



CCMA

ARBITRATION AWARD

Case Number: GATW 15513-11
Commissioner: MMAMAHLOLA GLORIA RABYANYANA
Date of Award: 17 FEBRUARY 2012

In the MATTER between

SHADRACK NKUNA

(Union/Applicant)

and

SSS SECURITY SERVICES CC

(Respondent)

APPROVED
Union/Applicant's representative: **MR S. NKUNA**

Union/Applicant's address: **1740 WINNIE MANDELA**

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Respondent/Representative: **MR D.A MANTHEY**

Respondent's address: **P.O BOX 50753**

MUSGRAVE

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DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for arbitration on 17 February 2012 at the Commission's Pretoria offices, situated at the 2nd Floor, Metro Park Building, 351 Schoeman Street, Pretoria.
2. The Applicant, Shadrack Nkuna appeared in person.
3. The Respondent, SSS Security Services CC was represented by Mr D.A Manthey Its member.

ISSUE TO BE DECIDED

4. I am required to decide whether the Applicant's dismissal was substantively unfair and if so, whether he is entitled to the relief sought.

BACKGROUND TO THE ISSUE

5. The Applicant, started working for the Respondent on 16 September 2011. At the time of the alleged dismissal the Applicant was a security officer and earned R2418,00 per month. He was allegedly dismissed on 14 December 2011 for misconduct.
6. The Applicant challenges the reason for the dismissal. He seeks compensation.

SURVEY OF EVIDENCE AND ARGUMENT

RESPONDENT'S EVIDENCE

The Respondent gave oral and documentary evidence marked Bundle A.

JACOBUS HERMANUS PIETERS

7. He testified that he is the Divisional manager of the Respondent. The Respondent's core business is to provide its clients with security services.

8. Pages 23 to 26 of the bundle is the Applicant's employment contract. They explained the contents of the contract to the Applicant before he signed it.
9. In terms of paragraph 7 of the contract, conducting a polygraph test is a requirement to ensure that the employees are always honest and loyal in safeguarding the client's property. Honesty of its employees is the utmost requirement for their business. There was never any security who refused to undergo the test except the Applicant.
10. The Applicant refused to undergo a test because he said he had a pay query.
11. Pages 5 to 10 are the minutes of the hearing. The Applicant pleaded guilty and signed the minutes.
12. There is procedure that needs to be followed when employees have pay queries. The Applicant had never made a pay query.
13. During cross examination he said that the Applicant never informed him of the pay query. The Applicant did not submit the pay query as per the procedure.
14. He denied that he told the Applicant that if he failed the polygraph test he would be dismissed. The Applicant blatantly refused to go for the test and threatened him.
15. During re-examination he confirmed that the Applicant admitted at the hearing that he refused to undergo the test.

APPLICANT'S EVIDENCE

SHADRACK NKUNA

- APPROVED**
16. The Applicant gave oral evidence.
 17. He testified that he had a salary query for September and October. His query was never attended to.
 18. He said the manager told him that he should attend the polygraph test and if he failed the test he would be dismissed. He told the manager that if he was going to fail the test he was not going to do the test. The polygraph examiner was not available.
 19. He was then told to attend the hearing on 13 December 2011. At the hearing he told them he did not attend the test because he was sick. He was dismissed.

20. During cross examination he said that he understood his employment contract. He said he did not refuse to do the test because the examiner did not show up. He said he told them in the hearing that he refused to do the test because he was short paid.

21. He said he told his manager about his salary shortage .However the manager scolded him.

RESPONDENT'S CLOSING ARGUMENT

22. The Respondent argued that the Applicant pleaded guilty in the hearing and had admitted refusing to do the test in his examination in chief and opening statement of this arbitration. The Applicant contradicted himself at one hand he says he did not refuse but the examiner did not arrive, on the other hand he admitted refusing. The Respondent had proved that the dismissal was substantively fair.

APPLICANT'S CLOSING ARGUMENT

23. The Applicant argued that I should believe his version and find in his favour that the dismissal was unfair. He seeks compensation.

ANALYSIS OF EVIDENCE AND ARGUMENT

24. The Respondent bears the onus to prove on a balance of probability that the dismissal was fair. Item 7 of Schedule 8 of Code of Good practice in the Labour Relations Act 66 of 1995 as amended which deals with guidelines in cases of dismissal for misconduct 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 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.

Did the Applicant contravene the rule

25. The Applicant was dismissed for breaking the term and condition of his employment contract by refusing to undergo a polygraph test. The Applicant admitted that he was aware that he was contractually bound to undergo the polygraph test.
26. The Applicant admitted in his examination in chief that he refused to undergo the test as he was told that if he failed he would be dismissed. He contradicted himself that he did not go because the examiner was not available. Later he changed that he refused because he had salary queries. The Applicant admitted that he pleaded guilty in the disciplinary hearing and had informed the enquiry that he refused to be test because he had salary issues.
27. The Applicant is not a reliable and credible witness as his evidence is not consistence. Respondent had successfully proved that the Applicant contravened the rule.

Was the rule a valid or reasonable rule

28. The Respondent had succeeded to convince me that the rule was valid and reasonable in that the its core function was to protect the properties of its customers. In so doing it required its security officers to be honest and loyal at all times. The test was necessary to ensure there is trust relationship.
29. In an unreported case *Nyathi V Special Investigating Unit case J1334/11* the Labour Court mentioned in passing that refusal to undergo the polygraph test by Applicant as she had contractually agreed may constitute misconduct and ground for dismissal. The court held that it was neither unlawful nor unreasonable considering the nature of business of the Respondent and its functions to require the applicant to submit to a polygraph test. I am also convinced that the rule was reasonable and valid due to the nature of the Respondent's business and its functions. It is not in dispute that the Respondent applied the rule consistently.

Was dismissal appropriate sanction for the contravention of the rule or standard.

30. It is the Respondent's case that the refusal to do the test broke the trust relation which was its core business this was not disputed. Therefore I am satisfied that dismissal was an appropriate sanction under the circumstances.

31. I am satisfied that the Respondent had proved on the balance of probability that the dismissal was substantively fair.

AWARD

32. I order that the Applicant's dismissal was substantively fair.

33. The application is dismissed.

34. No Costs Order is made.

SIGNED AND DATED AT PRETORIA ON 28 February 2012.



Mmamahlola Gloria Rabyanyana

CCMA COMMISSIONER

APPROVED