

ARBITRATION

AWARD

Panellist: ZG Fihla

Case No: GPBC 61/2023

Date of Award: 25 September 2024

In the ARBITRATION between

PSA obo E VAN WYK

(Union / Applicant)

And

DEPARTMENT OF HIGHER EDUCATION AND TRAINING

(Respondent)

Union/Applicant's representative: Mr JACQUES BOTHA

Union/Applicant's address: N/A

Respondent's representative: Mr MZIWAKHE MATHE

Respondent's address: N/A

Telephone: N/A

Email: N/A

DETAILS OF HEARING AND REPRESENTATION

[1]

The arbitration hearing was held on 09, 10 September 2024 at the offices of the respondent in Bellville No 80 Voortrekker Road. The applicant was represented by Mr Jacques Botha, a Union official from PSA, Mr Mziwakhe Mathe, 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 general foreman by respondent since 2007. In January 2023 applicant was dismissed by respondent following an incident happened on 21 May 2021, where the applicant was allegedly made discriminatory remarks toward his subordinate. On 24 June 2021 the respondent convened a formal disciplinary hearing which subsequently found applicant guilty and meted out dismissal as sanction. The applicant appealed his dismissal and received outcome on 11 January 2023. He referred a disputed to the Council which is the subject matter. Applicant is seeking retrospective reinstatement as relief.

[4]

The only charge levelled against applicant was crafted as follows.

(i)

Unfairly discriminates against other persons on the basis of race in that you referred to your subordinate as aapie when addressing a concern raised at the Wingfield Campus.

[5]

The applicant pleaded not guilty to the charge. The applicant was earning a net salary of R9232.05 per month. 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 Gavin Booyesen testified he work for the respondent as a general worker from 01 June 2019. He testified on 26 May 2021, applicant gave him a job and applicant was busy with student card issuing because it was registration time. He testified during lunch time he went to Miller's office to have his lunch and saw applicant in the smoking section and told him there was a student waiting for student card. He testified applicant called Miller and said tell that monkey I gave him a job and I have a job to do. He testified he was upset and felt heart breaking and reported applicant the following Monday to the campus manager.

[9]

Mr Miller testified he work in the supply chain management as a clerk since 18 June 2007. He testified on the day of the incident he was in his office, applicant was in his office and Booyesen was in the textbook section. He testified applicant called him and said tell that monkey not to tell me what to do. He testified when applicant called his phone was on the speaker and he was not aware Booyesen could hear the conversation which he overheard. He testified Booyesen came out of the textbook section very upset and did not speak.

[10]

He testified used the word appie which means monkey and the word was not meant with malicious intent. He testified he always put his phone on speaker and he would also feel offended if somebody calls him a monkey. He testified applicant used the word appie not the word knapie which means young person in Afrikaans.

[11]

Mr Mark Corneilse testified he work for the respondent since 1991, and he is a campus manager at Wingfield. He testified on 31 May 2021 Booyesen came to his office and complained to him about applicant calling him apple which means monkey, and he told Booyesen that the matter will be investigated. He testified he wanted to remain neutral because it was a sensitive matter needed to be handled with impartiality and he reported the matter to the labour relations office for handling.

[12]

He testified it would be discriminatory, demeaning and offensive to call another person monkey .He testified applicant was responsible to issue student cards to students and Miller he was assisted by Booyesen to issue textbooks to students. He testified it was not unreasonable for Booyesen to inform applicant there was a student waiting for student card. He testified applicant never contacted staff after he was dismissed, and he never got any complaint about applicant before he was dismissed. He testified he would respect whatever arbitration outcome.

[13]

Ms Mellissa Anthony testified she works as an assisted director in human resource management and labour relations section of the respondent since 2008. She testified the applicant is a former employee, he was dismissed for calling Booyesen a monkey. He testified the college cannot condone applicant's action calling another person a monkey because it is discriminatory and is not allowed in South Africa. She testified she viewed applicant's behaviour as derogatory and unacceptable. She testified applicant's appeal was handled by the minister who confirmed dismissal.

[14]

Applicant's Case

[15]

Mr Edwin Van Wyk testified he was working as a foreman for seventeen years. He testified on the day of the incident he was tasked with student card issuing but there were no students and he went for smoke break. He testified he was informed by Booysen there was a student for student card and he phoned Miller to tell that Knapi meaning a layite or young man to go and do his work. He testified after calling Miller he carried on with his work. He testified a week after the incident he was asked by a union member about the incident.

[16]

He testified Miller's phone was not on the speaker when he called him. He testified the relationship with Booysen was well and with the rest of the staff it was fairly good. He testified the appeal took 17 months and 20 days.

[17]

Ms Mishila Omar testified she works as a general assistant for the respondent since 2008. She testified she knew applicant as a foreman and used to work together. She testified she was on sick leave when the incident happened and she was contacted by Booysen who related the story and she could not believe it because Booysen and colleagues are playful at work and applicant is a serious person. She testified her colleagues were making a mockery of applicant's dismissal. She testified applicant treated everybody same but was stern when it comes to work, he wanted work be done by everybody.

[18]

She testified Miller always pick up hand set when answering the phone, and that the words knapie and appie sound same. She testified it is possible that Booyesen could have misheard applicant when he knapie and thought he said appie. She testified applicant treated subordinated fair and he would have his hand full on them because they were playful, they would play games in the textbook room next to Millers office.

[19]

She testified when she came from leave colleagues were making disgusting remarks about the applicant's case. She testified Booyesen felt sick after applicant's dismissal and she asked him why he could not talk to the principal to sort things out and Booyesen said it was too late.

ANALYSIS OF EVIDENCE AND ARGUMENTS

[20]

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? 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?

[21]

In cross examination Booyesen agreed that there is similarity between the two word knapie and appie.

[22]

When asked how was the relationship between him and applicant before the incident. Booyesen said it was good they had ups and downs and sorted issues out. When asked how he did feel after applicant was dismissed.Booyesen said it was not his intention to have applicant dismissed he only wanted him to be disciplined and he felt bad. He stated from 2019 working the applicant he never heard applicant accused of racism, and that after the disciplinary hearing the relationship was work related.

[23]

In cross examination Miller agreed that the word knapie and appie sound similar but he heard the work appie. He stated it was said in a light tone not in anger and it was not malicious. When asked how the applicant's relationship with him and the staff before the incident, he said it was good. When asked where Booyesen was when applicant called him, he said he was in another room and the office there is a petitioner dividing the room and the door was open when he answered the call from applicant. When asked how Booyesen reacted after the telephonic conversation with applicant, he said he could not recall but he could see Booyesen was upset. He stated applicant was never accused of racism before.

[24]

In cross examination Cornilse agreed that the words knapie and nappie sound similar, and it is possible that Booyesen misheard applicant and concluded that applicant said appie. Cornilse stated he recall the word appie would be used loosely in the soccer field either be referred to the opposition and it would not be racism in that context. He stated there was never a compliant before against applicant his behaviour was above reproach.

[25]

He stated he agreed with the exit interview conducted by Hazel Trussell, that applicant was a hard worker he would avail himself to work from 10 pm to pm offloading equipment received from China. When asked if he would re employ applicant, he said he respects the process and would accept whichever way and applicant's performance was above board. When asked if there was a breakdown in the relationship with applicant, he said there was no breakdown of trust relationship. When asked how he viewed applicant's dismissal, he said he was shocked it was not easy for him.

[26]

In cross examination Mellisa agreed that the words knapie and appie sound similar, and that there was never a racist compliant against applicant before. She further stated she could not confirm applicants conduct, and she could not confirm if other officials were dismissed for making racial remarks. She conceded to the fact that it took respondent a year and four months to finalise the appeal and was not in compliance with respondent's disciplinary code which provide thirty days time frame.

[27]

In cross examination applicant maintained he used the word knapie which refers to a young man because Booyesen shouted at him when he said there was a student waiting for student card. When asked if it was reasonable for Booyesen to shout at him. Applicant said it was unreasonable because he does not shout when speaking to his subordinates that is why he called Booyesen knapie. When asked how Booyesen shouted at him, he said Booyesen screamed saying Edwin there is a student for a student card. When asked how did he know Miller' phone was not on speaker when he called him.

[28]

Applicant responded he could hear the click when Miller was picking handset. When asked why he called Miller, applicant said he wanted him to inform Booyesen to go to his work. When asked why he called Booyesen a laytie he said it because he is a young man. When asked why he called Booyesen while he was on lunch, he said he did not know he was on lunch because the rule was that subordinates should inform him when taking lunch breaks.

[29]

In cross examination Omar was asked what was the planning against applicant occurred. She said Booyesen, Miller, Judy and Elroy always sit together talking about applicant going to lose his job. She further stated that they did not want to work they would played games like dominos working time and make fun of applicant, and from time to time applicant would be after them. She further stated applicant reported them to his supervisor Hazel Trussel. She stated Trussel knew about her colleagues not wanting to do their work.

[30]

When asked how did she know Booyesen was not offended by being called monkey. She replied Booyesen was easily influenced by colleagues, he never felt offender when same colleagues called Dora Boots referring to a cartoon where Dora is a monkey. She stated she asked Booyesen why you don't report colleagues calling you monkey but you reported Edwin, and Booyesen would not respond to her.

[31]

What all respondent witnesses agreed upon is that there is similarity in the pronunciation of the words knapie and appie.

[32]

All the witnesses testified including applicant are Afrikaans speaking, when they say knapie it would sound as if they are saying napie omitting the letter K of the word knapie. It would seem the words napie and appie would be difficult to separate when you hear people naming both of them. As I have observed witnesses saying these two words, seems more like some people would sound as saying Onest when saying Honest. It is therefore probably that Booysen misheard applicant over the phone from other office.

[33]

It is equally probably that Miller too misheard applicant, it is not probably applicant would call Miller who by race classification is a courlored and utter racial or discriminatory remark to Booysen who is also a courlored by race classification, because by extension applicant would be offending Miller too. The evidence of Miller that applicant used the word appie in a light tone seems to show that applicant was not angry or felt provoked by Booysen to an extent he would become racist, even if Miller got it all wrong.

[34]

The evidence by applicant that Booysen shouted at him seems more probably as applicant merely phoned Miller to tell Booysen to go to work as applicant was not aware Booysen was on a lunch break as he did not inform him. The evidence of Conelise that there was a possibility that Booysen misheard applicant seems more probably. Applicant's response after being shouted by Booysen was to refer to him knapie which means young man. It would seem if applicant was angry probably he would have confronted Booysen instead of calling Miller to inform him to go to work.

[35]

The evidence of Omar that Booyesen would not complain when called Dora referring to a monkey in a cartoon by his colleagues was not disputed by respondent. Omar narrated how the interactions and work dynamics were between applicant and her colleagues. Her evidence about colleagues playing games and applicant wanted work be done by them was also not disputed by respondent. Even the evidence that applicant would report his subordinates to Hazel Trussel but still there would be nothing done to them in terms of discipline was not disputed.

[36]

The fact that Omar was not at work during the incident but was willing to relate the animosity by her colleagues against applicant makes her evidence credible as she did not simulate honesty in her testimony. Because of her proximity to her colleagues and applicant she is better placed to know work dynamics prevailed prior to the incident and after the incident. Omar also being a courlored by race classification would not have vouched for applicant had he discriminated against Booyesen as alleged.

[37]

It would seem the main witnesses to the incident Booyesen and Miller whom applicant kept them on toes by being stern when wanted work done would likely not tell the truth. The evidence of Booyesen that he did not want applicant be dismissed but be disciplined, and the evidence of Miller stating applicant used the word appie in a light tone, seems to be evidence of people partly regretting consequences of being playful about the incident. Miller was all smiles when saying this and could not recall what Booyesen did after he overheard conversation between him and applicant, and how upset he was coming from the textbook room.

[38]

The respondent seem to have relied on a case of Rustenburg Platinum Mines vs SAEWA obo Bester and others 2018 (8) BCLR 951 (CC). The court in that case considered the context in which the racial remarks were uttered and held the following.” It was accepted by both parties the applicant and first respondent that the use of the term swart man, per se is not racist and that the context within which the words were used would dictate whether they were used in a racist or derogatory manner.

[39]

It was also accepted that the test to determine the use of the word is racist is objective, whether a reasonable, objective and informed person, on hearing the words would perceive them to be racist or derogatory. This is in accordance with the test for whether a statement is defamatory as enunciated in Sindani. The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply”.

[40]

The merits in the case *supra* are distinguishable in that the evidence considered was straightforward, without delving much on it, amongst factors taken into account was the testimony of four witnesses who saw, heard the employee uttering the words swart man and observed him pointing a finger angrily demanding a black man to remove his car which was parked next to his. Further to that the employee denied having uttered the words swart man, showed no remorse and persisted to be hostile in the disciplinary hearing.

[41]

The law is not static and so are the principles, the principle that like cases must be treated alike is of no relevance in this matter thus the context, merits, evidence, factors are not the same. Each case must be treated on its own merits, without repeating and on the preponderance of probabilities it is unlikely that applicant without felt being provoked by Booyesen shouted at him would have called him appie. Even the shouting applicant testified about seem to make reference to Booyesen being loud or raised his voice while entering Miller's office and saw applicant smoking outside the office.

[42]

Whether the word appie is often used jokingly, casually and informally amongst Afrikaans speaking people as testified by Cornilse, and which seem to have been accepted and misunderstood to have been said in a light tone by Miller. Its usage has no place in the employment environment and nor can it be a permanent vocabulary in any workplace.

[43]

Considering my findings at paragraphs 31, 32, 33, 34, 41, it cannot be said under the circumstances that the dismissal was fair. The respondent failed to demonstrate that dismissal was effected for a fair reason. The part of procedural fairness which was partly challenged relates to the appeal time frame which was not adhered to by respondent. It is trite law that when a dismissal is found to be substantively unfair an employee ought to be reinstated, as reinstatement is a primary remedy. The applicant sought retrospective reinstatement as relief, there seems to be no reason not to grant such relief as sought by applicant.

[44]

Remedies

The respondent is ordered to pay applicant an amount of R 193,872 calculated at applicants' basic salary after statutory deductions. $R 9232,05 \times 21 \text{ months} = R 193,872$. The amount must be paid on 29 November 2024 to the applicant.

[45]

AWARD:

The respondent, Department of Higher Education and Training is ordered to reinstate applicant retrospectively. The applicant must report for duty on 01 November 2024.

Name: Zukile Fihla.

(GPSSBC) Arbitrator:

