IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 604/2006**

In the matter between:

GERALD DUBE **Applicant**

and

PUBLIC SERVICE PENSION FUND **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**ELVIS MAZIYA**
FOR RESPONDENT	**:**	**ZWELI JELE**

J U D G E M E N T – 12/02/09

---

1. The Applicant has applied to court for determination of an unresolved dispute arising out of the Respondent's termination of his services.

2. The Applicant was employed by the Respondent on the 31st March 1999 and he was in the continuous employ of the Respondent thereafter until his services were terminated on 3rd March 2006. At the date of termination he held the position of Systems Administrator,

which was a supervisory position in the Information Technology (IT) department. He reported to the IT Manager.

3. Prior to committing the offences for which he was dismissed the Applicant had a clean disciplinary record, without any previous warnings for misconduct or poor work performance.

4. In his particulars of claim, the Applicant alleges that the termination of his services was procedurally unfair, for the reason that the disciplinary hearing was not held within the time period prescribed by clause 3.6 (a) of the Respondent's conditions of service and was accordingly time-barred.

5. He also alleges in his particulars of claim that the termination of his services was substantively unfair in that the sanction of dismissal was not in accordance with the sanction prescribed by clause 30.1 (d) of the Recognition and Collective Agreement between the Respondent and the Applicant's union, which provides for a written warning for a first offence.

6. In its Reply, the Respondent pleads that the Applicant was found guilty of an act that warranted dismissal after being accorded a fair disciplinary hearing and appeal hearing, and the termination of his services was therefore lawful and fair.

7. The representatives of the parties held a pre-trial conference, and the minutes of the conference record the following agreement as to the issues in dispute:

"Issues in Dispute

1. *The Applicant contends that the termination of his services was procedurally unfair in that the disciplinary process was time barred in accordance with clause 3.6 of the Public Service Pension Fund Conditions of Services.*

2. *Applicant contends that the termination of his services was unfair in that the sanction meted out by the Respondent was not commensurate to the offence, nor was it reasonable.*

3. *The basic salary remains in dispute.*

4. *The leave pay claim remains in dispute.*

5. *Maximum compensation for unfair dismissal remains in dispute."*

8. It is common cause that the Applicant was an employee to whom section 35 of the Employment Act 1980 applies. It follows, in terms of section 42 of the Act, that the Respondent bears the onus of proving, on a balance of probabilities, that the Applicant was dismissed for one of the fair reasons set out in section 36 of the Act, and that dismissal was a fair and reasonable sanction in all the circumstances.

9. In court, the Applicant admitted committing the act for which he was dismissed. The circumstances of the act and the events that ensued are as follows:

9.1 The Applicant cohabited with a certain Cebile, who was the mother of his child.

9.2 Cebile was also an employee of the Respondent, but she was dismissed for misconduct.

9.3 The Applicant's relationship with Cebile came to an end and they ceased living together.

9.4 Cebile obtained employment with the World Food Programme (WFP), an international agency of the United Nations Organization.

9.5 After a heated argument with Cebile, the Applicant sent an email to the WFP headquarters in Rome. The email reads as follows:

"To Whom it may concern

We confirm that Cebile Dawn Dlamini, born 28th December 1973 was employed by the Public Service Pension Fund as a payments Clerk from August 2002 until March 2005 when she was relieved of her duties due to dishonesty (fraud) and negligence of her duties. We understand she is employed by your organization in the office in Swaziland as an HR Assistant."

9.6 This email was sent from the Applicant's office computer using his official email address Gerald @ pspf.co.sz.

9.7 The WFP headquarters instituted an enquiry which caused

some embarrassment to the local WFP director in Swaziland who had employed Cebile. The local director then wrote to the Respondent enquiring as to the motives behind the unsolicited email, which apparently emanated from the Respondent.

9.8 The email was traced to the Applicant and he was suspended on 22nd December 2005 pending investigations. On 24 January 2006, charges were served on the Applicant, and he was invited to attend a disciplinary hearing to be held on 27 January 2006.

9.9 On 3rd March 2006 the Applicant was informed in writing that he had been found guilty on the charges against him, and on the recommendation of the chairman of the disciplinary enquiry the Respondent had decided to terminate his services with immediate effect.

9.10 The Applicant appealed against the termination of his services, without success.

9.11 The Applicant maintained at both the disciplinary hearing and the appeal hearing that he was not responsible for sending the offending email. At the appeal hearing, he alleged that his IT Manager had used his computer to send the email in order to get him into trouble. When the matter came to court, the Applicant turned around and admitted that he was the author of the email.

9.12 The Applicant reported a dispute to CMAC. Conciliation was

unsuccessful, and a certificate of unresolved dispute was issued. The Applicant then instituted the present proceedings. The issues in dispute are those agreed upon by the parties at their pre-trial conference.

WHETHER THE DISCIPLINARY HEARING WAS TIME – BARRED

10. Clause 3.6 (a) of the Disciplinary Rules Guidelines and Procedures provides:

"Hearings must be held within 14 working days from date of being aware of the offence, otherwise the Fund might be deemed to have waived his rights to discipline."

11. Although the first part of the clause 3.6 (a) appears to make it a peremptory rule for the hearing to be held within 14 days, this is qualified by use of the word 'might' in the second part, which indicates that this rule does not apply in all cases. In the view of the court, the intention of the parties to this collective agreement, as gauged from the language used, was to require that hearings be held within the agreed time limit but to permit condonation of a failure to meet the time limit where this is fair and reasonable in all the circumstances.

12. Where an employee charged with a disciplinary offence wishes to raise an objection that the hearing is not held within the 14 days period prescribed by clause 3.6 (a), he should do so at the outset of the hearing itself. The chairperson of the hearing will then decide whether there is any merit in the objection, and if so, whether the delay may be

condoned.

13. The Applicant did raise such an objection orally at the commencement of the hearing. According to the Applicant, the chairperson Mr. Leonard Nxumalo simply ignored his objection and ruled that the hearing would proceed. The Respondent's witness Elkan Makhanya, who attended the hearing as acting Human Resources Manager, confirmed that the objection was raised by the Applicant. Asked by the Respondent's counsel what was the outcome of the objection, Makhanya testified that the chairperson told the Applicant that he was at liberty to raise his objection at the appeal stage, and ruled that the hearing should proceed.

14. In the light of this evidence the court is satisfied that the chairperson failed to give proper consideration to the objection raised before him.

15. The objection went to the root of the Respondent's right to hold a disciplinary hearing. It was procedurally irregular and unfair for the chairperson to abrogate his duty to make a ruling on the issue and to tell the Applicant to raise his objection at the appeal stage.

16. The Applicant did raise the objection on appeal and the appeal chairman ruled that there was no breach of clause 3.6 (a) because 14 days had not elapsed since the conclusion of the investigation into the offence. This ruling on appeal did not cure the procedural irregularity committed by the chairman of the disciplinary hearing.

17. With regard to the merits of the objection, the Industrial Court is required to consider this de novo.

18. The Applicant was suspended pending investigations on 22 December 2005. The offices of the Respondent were closed for Christmas vacation from noon on 23 December 2005 until 3 January 2006. The disciplinary hearing was first held on the 27 January 2006. According to our calculations, 19½ working days elapsed between the date of suspension and the date the hearing commenced.

19. The Applicant denied being the author of the email. This necessitated an IT investigation into the Respondent's server, the Applicant's computer, and the email records of the Internet Service Provider. It was also necessary to interview Cebile. Whilst we do not accept Makhanya's evidence that the investigation was only complete on 24th January 2006 when the charge sheet was issued, we consider it reasonable to assume that the Respondent was only aware of the true nature of the offences and the Applicant's involvement therein on or after the 11th January 2006. In our view the disciplinary hearing was held within the prescribed time-limits.

20. Even if we are wrong in this regard, it is clear that the Respondent at no stage abandoned the disciplinary action or deliberately waived its right to proceed with such action. The holding of the enquiry was delayed by the Applicant's false denial of his involvement. If the time-limit was breached, it was by only a few days, and no prejudice was occasioned to the Applicant. In the circumstances the court would be prepared to condone any non-compliance with clause 3.6 (a).

21. In summary then, the court finds that the Respondent was not precluded by clause 3.6 (a) from proceeding with the disciplinary hearing. We do however find that the chairperson's failure to address

the Applicant's objection rendered the hearing procedurally unfair.

WHETHER IT WAS REASONABLE IN ALL THE CIRCUMSTANCES TO TERMINATE THE APPLICANT'S SERVICES.

22. The first charge against the Applicant is that he disclosed confidential information to the World Food Programme without the Respondent's authorization. Regarding the remaining three charges, it is clear that there has been a duplication or splitting of charges. The three remaining charges all refer to one offence, namely abusing the Respondent's email facility and thereby bringing the Respondent's good name into disrepute.

23. The Applicant admitted in court that he committed these offences. He said that what he did was "very, very wrong". He conceded under cross-examination that he sent unsolicited email to WFP from his place of employment using the computer provided to him for work by the Respondent, and that he had no authority to send the email or disclose the information contained therein. He agreed that the email had the effect of tarnishing the reputation of the WFP local office and its director.

24. The Applicant did not claim to have obtained the information about how Cebile left the Respondent's employ from Cebile herself. He did not deny that he disclosed confidential information without the authority of the Respondent. He simply relied on clause 30.1 (d) of the Disciplinary Rules, Guidelines and Procedures attached to the Recognition and Collective Agreement, which provides that the appropriate sanction for "breach of the employer's secrecy code" is "1st offence written warning, 2nd offence dismissal". The Applicant

asserts that since this was his first offence, he should have received a written warning.

25. The Respondent's first response to this assertion is that the Applicant was not charged with the offence of *"breach of the employer's secrecy code"*, so the requirement for a prior written warning does not apply.

26. The court rejects this submission. If the term 'secrecy code' refers to a specific written set of rules, no such document was produced in court. The term "secrecy code" clearly refers to the Respondent's code of conduct regarding dissemination of confidential material or information. In our view the offence of unauthorized disclosure of confidential information is precisely the offence described as *"breach of the employer's secrecy code."*

27. Secondly, the Respondent submits that the Disciplinary Rules, Guidelines and Procedures relied on by the Applicant were amended by the Respondent when it unilaterally issued the Public Service Pension Fund Conditions of Service.

In the Conditions of Service, the prescribed penalty for a breach of the employers Secrecy Code has been amended to be dismissal for a 1st offence.

28. The court rejects this submission also. A negotiated disciplinary code cannot be unilaterally amended by the employer. See **SA Municipal Workers Union v City of Capetown (2008) 29 ILJ 1978 (LC)**. The Respondent has not produced any document evidencing that the union agreed to an amendment of clause 30.1 (d) of the Disciplinary Rules, Guidelines & Procedures, which are part and parcel of the Recognition

and Collective Agreement.

29. It is common cause that this was the Applicant's first offence, and in terms of the disciplinary code the proposed sanction for an unauthorized disclosure of confidential information is a written warning for a first offence.

30. It has been held by the courts that the proposed sanctions set out in a disciplinary code are guidelines and are not inflexible.

SA Yster, Staal - & Verwante Nywerhede Unie & 'n Ander v Asea Electric SA (1988) 9 ILJ 463 (IC)

Country Fair Foods v CCMA (1999) 20 ILJ 1701 (LAC).

Oerlikon Electrodes SA v CCMA (2003) 24 ILJ 2188 (LC).

31. These judgements found support in the wording of the code itself. The Respondent's code states at clause 28.10:

"The dismissal of a staff/employee will be considered as the proper cause of action where a warning, or some other sanction short of dismissal, would not be sufficient in the circumstances."

32. It is also noteworthy that clause 30 states: "The following penalties may be imposed for the following offences:" (emphasis added).

33. In the opinion of the court the proposed penalty of a written warning for a first offence involving breach of confidentiality may be departed from in circumstances where a sanction short of dismissal would not be

sufficient - in other words, where the breach of confidentiality has rendered the continued relationship between employer and employee impossible.

34. Relevant factors to be taken into account include the nature of the confidential information disclosed, the extent of the breach of trust, the possible prejudice to the Respondent, and the state of mind of the Applicant.

c.f Rycroft & Jordaan : A Guide to SA Labour Law (2nd Ed) 200.

35. These factors are reflected in section 36 (e) of the Employment Act 1980, which provides that it shall be fair for an employer to terminate the services of an employee *"because the employee has willfully revealed manufacturing secrets or matters of a confidential nature to another person which is, or is likely to be, detrimental to his employer"* (emphasis added).

36. The sanction for the Applicant's breach of confidentiality cannot be considered in isolation from his other offence of abusing the Respondent's email facilities and bringing the Respondent into disrepute.

37. There can be no doubt that the Applicant was motivated by malice towards Cebile when he sent the offending email. In our view his action in sending the email to the WFP head office in Rome also indicated malice towards the WFP local director for employing Cebile and a wish to embarrass the local director. We do not believe that the Applicant intended any harm to come to the Respondent, but from the tenor of his email we are of the view that he intended the WFP head

office to believe that the email was an official communication from the Respondent. He must have appreciated the potential embarrassment to his employer, but he proceeded recklessly under the sway of his emotions. The information he conveyed did not have a high degree of confidentiality, but it impacted on the integrity of the Respondent's confidential records and its relationship with a former employee. The Respondent suffered no more than embarrassment as a result of the Applicant's actions. It did not sustain any financial loss nor, in the final analysis, any real damage to its reputation or integrity.

38. The Applicant was a managerial employee in a position of trust. He betrayed that trust by abusing the Respondent's facilities and confidential information for his own unsavoury purposes. This betrayal in itself did not however irrevocably destroy the employment relationship. It is the view of the court that had the Applicant owned up to being the author of the email and manifested remorse for involving his employer in his private vendetta against Cebile, a written warning would have been an appropriate sanction. Unfortunately the Applicant chose to falsely deny authorship of the email, and to compound this gross dishonesty he falsely implicated his manager and made serious allegations against him which had no basis in fact or truth. It was this appalling deceit that effectively rendered any continued employment relationship impossible.

39. In the case of **National Trading Co v Hiazo (1994) 15 ILJ 1304 (LAC), The SA Labour Appeal Court** held that where an employee had, at a disciplinary hearing, falsely accused his supervisor of being untruthful, this was a valid factor to be taken into account when assessing whether the relationship between an employer and an employee has broken down. In the present case, the Applicant did not

merely accuse his supervisor of being untruthful, but falsely accused him of entering his computer and sending the offending email in order to settle some grudge. No reasonable employer could be expected to continue the employment relationship in such circumstances, let alone have trust thereafter in the Applicant's integrity and honesty as a manager.

40. We find that a sanction short of dismissal would not have been sufficient, and it was reasonable in all the circumstances for the Respondent to depart from the standard sanction laid down in clause 30.1 (d) of the disciplinary code and to terminate the services of the Applicant.

41. The Applicant also raised a complaint that he was denied proper representation during the disciplinary process. This is not one of the issues for determination agreed upon by the parties at their pre-trial conference. In any event, the court finds no merit in the complaint. The Applicant was given proper notice of his right to be represented by a fellow employee. We accept the evidence of Elkan Makhanya that the Applicant attended the hearing without a representative and elected to conduct his own defence.

42. The Applicant submits that he could not arrange representation by a fellow employee because the terms of his suspension forbade him from discussing his case with other employees. This submission is, in our view, a disingenuous afterthought. Firstly, the letter of suspension only forbids him from discussing the terms of his suspension. Secondly, he never raised this alleged difficulty with management or at the hearing, when any misunderstanding would have been promptly dispelled.

43. At the appeal hearing, the Applicant attended with a legal representative. When the Respondent's representative objected, the Applicant agreed to proceed without a representative. This is borne out by the evidence of Makhanya and the minutes of the appeal hearing.

44. In the result, the court finds that the termination of the Applicant's services was substantively fair, but it was procedurally unfair for the single reason that the chairperson of the disciplinary hearing failed to apply his mind to the Applicant's objection as to the hearing being time-barred. The Respondent must bear responsibility for this serious procedural irregularity, and in the exercise of our discretion, we award the Applicant the equivalent of one months remuneration as compensation, in the sum of E16,661-69.

45. Judgement is entered for payment of the sum of E16,661-69. We make no order as to the costs of the application.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT