposited moneys into her Nedbank account. She went to Nedbank, Maponya Mall with Tsepiso and withdrew R20 000.00. From there she moved to Nedbank Diepkloof and withdrew R15 000.00. These transactions happened on the same day. She opened Capitec Bank account and gave it to the applicant. The applicant deposited moneys into it three (3) times and she was given R3 000.00 each time money was deposited into her account. She was told by the applicant to look for people to open an accounts and she got DT Molobetsi, MB Dlamini, IV Monnamonolo, K Banda and SE Moetsela. These people were each given R5 000.00 whenever there were moneys deposited into their respective accounts and she would get R5 000.00 as well. She does not know Mohlamme MA, Kolobe NJ, Molapesane LD and Dithotse D.

During cross examination Moetsela Mary testified that, she was still young and in primary school when she met the applicant. She gave the bank account of her mother to the applicant. She never went to the Department of Labour to claim any money. The applicant requested her to testify in the disciplinary hearing against the applicant that she does not know the applicant. She met with the applicant at Calton Centre and Baragwanath Taxi Rank. She does not know where the Department of Labour was in Braamfontein. The Identity Document numbers for K Banda, D Molobetsi, Dlamini, ES Moetsela and hers were forwarded to the applicant through Whatsup. She started to receive the moneys

into her bank account from 2012 up until 2014. She never received any money in 2015.

The second witness of the respondent was Dikeledi Molobetsi.   **Dikeledi Molobetsi** testified under oath and in English that:

4.2   She was testifying in respect of charge 12. The money was paid into her bank account. Around January 2014, she was approached by Mary Moetsela (witness 1) asking her to open a bank account with Capitec Bank. She went to Capitec Bank, Diepkloof Square with Mary Moetsela to open an account. She was give cell phone numbers that she must use when opening an account. After four (4) to five (5) days money was deposited into her account. She went to town with Mary Moetsela and withdrew R10 000.00. She was given R5 000.00 out of that R10 000.00. She then, together with Mary Moetsela met with a certain lady at Calton Centre whereby Moetsela gave that lady her bank card and pin code. Money was paid into her account, but she did not know about it. She did not have kids. She does not know Mr. Mukwanazi.
During cross examination Dikeledi Molobetsi testified that, Moeletsi did not tell her where the money was coming from. Mary Moeletsi would only come to her when money was paid into her bank account. She gave Mary Moeletsi her bank card and pin code.

The third witness of the respondent was Cecil Gregory. **Cecil Gregory** testified under oath and in English that;

4.3   He was the Senior Administration Officer: Investigation Risk Management. His duties included doing audit, risk management, investigation and awareness. He investigated the case against the applicant. There was a client who came to enquire about the death benefits payment. They found that the benefits were paid, but not to the client. An Audit Trail was requested based on the five files that he requested. He went through the audit files and contacted the employer to

validate the employment of the clients who made the claims. Then the companies confirmed that the clients never worked for those companies and again the clients never completed any UI 19 forms. After discovering this information, he then requested additional audit file from the applicant's profile and started to test the authencity declarations of the employers. An employee is given UI 19 forms to complete when he or she leave the employment. The UI 19 forms have the details of the employee as well as the reason for the employment termination. The respondent would then capture the UI 19 into the system, creating a Declaration of the employment history, which in turn led to the generation of claim. In all the allegations against the applicant, the employers confirmed that the clients never worked for them and did not complete any UI 19 forms. The clients as well confirmed that they never worked for the companies declared as per declarations. All the clients received all the benefits. He confirmed that on the application for maternity benefits, Department of Home Affairs confirmed that there were no children born with those application. Most of clients indicated to him that they were recruited, but not aware that it was for death benefits. Some of the clients he could not locate due to the fictitious addresses used. The applicant indicated to him that she was getting work from her supervisor and conceded that she was the one who captured the Declarations into the system. The applicant alleged to him that she noticed that someone was working on her system, but she never reported to her Supervisor or Manager. However, she reported to the System Administrator. In all the fictitious claims, the applicant captured the Declarations into the system. The audit trail showed that the applicant was the Declarer, as per her Persal number, **21900931** (page 35-67 of bundle A). There was no source document for those clients. The applicant created the Declaration in all the charges (charge 1 to 45). Her Persal number appeared in all those Declarations and the password used to open SIYAYA System belong to the applicant.

During cross examination Cecil Gregory testified that Mary Moetsela indicated to him that she knew the name and not the surname of the applicant. He could not interviewed all the 45 clients. The applicant attended the interviews on 02 April

2014. The applicant could have captured transactions into the system on that day, 02 April 2014, because the interviews were conducted in the same building wherein she work and she had access to her office. There would be no payments without employment history/declarations created by the applicant. The applicant was not directly dealing with the clients, but with the Identity Numbers of the clients. The applicant should have reported to either supervisor/manager or Risk Management, when she realized that somebody was using her password.

The forth witness of the respondent was Vongani Leonard Nkwinika. **Vongani Leonard Nkwinika** testified under oath and in English that;

4.4 He worked for the respondent: UIF Unit as a Deputy Director: Information and Communication Technology (ICT). Page 29-34 of Bundle A was the Audit Trail extracted from SIYAYA System, which showed the transactions captured into the system. The transactions on the Audit Trail showed that the applicant was the one who captured them on the SIYAYA System. It means that the Audit Trail would show person who captured information on SIYAYA System and what exactly was captured. There was a password which one should enter first before one accesses the system. Once you log into SIYAYA System, another person could not log in at the same time. In terms of the Password Security Policy, every employee must after each and every 30 days change the password. Every month the system would need employees to change their respective passwords and the new password must not be shared with anyone. The password of the applicant was changed in a period of 3 years. There was many months that the applicant changed her password.
During cross examination Nkwinika testified that it does not happen that someone's password could be used while he or she is not there.

The fifth witness of the respondent was Nomalan Pillay. **Nomalan Pillay** testified under oath and in English that;

4.5   She was an Assistant Director in the Department of Labour. She was the direct supervisor of the applicant between 2012 and 2015. One of the applicant's duties was an employ services (Declarer). A Declarer would receive UIF documents ((UI19 and UI8 forms). The information from UI19 would be declared into the SIYAYA system. The capturing of UI19 would be done by the Declarer, the applicant in this matter. When you have registered the employer, you have the registration of the company. The UI19 document entitled the claimant to claim. The applicant was required in terms of her performance agreement to report any suspicious activity or transaction. The applicant never reported suspicious activity or transaction. The applicant attended interviews which were held on 02 April 2014 at the Braamfontein offices.

During cross examination Nomalan Pillay testified that, she could not recall the exact time the applicant was interviewed. It was plausible that the applicant could have done the transactions, because the interviews were conducted in the same building. She knew Rendani Mukwevho to be the Administration Officer for UIF. In terms of the Performance Management System, the applicant was expected to report to Risk Management. Rendani Mukwevho was part of the SIYAYA System and not Risk Management. There were fraudulent activities in UIF section.

The sixth witness of the respondent was Peter Mashile. **Peter Mashile** testified under oath and in English that;

4.6   He was the Presiding Officer in the Disciplinary hearing against the applicant. He recommended dismissal to all the charges. The applicant was charged for creating fictitious claims and those charges were serious. The key evidence was that the applicant used her credentials/Persal number to create fictitious claims, where people got moneys even if they did not work for those companies the applicant claimed they work. The password expires after a particular time and the computer system would require the user to change it.

During cross examination Peter Mashile testified that employees were not allowed to create fictitious claims. There were two disciplinary hearings of that

nature during the time. One was against Mokoena and the other one against the applicant.

5. Survey of the applicant's evidence and argument.

The applicant handed in a bundle of documents marked **BUNDLE B**. The applicant testified for herself. **Hilda Mangena** testified under oath and in English that:

5.1   She was an Administration Clerk of the respondent. She was charged with 45 charges of misconduct. It was alleged that her password was linked to those charges of misconduct. She was dealing with Identity numbers of clients when capturing UI19 forms into the SIYAYA system. Cecil Gregory showed her copy of her Identity Document and those of the clients during the disciplinary process. She met with Mary Moetsela during the disciplinary hearing and Mary Moetsela failed to identify her by giving description which did not suit her. She does not have a sister by the name of Thapelo. She never went anywhere with Mary Moetsela. They change password on a monthly basis. There was a challenge of her password, which was been used by the other person. She suspect that Tsepiso was using her password, since Tsepiso was the one who was working on her computer. She reported that incident to the System Administrator, Rendani Mukwevho. She then called Gladness in Pretoria, who promised to come back to her, but not. Pillay, who was her supervisor, was not always in the office, since they were having satellite offices. From long time ago, they had password that they were not secret about. There was an instant where she gave her colleque her password. On the day of the interview, she requested half day and left after been interviewed, because the following day was her daughter's birthday. There were people who could use other people's Persal numbers and credentials. She suspected that somebody might have had access to her system, because she was in the interviews and not in the office. However, for those other days, she was in the office.

During cross examination, Hilda Mangena testified that she does not know Mary Moetsela. She did not call Rendani to come to the arbitration hearing, because Rendani told her that the respondent had already approached her for testifying on its behalf. According to the Audit Trail, she was the Declarer, but she does not agree with it. She was not an ordinary Declarer, she was able to delete. She never gave her password to anybody, but it was tempered with. She changed her password once every month. No one could access her computer without her credentials/password. Her password was stolen. She left the system open for Tsepiso. It was Tsepiso who stole her password. She did not say the password was not secretive, she just opened her system for her supervisor Tsepiso to work on it. She did not know who performed those fictitious transactions. She did not lock the computer, because SIYAYA System was not working. She was on duty in all the dates linked to the charges. She was given an opportunity to respond to the investigations.

6 Analysis of the evidence and arguments

6.1   In terms of Section 192 (1) of the Labour Relations Act, 66 of 1995 as amended, the onus is on the employee to establish the existence of a dismissal. Once that has been established, sub-section 2 provides that the employer must prove the fairness of the dismissal. It was common cause that the applicant was charged with misconduct of creation of fictitious Unemployment Insurance (UI) in respect of forty five (45) various beneficiaries (refer to page 33-44 of Bundle B). Subsequent to that, she was dismissed on 29 July 2016. She is challenging both the procedural and substantive fairness of her dismissal.

6.2   The testimony of the respondent was that during the period 2012 to 2015, the applicant captured the fictitious UIF employment declarations (Ordinary, Death, Maternity and Illness benefits) in respect of Forty Five (45) Beneficiaries, thereby causing the respondent to suffer financial prejudice. The respondent testified that the applicant was linked to the creation of these fictitious declarations, because of the Persal number which was used in capturing them. The Audit Trail showed

that the Persal Number and the Password used to access the SIYAYA System belong to the applicant. It was the testimony of the respondent that in all the forty five (45) charges, all the fictitious beneficiaries received various amounts of moneys. The witnesses of the respondent testified that they were recruited to supply their respective Bank Account numbers and in some instances some supply their relatives' bank details. The witnesses of the respondent went further to testify on how they were getting money into their respective bank accounts and how much they were getting for allowing their bank accounts to be used. The respondent's testimony continued to the effect that the applicant was subjected to a disciplinary hearing which was chaired by Peter Mashile.

6.3   The applicant on the other hand testified that she had challenge with her Password. Somebody was using her Password and she reported this to the System Administrator, Rendani Mukwevho. However, the applicant went further to testify that for long time that the Password was not secretive. She used to change her password on a monthly basis. She once left her computer open for her supervisor Tsepiso to work on it. On 02 April 2014 she was attending interviews and she did not work. Somebody might have had access to her system while she was in the interviews.

6.4   The applicant in her evidence in chief did not dispute the respondent's testimony that, her Persal Number was linked to the creation of those fictitious declarations. In terms of the Audit Trail, the employee whose Persal number was appearing was the applicant. That means that, the applicant was the one who captured those fictitious transactions. There was also the issue of the Password which was used to access the System. The Audit Trail and the testimony of the respondent revealed that it was the Password of the applicant which was used to access the System. The applicant testified that she once had a challenge with her Password, meaning that her Password was being used by somebody. This evidence of the applicant cannot be relied on, because the capturing of those fictitious declarations was not done once. Those fictitious declarations were captured on different dates during the period 2012 to 2015. The applicant herself conceded that her password was not secretive, she once left her supervisor working on her

system. I am not taking the applicant's evidence that her supervisor Tsepiso stole her Password. How could Tsepiso steal the applicant's password, when the applicant herself use to leave her computer open to Tsepiso? The fact that the Audit Trail and the testimony of the respondent showed that the applicant was the one who captured those fictitious declarations make it more probable that the applicant might have committed those misconduct. The applicant's testimony as far as the Password issue is concerned, was appalling. It was only during cross examination that the applicant testified that, she does not know who performed the capturing of those fictitious declarations. She never explained further. The applicant also did not deal with the testimony of Mary Moetsela when she testified that she knew her (applicant) and her sister Thapelo Mangena. Mary testified that she grew up with Thapelo Mangena while Thapelo was staying with the applicant. The applicant only testified that she does not know Mary Moetsela and she also does not have a sister by the name of Thapelo. The applicant did not explain further. In view of the above, I therefore, find that the applicant is guilty of all the forty five (45) charges leveled against her.

6.5   In terms of the procedure, the respondent testified that the applicant was subjected to a formal disciplinary hearing. It was also common cause that the applicant was formally charged with misconduct. The applicant has during cross examination conceded that she was given an opportunity to respond to the investigations. To me, this means that the applicant was given an opportunity to put her side of the story before she was dismissed. It is therefore my finding that the respondent has followed a procedure before dismissing the applicant.

6.6   Schedule 8, item 7 of the Labour Relations Act, 66 of 1995 states that "any person who is 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 has been contravened, whether or not-
>
>> (i) the rule was a valid or reasonable rule or standard;
>>
>> (ii) the employee was aware or could reasonably 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 with an appropriate sanction for the contravention of the rule or standard".

It is common law that an employee cannot create/capture fictitious declarations/transactions. The evidence of the respondent displayed that the applicant contravened a reasonable rule, of which she is reasonably expected to be aware. The applicant captured fictitious declarations which resulted into prejudicing the respondent financially. The respondent had a huge financial loss due to the action of the applicant. In terms of the appropriateness of the dismissal, I would rely on the decision of the Labour Appeal Court in **De Beers Consolidated Mines v CCMA & others (2000) 21 ILJ 1051 (LAC),** where the court held that "where the employee had broken the high degree of trust placed on him or her, an employer was legitimately entitled to say to itself that the risk of continuing the employment relationship was unacceptably great." Since dismissal is not a punishment but a response to risk management in the affected enterprise, factors relevant to the risk of future instances of misconduct in the future, and the risk of harm to the enterprise as a result of such misconduct should be considered". The capturing of the fictitious declarations by the applicant should be viewed in a very serious light and it goes into the heart of the trust relationship between the employer and the employee. It would be difficult for the respondent to trust the applicant after committing that misconduct. It is therefore, my belief that there is no longer trust relationship between the applicant and the respondent. In these circumstances, dismissal would be an appropriate sanction.

6.7   In view of the above, it is therefore my finding that the respondent has on the balance of probabilities proved that the applicant was guilty of misconduct as charged. I will not temper with the sanction of dismissal imposed by the respondent, since I view it as appropriate in these circumstances. The dismissal of the applicant was, accordingly procedurally and substantively fair.

7.   **Award**

7.1   I find that the dismissal of the applicant, **Hilda Mangena** was both procedurally and substantively fair.

7.2   The applicant's case is dismissed.

_____

Victor Madula

Panelist(2020-02-04)