



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **Hilary Mofsowitz**

Case No: **PSHS1027-16/17**

Date of Award: **18 July 2017**

In the matter between:

NEHAWU obo FABIAN DE JONGH

(Union/ Applicant)

and

DEPARTMENT OF HEALTH- WESTERN CAPE

(Respondent)

Details of hearing and representation

1. This is the award in the matter between National Education Health and Allied Workers' Union ("NEHAWU") obo Fabian De Jongh ("the applicant") and the Department of Health Western Cape ("the respondent"). Arbitration was held at the respondent's premises on 20 April 2017 and 28 June 2017. Closing argument in the form of written submissions was received on 7 July 2017. Both parties availed themselves of this opportunity.
2. Margaret Wildschut ("Wildschut") an official of NEHAWU represented the applicant.
3. Abraham Solomon ("Solomon") the assistant director of labour relations officer represented the respondent.

4. The proceedings were digitally recorded and the documentary evidence forms part of the record.

Issue to be decided

5. I have to decide whether the applicant's dismissal was procedurally and substantively fair. The dispute was referred in terms of section 191 of the Labour Relations Act 66 of 1995 as amended ("the LRA"). The applicant is seeking to be re-instated.

Background to the dispute

6. The applicant has been an employee of Groote Schuur Hospital since August 2013 and held the position of handyman/plumber. He was earning an annual salary of R 120 942.00. The applicant was dismissed on 22 December 2016 when the outcome of the appeal confirmed dismissal. The applicant was dismissed with immediate effect.
7. The applicant was dismissed on a conduct related issue. The allegation for which the applicant was dismissed related to an incident on 27 October 2016. The respondent alleged that the applicant was found in possession of state property and that he had no authority or permission to be in possession of the property. The property was found on the applicant's possession when he was searched by security personnel. It was the respondent's contention that the applicant intended to remove the property from Groote Schuur Hospital without authorization to do so. The property was described as eight 21 cm pieces of copper pipes and copper pipe connections. The respondent estimated the value to be approximately R 100.00 and the applicant conceded the value. The respondent argued that the applicant's conduct was in contravention of Annexure A of Resolution 1 of 2003 read with section 14 (a) of the code of conduct of the public service. The respondent's policies were not placed in dispute. The applicant did not dispute the rule (regarding the removal of state property) and there was no dispute that the rule was reasonable.

8. The applicant conceded that when security personnel searched him, he was found in possession of state property. The applicant agreed that he was suspended with pay and that he attended a disciplinary hearing on 23 November 2016. He conceded that he pleaded “guilty” during the disciplinary process. He conceded that he received notice of the disciplinary process and was afforded the opportunity to be represented. The applicant challenged the fairness of dismissal mainly on the grounds that the respondent did not apply discipline in a consistent manner. The presiding officer did not apply his mind to the issue of inconsistency. This was only considered during the appeal stage. The details of the inconsistent application will be detailed below. The minutes of the disciplinary enquiry and the minutes of the appeal process form part of the record.

Survey of evidence and argument

The respondent’s submissions

9. Rowan James (“James”) testified. He served as the presiding officer of the disciplinary enquiry. It was his evidence that there were claims of inconsistency raised during the disciplinary process but no evidence to substantiate the claims. He provided the trade union with the opportunity to submit evidence within five days. He only received the trade union’s claim of inconsistency after his report was submitted. He considered the claim which dealt with one specific employee but found the claim to be lacking. The merits of the case presented were different merits to the applicant’s case and on this basis James considered that the new evidence did not warrant interference in his decision. The applicant raised the issue of Lindiwe Malusi (“Malusi”) who was charged for intentionally removing a mop covered in a plastic bag from the premises of the respondent without authority or permission. The incident occurred on 13 January 2014. The outcome of the disciplinary hearing was that Malusi was issued with a period of three months unpaid suspension and a final written warning. James considered that the case of the applicant and the case of Malusi were different with due regard to the different positions they hold within the respondent’s employ. Malusi is an administration clerk (with limited access to parts of the hospital) whereas the applicant (by the nature of his job) has access to all areas of the hospital and many areas that

no one else has access to. The applicant was responsible for repairing and replacing expensive equipment and therefore his conduct lead to a complete breakdown of the trust relationship. James also considered that there was a five months delay before the Malusi case was dealt with and that Mausi had twenty-four years' service with a clean disciplinary record. The presiding officer of the Malusi case was a different person to the presiding officer in the applicant's case.

10. Denton Smith ("Smith") testified. He is the head of engineering at Groote Schuur hospital. Smith confirmed that he no longer trusts the applicant. The applicant had been responsible for engineering jobs all over the hospital and the respondent no longer trusts him to work alone. Theft of copper cable has been a major problem at the hospital and the consequences of the loss of such items has a direct effect on the respondent's ability to provide equipment in good working order, including life saving equipment and affects service delivery. The statistics reflecting the loss of copper for 2016 forms part of the record. Scrap copper is condemned and sold to an outside contractor and this has a financial implication to the hospital.

The applicant's submissions

11. The applicant testified. The applicant conceded that security personnel found the items in his possession at the exit gate. It was his evidence that it was scrap metal pipes with fittings and that the items were condemned. On account of it being condemned, it could not be used again. There were eight pieces of pipes with fittings. The applicant explained his personal circumstances. His wife was on maternity leave and his young son (two months old) was in hospital. He needed the money to travel to work the following day. The applicant was of the opinion that there was no damage caused to the hospital on account of the items being scrap metal. It was the applicant's evidence that he was willing to apologize for his conduct and that he would guarantee that he would not repeat the same misconduct.

12. Ernest Mongezi Madikane ("Madikane") testified in support of the applicant's case. He testified in his capacity as a shop steward from NEHAWU. It was his evidence that the respondent applied dismissal in an inconsistent manner. He referred to the case of

Malusi (detailed above). It was his argument that the applicant stole scrap metal whereas Malusi stole a mop which is property of the respondent used on a daily basis. Malusi stole the mop from an area she does not work in. Alec Manuel (“Manuel”) was employed as a handyman/plumber and had thirty years service. He was charged with the offence of loss of state property. He ordered certain items that were needed for a specific repair job. The repairs were never done and therefore state property was lost. Manuel was dismissed. On appeal, the dismissal was overturned and he was issued with a final written warning and a month’s unpaid suspension. The incident took place in November 2011 and the disciplinary process took place in October 2012. Mogamat Taliep (“Taliep”) was dismissed during 2014 for unauthorized possession/removal of state property. On appeal, Taliep produced a letter from a contractor that sought to give Taliep permission to have the item. Based on this, the dismissal was overturned and substituted with a final written warning. I was referred to the case of Aubrey Williams (“Williams”) who was also dismissed for being in possession of state property on or around March 2016. The applicant was a cleaner in a day hospital in the area of George. At arbitration, Williams was re-instated on the basis of inconsistent application in the sanction of dismissal. The arbitration award forms part of the record. Madikane confirmed that he had first hand knowledge of the Malusi case and the other cases were discussed within NEHAWU structures.

Analysis of evidence and argument

13. The applicant was dismissed because copper pipes and fittings were found in his possession. The background to the dispute and facts of the dispute were not disputed. The applicant agreed that he removed copper pipes that were condemned. He agreed that the respondent normally sold the condemned items and that he removed the items for personal gain. He intended to sell the items as he needed transport money to travel to work. He agreed that the copper pipes were concealed in his back pack. He pleaded “guilty” during the internal disciplinary process. The parties agreed that the value of the items was approximately R 100.00. He conceded that he cut up the pieces of copper pipes in order to conceal it in his bag and that the reason he was caught was because he was searched by a security official. From the evidence presented and the applicant’s concessions, it is clear that the applicant’s conduct was in breach of a rule

regarding the unauthorised removal of state property. The applicant conceded that it was a reasonable rule and that he was aware of the rule. I therefore find that the applicant did commit the misconduct for which he was dismissed.

14. The material challenge to the fairness of dismissal was based on the alleged inconsistent application of the sanction of dismissal. The applicant referred to a number of other employees whose details are highlighted above. The labour courts have considered the issue of consistency which is also known as the parity principle. The courts have concluded that there are limits to the extent that the parity principle will be applied to assist employees guilty of serious misconduct. The labour appeal court in the judgment of *SACCAWU v Irvin and Johnson Limited (1999) 20 ILJ 2302 (LAC)* stated the following: “Consistency is simply an element of disciplinary fairness. Some inconsistency is the price to be paid for flexibility, which requires the exercise of discretion in each individual case. If the chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision”.
15. In taking the principle of the judgment outlined above, I have concluded that it was not unreasonable for the respondent to differentiate between the different cases. The differentiation was not motivated by irregular or improper reasons. The respondent has provided reasons for its differentiation including years of service, the implication of the different positions held, a letter from the client authorizing the removal and the time lapse between the offence and the implementation of disciplinary action. The case of Williams cannot be considered as the respondent also dismissed him. The fact that another arbitrator found the dismissal of Williams to be unfair does not assist the applicant as no arbitrator is bound by another arbitrator’s decision. Even if there were some elements of inconsistency, I have not found that there was unfair inconsistency to warrant a conclusion that the applicant should benefit by the different treatment. The other cases were investigated and some form of disciplinary action was taken. I therefore find that the sanction of dismissal was not inconsistently applied.

16. In deciding whether dismissal was an appropriate sanction, an arbitrator must have regard to the totality of circumstances. I must determine whether dismissal was justified. In this regard, I have considered that the applicant's conduct was in breach of a fundamental rule or standard. The reason for the rule or standard is self explanatory and was not disputed. It was undisputed that the respondent experienced a fundamental problem with the theft of copper cable. It was undisputed that the condemned copper was sold to generate funds. The applicant planned the dishonest conduct. The applicant conceded that he had unlimited access to different areas of the hospital where there is no security presence. The applicant's conduct was in breach of the respondent's disciplinary code and procedure. Smith confirmed that the respondent no longer trusts the applicant. It is one of the fundamentals of an employment relationship that the employer should be able to place trust in the employee. A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship. The applicant's conduct has therefore resulted in an irreparable breakdown of the employment relationship. In these circumstances, dismissal was an appropriate sanction. I have therefore concluded that the respondent has discharged the onus to show that dismissal was substantively fair.

17. There was no material challenge to procedural unfairness. The applicant conceded that he was given the opportunity to prepare for the disciplinary process; he was afforded the right of representation and was provided with an opportunity to present his side of the story. James (the presiding officer) conceded that he delivered his outcome report before the trade union furnished him with their claim of inconsistency. The trade union presented one such case to the presiding officer. It was his evidence that the case presented compared to the applicant's case did not warrant a conclusion of inconsistent application of sanction. In this regard, I have considered that the applicant presented his claim of inconsistency during the appeal process and at arbitration (which is a hearing de nova). On these grounds, the conduct of James does not warrant a conclusion that dismissal was procedurally unfair. I therefore find that the respondent has discharged the onus to show that dismissal was procedurally fair.

Award

18. I find the dismissal of the applicant to be procedurally and substantively fair.

HILARY MOFSOWITZ
For the PHSDSBC