

**ARBITRATION**

**AWARD**

Panellist: ZG Fihla

Case No: GPBC 169/2024

Date of Award: 22 November 2024

**In the ARBITRATION between**

PSA obo T SYSTER

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**(Union / Applicant)**

**And**

DEPARTMENT OF HIGHER EDUCATION AND TRAINING

**(Respondent)**

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**Union/Applicant's representative:** Mr JOHANN VORSTER

Union/Applicant's address: N/A

**Respondent's representative:** Mr SIFISO HADEBE

Respondent's address: N/A

Telephone: N/A

Email: N/A

## **DETAILS OF HEARING AND REPRESENTATION**

[1]

The arbitration hearing was held on 24 June 2024 and 29 October 2024 at the offices of the respondent in Citrusdal Campus Buildings. The applicant was represented by Mr Johann Vorster, a Union official from PSA, Mr Sifiso Hadebe, a Labour Relations Officer represented the respondent party, the Department of Higher Education.

## **ISSUE TO BE DECIDED**

[2]

Whether the dismissal was substantively fair. Procedural fairness was not in dispute.

## **BACKGROUND TO THE MATTER**

[3]

The applicant was employed as a housekeeping supervisor by respondent since 30 January 2013. On the 12 January 2023 applicant was dismissed by respondent following an incident happened on 06 October 2022, where the applicant allegedly assaulted a student. On 15 November 2022 the respondent convened a formal disciplinary hearing which subsequently found applicant guilty and meted out dismissal as sanction. The applicant appealed his dismissal on 20 January 2023 and received outcome which upheld dismissal on 29 January 2024. He referred a disputed to the Council which is the subject matter. Applicant is seeking retrospective reinstatement as relief.

[4]

The charges levelled against applicant were the following.

(i)

It is alleged that you misconducted yourself on 06 October 2022, assaulted a College student, Hlumelo Booi at the Vredendal Campus.

(ii)

It is alleged that you misconducted yourself on 06 October 2022 by allegedly acting seriously disrespectful when engaging in a confrontational manner with of the College students.

[5]

The applicant pleaded not guilty to the charge. The applicant was earning a salary of R 213912.00 per annum. The applicant is seeking retrospective reinstatement as relief.

[6]

#### **Summary of evidence and arguments**

[7]

Although I have considered all the evidence and arguments, because section 138 (7) of the Labour Relations Act 66 of 1995 requires that the reasons for my decision be stated briefly. I shall refer only to the evidence and arguments which I regard necessary to substantiate my finding and the determination of the dispute. The parties agreed to the admission into evidence bundle A and B of documents and that the documents are purported as what they appear to be, neither party disputed the validity of the documents.

## Respondent's Case

[8]

Mr Wesley Kelly testified he works for the respondent as an assistant director human resource management. He testified he was asked by the campus manager Mr Johann Engelbrech at Vredendal College, to investigate an incident happened on 05 October 2022 between the applicant and two students. He testified he collected statements from the applicant and the student Mr Hlumelo Booi. He testified applicant was put on precautionary suspension because he assaulted Mr Booi. He testified a disciplinary hearing was convened and applicant pleaded guilty on both charges of assault and displaying disrespectful behaviour, and he was dismissed.

[9]

Mr G Coetzee testified he works for the respondent as an acting Campus manager at Citrusdal Campus. He testified he was appointed to as the chairperson of applicant's disciplinary hearing. He testified applicant pleaded guilty to both charges and he was dismissed because assault is a serious offence which is also criminal. He testified there was an employee who was dismissed for assaulting a student, but he cannot recall the name of that employee.

[10]

Mr Hlumelo Booi testified in the evening of 05 October 2022, he was walking with a fellow student friend Anele Stuurman passing applicant's room and applicant called them inside his room. He testified applicant asked them why they did not open the door when he knocked the previous day. He testified applicant was angry.

[11]

He testified he asked applicant what time was he knocking and applicant threw keys trying to hit him but he managed to dodge, and applicant slapped him at the back of his head, and they left applicant's room. He testified he called police and reported the incident. He testified he also reported the incident to the campus manager.

### **Applicant's Case**

[12]

Mr Thys Syster testified he was employed by the respondent as a housekeeping supervisor from the 30 January 2013. He testified on 04 October 2022 he smelt cooking coming from the resident of two students Mr Hlumelo Booie and Mr Stuurman. He testified he went to knock on their door because students are not allowed to cook in their rooms. He testified they did not open instead they switched off lights and he walked away. He testified the following day he went to their room but they were not in the room, he saw them in the afternoon passing his room and he called them inside.

[13]

He testified he sat them down and asked why they did not open the door the previous day when he knocked at their room. He testified both students pretended not to know, and Stuurman was trying to explain and Booie was disruptive talking while he was listening to Stuurman. He testified he had a bunch of keys in his hand which he was playing with by banging down on the floor. He testified he asked Booie to keep quiet but he could not and he slapped him at the back of his head while they were sitting down.

[14]

He testified both students got up and left his room, and later he was visited by police who asked him what happened and he related the story to them and police asked him to apologize to Booi and he agreed to do so. He testified he went to Booi and apologized and Booi accepted his apology. He testified he was called by a Campus manager who asked him about the incident, and which he related the story. He testified the Campus manager asked him to apologize to Booi.

[15]

He testified he informed the Campus manager he had apologized to Booi already and Booi accepted his apology. He testified few weeks he was given a charge sheet to attend a disciplinary hearing, and he attendant the hearing unrepresented. He testified he pleaded guilty to both charges because he wanted the hearing to be over in order to go on with his life. He testified he appealed the dismissal sanction and he was transferred from Vredendal campus to Citrusdal campus while waiting for appeal outcome which he received after a year.

[16]

### **ANALYSIS OF EVIDENCE AND ARGUMENTS**

[17]

The Code of Good Practice: Dismissal (Schedule 8 of the Labour Relations Act 66 of 2005) sets out the following guidelines:

Any person, who is determining whether a dismissal for misconduct is unfair, must consider: 1 whether a rule was contravened. 2 If it was, was the rule valid and reasonable?

[18]

3 Was the employee aware or could he reasonably have been expected to be aware of the rule... 4 Was the rule consistently applied? 5. Was the dismissal an appropriate sanction?

[19]

Whilst it is common cause between the parties that procedural fairness relates only the late finalisation of applicant's appeal by the respondent. The evidence adduced by the respondent on the issue of late finalisation was that the reason it took more than a year to finalise applicant's appeal was because of internal processes. Further to that the respondent averred that applicant suffered no prejudice by the inordinate delay because he fully paid while waiting for the appeal outcome. The respondent further conceded to the fact that it ought to have dealt with the appeal within 30 days provided in the Disciplinary Code and Procedures Resolution 1 of 2003.

[20]

In cross examination it was put to Coetzee what was the nature of assault of the employee who was dismissed and who was that employee, Coetzee replied he could not remember the name of the employee and the merits of that case. It is in light of Coetzee response which is not assisting to comprehend respondent stance in cases of assault, in other words as the witness of the respondent Coetzee failed to demonstrate how he arrived to dismiss applicant on the basis of comparison to the previous assault case he testified about.

[21]

Furthermore the evidence of Both Coetzee and Kelly provided no probative value to substantive fairness of the dismissal. They both maintained applicant broke trust relationship because he slapped Boo.ii.

[22]

When both asked what duties applicant was performing while waiting for the appeal outcome at Citrusdal Campus, they said applicant performed same duties he performed at Vredendal Campus. It is therefore illogical for the respondent to say trust relationship is broken, yet it allowed applicant to interact with students at another campus for a year. It is only in name that the trust relationship is broken as it is not demonstrated how it is broken.

[23]

In cross examination it was put to Booi why he did not open a criminal case against applicant for assault, and he replied that it was not serious it was just a slap. When asked why he reported the incident to the campus manager Engelbrech, he said he only wanted to make sure it does not happen again. This version by Booi corroborates with applicants version during cross examination that the slap was mild. When applicant was asked why he slapped Booi, he maintained he wanted to keep quiet as he was disruptive while he was listening to Stuurman. Another version by applicant was that both students were drunk and smelling alcohol while he was engaging them in his room.

[24]

This version that the students were drunk and smelt alcohol was not disputed by the respondent. Further to that applicant pleaded guilty for slapping Booi and apologized to him. Applicant apologized when he was asked by police to do so, and when he was asked by the campus manager Engelbrech him informed he already apologized to Booi and the apology was accepted by Booi.



[25]

The applicant in his evidence challenged the fairness of dismissal sanction and averred that he had a clean disciplinary record, and this was too not disputed by respondent. In my respectful view, and as the evidence shows applicant guilty plea for the offence and demonstrated remorse, and the remorse shown by applicant is not simulated. Considering the totality of evidence adduced by parties and circumstances of how the assault complained of took place, the reason for dismissal sanction meted out by respondent.

[26]

The respondent stance to in relation fairness of dismissal was applicant committed serious offence by assaulting Booi. It would seem the word serious according to the respondent means every serious offence warrants dismissal. If this stance by the respondent is to be accepted, it would actual be contrary with respondent's disciplinary code and procedures Resolution 1 of 2003 which also provide for progressive discipline be followed before considering dismissal which is the last severe sanction.

[27]

Furthermore the same stance would be against the principle, that each case must be treated on its own merits. Whilst it is accepted that an assault is a dismissable offence, but this does not mean a blanket approach should be adopted so as to mete out dismissal as a sanction in every case of assault without considering pertinent factors revolving around the case. It is for that reason sanctions short of dismissal are provided to be considered in the disciplinary code and procedures. The applicant has been without a salary for ten months from 29 January 2024 to date, therefore it won't be appropriate to consider a sanction short of dismissal. It is evident applicant has learnt a lesson as he showed genuine remorse.

[28]

In light of the fact that the respondent has failed to demonstrate fairness of dismissal, it would seem the appropriate primary remedy available to him is retrospective reinstatement. In the matter of *Booi vs Amathole District Municipality and Others* (2021) ZACC-36, at paragraph 42 the court held the following.

[29]

“I hasten to add that the evidentiary burden to establish intolerability is heightened where the dismissed employee has been exonerated of all charges. In this context, what ought to ring true are the words of the Labour Court in *Amalgamated Pharmaceuticals*, that in a constitutional democracy in which the right to fair labour practises is entrenched, “[t]o punish ...[individuals]... with unemployment, even if this is accompanied with some compensation, without finding them of guilty of any wrong doing is gross unfair”.

[30]

Similarly, ought to be guided by what this Court said in *Billiton*: “[i]f [the conduct] did not justify dismissal...it [is] difficult to understand why, at the same time, it could nevertheless provide a ground to prevent reinstatement”. It should take more to meet the high threshold of intolerability than for the employer to simply reproduce, verbatim, the same evidence which has been rejected as insufficient to justify dismissal”.

[31]

Considering what was said in the *Booi* case *supra* in conjunction with what was said in the case of *Mgijima vs Metropolitan* hereunder.

[32]

"The Labour court held the following. "In deciding whether to intervene with the sanction of dismissal it is necessary to consider whether the applicant has shown remorse. Instead of the applicant taking responsibility for her actions the applicant presented false evidence to the arbitrator. Where an employee denies allegations of misconduct and lies about it in order to advance his/her case it cannot be expected of the arbitrator to come to his/her assistance. In the present matter I would have considered a sanction short of dismissal had it not been for her lack of remorse and the fact that the applicant had presented false testimony to the arbitration".

[33]

Without repeating remorse shown by the applicant, it is further worth mentioning that both applicant and Booie were very credible witnesses, something which is very rare to find from witnesses not to tailor their evidence in order to advance their case. Considering my findings at paragraph 28, that the respondent has failed to demonstrate on the preponderance of probabilities, that dismissal was substantively fair. The following orders are made.

[34]

### **Remedy**

The respondent is ordered to pay applicant back pay in the amount of R 132,710 calculated as follows basic net salary after statutory deductions:  $R\ 13271 \times 10 = R132,710$ . This amount must be paid before 31 December 2024 into applicant's bank account.

[35]

**AWARD:**

The respondent, Department of Higher Education is ordered to reinstate applicant retrospectively. The applicant must report for duty on 09 December 2024.

**Name:** Zukile Fihla.

**(GPSSBC) Arbitrator.**

