



ARBITRATION AWARD

Case Number: GPBC1905/2016
Panelist: William Richard Pretorius
Date of Award: 27 February 2017

In the **ARBITRATION** between

M Toni

(Applicant)

and

Department of Transport

(Respondent)

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DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the arbitration between Mr Mphuthumi Toni, the employee (hereinafter the Applicant) and the Department of Transport, the employer (hereinafter the Respondent) that was held on 9 February 2017 at the offices of the Respondent in Mthatha.
2. The arbitration was held under the auspices of the General Public Service Sectoral Bargaining Council (GPSSBC) in terms of section 191 of the Labour Relations Act 66 of 1995 as amended (LRA) and the award is issued in terms of section 138(7) of the LRA.
3. The Applicant was present and was represented by Mr Mlungisi Nomphe an official from the Police and Prisons Civil Rights Union (POPCRU) and the Respondent was represented by Mr Themba Rataza, a manager in the Department of Transport. Mr Shakespeare Nongi was appointed by the GPSSBC as the interpreter.
4. The Parties submitted documentary evidence and admitted that the documents appeared what it purported to be. In this regard the bundle submitted by the Applicant is marked as "Bundle A" consisting of 15 pages and the bundle submitted by the Respondent is marked as "Bundle B" consisting of 18 pages. The Parties submitted their written closing arguments on 16 February 2017 as agreed to.
5. The proceeding was recorded.

ISSUE(S) TO BE DECIDED

6. I am required to determine whether or not the dismissal of the Applicant was procedurally and substantively fair, and if not, to determine the appropriate remedy.

BACKGROUND TO THE DISPUTE

7. The following matters were established as common cause:
 - (a) Mr Toni was employed as a Traffic Inspector by the Respondent since 2010 and earned at the time of his dismissal R 14 000,00 per month. The Applicant had a clean disciplinary record. The Applicant returned to work after his bail application was successful, but did not resume his normal duties as Traffic Inspector.
 - (b) On or about 4 April 2014 the Applicant received the notice of the disciplinary hearing in which he was charged with:

Allegation No 1

It is alleged that on the 10 February 2013 you failed to comply with, or contravened Act 60 of 2000 in that you used firearm 9mm Glock no LXE 917 which belongs to the State to kill your wife/ another human being with police case number 236/02/2013.

Allegation No 2

It is alleged on the 10 February 2013 you contravened the government regulation (Provincial Firearm Permit Regulation 77) in that you were assigned to use the firearm solely in the execution of your duties and nowhere else but you used it to kill your wife/ another human being, by doing so you prejudiced the discipline, efficiency and administration of the department /state or office.

Allegation No 3

It is alleged that on the 10 February 2013 you grossly misused the powers vested in you as a peace officer in terms of section 49 of the Criminal Procedure Act No 51 of 1997 in that without any reasonable cause you shot your wife/ another human being.

Allegation No 4

It is alleged that on the 10 February 2013, you willfully failed to safeguard firearm 9mm Glock no LXE 917 with magazine and rounds, contravening Provincial Firearm Permit Regulation 77, as you left the safe belonging to the state to safeguard the state firearm at your residence in that your firearm was confiscated by the police with case number 236/02/2013.

Allegation No 5

It is alleged that on the 10 February 2013, you being a peace officer of the Department of Transport were grossly negligent in that you killed another human being and thereby putting the good name of the Department of Transport into disrepute.

- (c) On 14 April 2014 and 8 August 2014 the Applicant was subjected to a disciplinary hearing and was found guilty on all the charges. On 8 May 2015 the Applicant was dismissed by the Respondent. On 1 August 2016 the Applicant's appeal was dismissed by the Member of the Executive Council (MEC).
- (d) The Applicant referred a dispute to the GPSSBC on 29 August 2016. A conciliation hearing was held on 24 October 2016 but the dispute remained unresolved and a certificate to such effect was issued. On 24 October 2016 the Applicant requested that the dispute be resolved through arbitration and the matter was set down on 07 December 2016, further postponed to 13 December 2016 and later to 09 February 2017.

8. I deal with the defectiveness of allegations 1 and 3 below.

9. The Applicant was aware of all regulations and policies of the Respondent regarding the use and safekeeping of the firearm that was issued to him by the Respondent. He also admitted that the rule on

the safeguarding of the firearm was valid and reasonable firearm that was identified by the police at the crime scene on 10 February 2013 belonged to him. The evidence by the Respondent that the rule was consistently applied was not challenged. The Parties agreed that the main issue in dispute is whether or not the Applicant shot and killed his wife.

10. The Applicant raised a point in relation to possible procedural unfairness of his dismissal insofar as the delay in finalising the disciplinary hearing, the appeal as well as the allegation that he was not served with the finding and reason for the sanction by the chairperson of the disciplinary hearing were concerned. In this regard the disciplinary hearing took six months to finalise and the verdict and sanction took another 49 days whereas Resolution 1 of 2003¹ states that it must be done within 5 working days. The finalisation of the appeal by the Respondent took 90 days whereas Resolution 1 of 2003 states that the appeal must be finalised within 30 days. The Respondent submitted that the services of an external person was utilised as the Chairperson of the disciplinary hearing. The Chairperson experienced personal problems with his sick child and advised the Parties accordingly. The Respondent indicated that the Applicant did not suffer prejudice while waiting for the verdict because he received his full salary during that period.
11. The Applicant is seeking retrospective reinstatement.

SURVEY OF EVIDENCE AND ARGUMENT

The Respondent's Case

Witness 1: Detective Bongani Mtirara

12. He testified that he is employed by the South African Police Service (SAPS) as a lieutenant-colonel on salary level 10. Currently he is the unit commander for stock theft. In 2009 he was promoted as Captain and group commander responsible for investigating serious crimes.
13. He said that in February 2013 (not sure of the date) he visited such a crime scene that involved murder. On that specific day he was on standby. He was called to a murder scene at the police camp outside Mthatha and was told by one Captain Nqumama who worked for the National Intervention Unit that a policewoman was shot by her husband. I deal with the issue of its admissibility below.
14. In the bedroom he saw a woman who was already dead laying on the bed and there was a gun next to the bed. The deceased was naked in the lower part of her body. He also saw empty cartridges next to

¹ Parties to the Public Service Co-ordinating Bargaining Council (PSCBC) adopted Resolution 1 of 2003 as the Disciplinary Code and Procedures for the public service.

the bed. The deceased had two bullet wounds, one in the thigh and one behind her left ear. He also noticed that the deceased was shot from close range because the bullet went through the mattress.

15. He called the police from the Local Criminal Centre to take photos and do the sketch plan and to pick up the bullets, cartridges and the gun for ballistics.
16. He said he saw blood in the bathroom. He indicated that at that time the husband was not present. He was told that the husband was taken to hospital.
17. He said because he knew that the deceased was a policewoman he checked around the room for her gun. He did so because in most cases the SAPS officers are issued with a 9mm Z88 and the gun next to the bed was not a Z88. He found the gun of the deceased in a chest of drawers. He said that the normal practice is that if the gun is not on your person it must be in a safe. It had a cartridge with 15 bullets and the magazine. The gun was not cocked. He took it and out and placed it with the one that was next to the bed. He was told that the gun that was next to the bed was the Applicant's gun. He said that no fingerprints were taken from Applicant's gun (the gun found next to the bed) because it was covered in blood. Both guns were given to the Criminal Centre members for the ballistics section to determine which one was used in the shooting that took place.
18. Under cross-examination he said that he was the investigator and he called the Criminal Centre to take photos of the crime scene. He saw the photos that were taken and it confirmed that she was naked in her lower part of her body. The last time he saw the docket was in 2015 when he left the police service. (The Applicant's representative alleged that in all the photos the victim was covered with a blanket).
19. The witness confirmed that he was told that the deceased was shot by the Applicant but he could not confirm it because he admitted that he did not witness the shooting. He was simply informed and Captain Nqumama also never said to him that he (Captain Nqumama) had seen the shooting. He repeated himself by saying that he was called at night but wasn't sure of the time. He said that the Criminal Unit took the photos and he also asked them to do a PR test (Prime Residue). He explained that this test was done to check for gunpowder residue. He said that the test was done on the deceased, but not on the Applicant, because the Applicant was already taken to hospital.
20. He said that the blood found in the bathroom was not sent to the biological unit in Cape Town to establish whether or not it was the Applicant's blood. According to him the reason was that the blood was already mixed with water in the basin in the bathroom, i.e. it was contaminated. He said that he was not the first person on the scene and could not say whether the crime scene was contaminated or not.

21. During re-examination he said that when he looked in the bathroom it was clear that someone had washed himself in the basin. The water in the basin was bloody. He said that he does not know for certain if such bloody water can be tested.

Witness 2: Warrant Officer Nandipha Sweetness Batyi

22. She testified that she is employed as a Warrant Officer in the South African Police Service (SAPS) in the Ballistics section in Port Elizabeth. She has been employed as a forensic analyst for 8 years and 3 months. Her duties include the examination of ammunition, fired bullets, firearms, cartridges and court appearances.
23. On 12 April 2013 she received case number 236/02/2013 from the Mtatha SAPS. It was a sealed bag PA50003774060 with 2 bullets and 4 fired cartridges 9mm parabellum caliber bullets. She examined it under the microscope and saw that the bullets were damaged.
24. On 16 April 2013 she received a sealed bag PA30001932680 with two firearms. Serial numbers: LXE917 and Q036984. The normal procedure is to take the firearms and shoot it to test the bullets from the firearm. She successfully determined that the 2 bullets found at the crime scene were fired from the gun with serial number LXE917.
25. The witness was not cross-examined.

Witness 3: Ms Nosipho Bini

26. She testified that she used to live in the police camp and worked as a domestic worker for the Applicant and the deceased. She said that the Applicant's wife was shot and killed in February 2013. According to her it was late in the evening between 23h00 and 24h00 when she woke up to crying of a child. She heard the voice of the deceased saying: "Please, please my husband. What about the child?" Directly after that she heard a gunshot.
27. She said she stood up and opened the door to investigate what was happening and at the same time the Applicant opened another door opposite her door. According to her the Applicant did not say anything but he pointed the gun at her. She closed the door and then heard two (2) more gunshots. She confirmed that she heard three (3) gunshots in total.

28. She decided to stay in her room because she was too scared to go outside. After a while she heard footsteps outside the door. The footsteps were going to the bathroom. She heard the sound of a tap opening in the bathroom.
29. She said that she sat quietly in her room for a while until she heard a knock on the door. It was the Applicant's brother who also lived with the family at the time. The two of them then got an opportunity to get out of the house. According to her that was the time when she saw the Applicant in the bathroom washing himself.
30. She asked the Applicant's brother to go to the house of one Mrs Siquhaza to wake her up. The Applicant's brother told her that he had already done that and that he was busy waking up other people.
31. She confirmed that there were only three (3) people in the bedroom, the deceased, the child and the Applicant. She said that she did not come back to the house after the shooting. They remained at Mrs Siquhaza house and during that time the police arrived and they were told not to go back to the house. Later the police asked her about her relationship with the Applicant and the deceased and she told the police that she was looking after their child as a domestic worker. She said that the police later took a statement from her. She confirmed that she is attending the criminal court case against the Applicant as a witness.
32. Under cross-examination she said she was requested by the police to make a statement following the shooting that took place. She made the statement in Isi-Xhosa. However the written statement was translated to English by the police. She confirmed that it was her signature appearing on the statement. She said she was confused, because the statement is in English whilst she made the statement in Isi-Xhosa.
33. She initially said that she did not see the deceased after the three gunshots. She said that the deceased arrived from Port Elizabeth between 17h00 and 18h00 on the same day that she was killed. She indicated that when the deceased arrived she asked the witness to cook. The deceased took the child from her to put him to sleep. The deceased came back and put her food in the refrigerator and told her that she was going to sleep. She said that the last time she saw the deceased was around 19h30. It was put to her that according to her statement to the police she indicated that the last time she saw the deceased was when she left the house after the shooting and that the deceased was laying in the bedroom and there was blood. She admitted that she made a mistake by testifying that the last time she saw the deceased was at 19h30 when in fact the last time she saw the deceased was when she left the house after the shooting and saw the deceased laying on the bed with blood.

34. She also indicated that she did not notice any injuries on the Applicant. She indicated that she only saw him washing himself in the bathroom as she was leaving the house after the shooting. She confirmed that she only heard three (3) shots that night.
35. It was put to the witness that the Applicant is to testify that he never said: "Please, please my husband. What about the child?" Instead he is going to testify that the deceased said to Applicant: "Put this child aside I am finishing with you today." The witness replied that although she was not in their bedroom she clearly heard the deceased pleading with the Applicant and not the other version.
36. She said she decided not to take any steps against the Applicant for pointing the gun at her. The witness said that she did not know who killed the deceased.
37. During re-examination she confirmed that she saw the deceased laying on the bed when she and the Applicant's brother left the house after the shooting. The witness said she could not recall whether the deceased was naked or not when she last saw the deceased.

The Applicant's case

The Applicant was the only witness. He testified as follows:

38. On 10 February 2013 he arrived late home after he watched soccer at the canteen. He said that the deceased asked him about his whereabouts and accused him of having affair. An argument ensued between them.
39. He submitted that the deceased said to him the following: "Put this child aside I am finishing with you today." According to him the deceased came towards him and bent down next to the bed where he was laying and when she stood up she had his gun in her hand and pointed it at him. The last thing he remembered was a shot being fired where after he recovered in hospital in Mthatha.
40. He submitted that he was shot and the bullet entered under the chin and exited through the forehead. He was hospitalized from 10 February 2013 to 19 February 2013.
41. He testified that he did not know who shot and killed his wife. He disputed the evidence of Ms Bini that he pointed a firearm at her and that he would have said: "Please, please my husband. What about the child?"

42. Under cross-examination he confirmed that there were only three persons in the room, i.e. the deceased, their child and himself. He said that the deceased must have taken his gun out of the safe before his arrival. He said that he could not remember whether or not he went to the bathroom to wash. He denied killing his wife. He confirmed that he was arrested in relation to allegations pertaining to the murder of his wife.
43. No re-examination took place.

ANALYSIS OF ARGUMENTS AND EVIDENCE

Substantive fairness

44. Section 185(a) of the LRA, stipulates that every employee has the right not to be unfairly dismissed.
45. Section 188(1)(a) and (b) of the LRA, stipulates that a dismissal that is not automatically unfair, is unfair if the employee fails to prove –
- (a) that the reason for dismissal is a fair reason;
 - (b) that the dismissal was effected in accordance with a fair procedure.
46. The LRA provides the relevant law on substantive fairness in the Code, Item 7 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
 - (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 are, 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.
47. The substantive requirements of a disciplinary hearing and the standard of proof required were decided on in the case of ***Avril Elizabeth Home for the Mentally Handicapped v CCMA & others (2006) 15 LC 1.11.4, [2006] 9 BLLR 833 (LC); [2006] JOL 17623 (LC)***. The Labour Court held that, when determining whether an employee is guilty of misconduct, the proper test is proof on a balance of probabilities, not that of beyond reasonable doubt, which is the burden of proof as it applies in our criminal law system. The Labour Court found that the commissioner, while purporting to apply that probabilities test, had in fact applied the test of proof beyond reasonable doubt. This was in itself a ground for review.

48. It is trite law that commissioners must deal with the substantive merits of a case with the least of legal formalities.
49. The Parties did not raise the defectiveness of allegations no 1 and 3; however I find that it is material for the reasons stated below.
50. Section 35(3) of the Constitution of the Republic of South Africa (the Constitution) accords to every accused person a right to a fair trial. An integral part of this, spelt out in section 35(3)(a), is the right to be informed of the charge with sufficient detail to answer it. The question under section 35(3) of the Constitution is whether a necessary averment in a charge can be implied in such a way that it can be said that the accused person has been informed of the charge with sufficient detail to answer it.
51. One of the most important items in the disciplinary process is the disciplinary notice (or “charge sheet”, as some prefer to call it). Yet, it is generally also the most neglected one, with too little attention paid to proper drafting. This case is no different.
52. In this regard allegation no 1 as contained in the notice of the disciplinary hearing that was signed by the Applicant on 4 April 2014 is not referring to a specific section of the Firearms Control Act no 60 of 2000 that the Applicant is alleged to have failed to comply with or that he contravened. [my emphasis] This has the effect that the Applicant must speculate which section of the Firearms Control Act he has contravened or not complied with.
53. Secondly, allegation no 3 of the same notice referred to above points to section 49 of the Criminal Procedures Act 51 of 1977. However this section deals with the “Use of force in effecting arrest”, which is clearly irrelevant to this case, because the Applicant was not charged with arrest of the deceased. [my emphasis]. Section 49 of the Criminal Procedures Act 51 of 1977 reads as follows:
- “Use of force in effecting arrest
- (1) For the purposes of this section-
- (a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect;
- (b) 'suspect' means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and
- (c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.
- (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force

must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

[S. 49 substituted by s. 7 of Act 122 of 1998 and by s. 1 of Act 9 of 2012.]”

- 54. I find that allegations no 1 and 3 referred to above are defective, i.e. allegation no 1 lacks sufficient detail to allow the Applicant to make a proper response and allegation no 3 is totally irrelevant because it is citing the wrong provision of the Criminal Procedure Act 51 of 1977 in relation to the allegations against the Applicant as stated above.
- 55. In this regard I will only focus on allegations no 2, 4 and 5 of the notice of the disciplinary hearing that was signed by the Applicant dated 4 April 2014.
- 56. It has been established that is common cause that:
 - (a) there is a rule in the workplace, i.e. Provincial Firearm Permit, Regulation 77 (Regulation 77) that states that the owner of the firearm must “store the firearm at his or her place of residence in a safe or strongroom [*sic*] that conforms to the prescripts of SABS Standards 953-1 or 953-2”;
 - (b) the above rule is valid and reasonable;
 - (c) the Applicant was aware of the rule; and
 - (d) the Respondent applied the rule consistently.
- 57. The issues in dispute are whether or not the Applicant breached the rule and the appropriateness of the sanction of dismissal.
- 58. The Respondent submitted that the Applicant admitted that his firearm was used in the shooting of the deceased and therefore he failed to safeguard his firearm in terms of Regulation 77. The Applicant stated that he locked his firearm in the safe and that he suspected that his wife took it out of the safe before his arrival on 10 February 2013 and used it to shoot him. It is clear that the Applicant did not take reasonable steps necessary to safeguard his firearm.
- 59. I find on a balance of probabilities that the Applicant breached the rule for the reasons stated above.
- 60. Regarding the alleged shooting and killing of the Applicant’s wife, I must point out that the Respondent did not charge the Applicant with murder. He was charged with non-compliance and negligence in relation to Regulation 77 referred to above. The shooting and killing of the deceased was the subsequent outcome of his non-compliance and negligence with regard to Regulation 77.

61. In this regard the evidence of the three witnesses of the Respondent is only relevant insofar as it described the crime scene and procedures followed by detective Mtirara, the findings by Warrant Officer Batyi that confirmed it was the Applicant's firearm from which the shots were fired and the testimony of Ms Bini in relation to what she heard and seen at the crime scene, i.e. confirming that there was an argument between the Applicant and the deceased, only three shots were fired and she saw the deceased laying on the bed covered with blood. I have disregarded the hearsay evidence of detective Mtirara, i.e. that Captain Nqumama told him that the Applicant shot and killed his wife, because it was pure speculation on the part of Captain Nqumama and no reason was given as to why Captain Nqumama could not give evidence himself regarding what he told detective Mtirara as provided for in section 3 of the Law of Evidence Amendment Act 45 of 1988. All three witnesses were credible and reliable in that their evidence was consistent with what happened on the night of 10 February 2013 and were they made mistakes they conceded and corrected it, i.e. Ms Bini admitted to the contradiction that was pointed out by the Applicant and corrected it. The Parties to a large extent have accepted the above evidence as common cause, e.g. the evidence of Warrant Officer Batyi.
62. Regarding the above, the main issue in dispute between the Parties relates to the question: who shot and killed the deceased? This question, as to who shot and killed the deceased is a matter that does not reside in this forum because the Applicant was not charged with the murder of his wife and as such the matter should be tested in the criminal court. The Applicant has admitted that he is currently facing murder charges of his wife in the criminal court.
63. In considering the fairness of a sanction, the court had developed an approach that must be tested as decided in ***Sidumo and another v Rustenburg Mines Ltd & another* [2007] 28 ILJ 2405 (CC) [2007] 12 BLLR 1097 (CC)**. In approaching the dismissal dispute a commissioner will take into account the totality of the circumstances. He or she will necessary take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are factors that must be considered, e.g. the harm caused by the employee's conduct, whether training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee and his or her long service record, the impact it had on the trust relationship.
64. The Applicant argued that the dismissal sanction was unfair. I accept that Schedule 8 of the LRA, i.e. the Code of Good Practice: Dismissal provides for progressive disciplinary measures with the objective to rehabilitate an employees' behaviour. This in my opinion was not an option in this matter, because his non-compliance and negligence of not safeguarding his firearm has caused the death of another

human being. This subsequent outcome of his misconduct weighs heavily against the Applicant. A lesser sanction would have been appropriate if the non-compliance and negligence of not safeguarding his firearm has not resulted into the death of another human being. It is common cause that the Applicant did not have a previous disciplinary record. However the trust relationship had broken down irretrievably as a result of the subsequent consequences of his action not to safeguard his firearm, i.e. the death of another human being. The Applicant was placed on special leave and whilst he returned to work after his bail application was successful, he was not allowed to resume his normal duties, which is an indication that the trust relationship had broken down.

65. I find on a balance of probabilities that the sanction of dismissal of the Applicant is appropriate, fair and reasonable.

Procedural fairness

66. Item 4 of the Code of Good Practice: Dismissal (the Code) contained in the LRA also provides that the termination of an employee's services should not be effected without a fair procedure being followed. According to the Code the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should do the following:
- a) Notify the employee of the allegations using a form of language that the employee can reasonably understand;
 - b) The employee should be allowed the opportunity to state a case in response to the allegations;
 - c) The employee should be entitled to a reasonable time to prepare the response and to be assisted by a trade union representative or fellow employee.
 - d) After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification.
67. The Applicant submitted the issue of procedural unfairness, i.e. the finalisation of the disciplinary hearing took six months. The finalisation of the verdict and sanction took another 49 days; whereas the GPSSBC Resolution 1 of 2013 provides for 5 days. The appeal took a further 90 days to finalise instead of 30 days as provided for in the same resolution referred to above was unreasonably and extremely excessive.
68. I accept the Respondent's explanation that the Chairperson of the disciplinary hearing experienced personal problems with his sick disabled child insofar as the finalisation of the disciplinary hearing is concerned. Despite these acceptable challenges the delay in finalising the disciplinary hearing was very excessive.

69. The Respondent did not provide any reason(s) for the delay in the finalisation of the appeal as referred to above.
70. I do not agree with the Respondent's submission that the Applicant did not suffer any prejudice because he received his full salary for the duration of the delay, because prejudice must not only be seen in monetary terms – even more importantly is the emotional prejudice that the Applicant may have suffered during this period.
71. The uncontested version of the Applicant that he was not served with the findings and reasons on sanction by the Chairperson of the disciplinary hearing is viewed in a very serious light. It is trite law that employees must be furnished with reasons on sanctions and not only be informed about the outcome of the disciplinary proceedings.
72. Regarding procedural fairness, I find that the lengthy delay in finalising the appeal of the Applicant coupled with his uncontested evidence that he was not served with the finding and reasons of the sanction of dismissal of the Chairperson of the disciplinary hearing was prejudicial to the Applicant. The Respondent did not provide any acceptable reason for the delay in the finalisation of the appeal of the Applicant. I was unimpressed by the conduct of the Respondent not to provide the Applicant with the finding and reasons for the sanction. I have also taken into consideration that the Applicant was charged in April 2014 almost a year after the incident happened (10 February 2013). The latter renders the period of investigation unreasonably lengthy and as such prejudicial to the Applicant. In the circumstances it is clear that the Respondent failed to discharge the onus on it to prove that the Applicant's dismissal was preceded by a fair procedure.
73. Regarding an appropriate remedy, I have borne in mind that the Applicant's dismissal was only procedurally unfair and I am, therefore, not required to accede to the Applicant's request for reinstatement (Section 193(2)(d)) of the LRA. In any event, "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable" (Section 193(2)(b) of the LRA).
74. In the circumstances, compensation is the only just remedy. In terms of Section 194(1) of the LRA, any compensation awarded "must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal". In determining the quantum of compensation, I have had regard to the circumstances of the Applicant's dismissal, his length of service and the fact that the dismissal was only procedurally unfair.

75. I have also taken into consideration that any compensation, which is awarded for a procedurally unfair dismissal is in the nature of a solatium (*Carephone (Pty) Ltd v Marcus NO and Others 1993 (3) SA 304 (LAC)*). Compensation equal to two (2) months' remuneration constitutes, in my view, "just and equitable" compensation.
76. I, accordingly, find that the dismissal of the Applicant was unfair because the Respondent failed to prove that the Applicant's dismissal was preceded by a fair procedure. I therefore make the following award:

AWARD

77. The dismissal of the Applicant, Mphuthumi Toni, by the Respondent, the Department of Transport, was substantively fair but procedurally unfair.
78. The Respondent, the Department of Transport, is ordered to pay to the Applicant, Mphuthumi Toni, compensation in the amount of R 28 000,00 (twenty eight thousand rand) that is the equivalent to two months' remuneration that must be paid on or before 30 April 2017.
79. There is no order as to costs.

Signature: 

Panelist: ***William Richard Pretorius***