PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Arbitrator: **Mr T. Ndzombane**

Case No: **PSHS1086-16/17**

Date of Award: **29 April 2017**

In the matter between:

PSA OBO J.J PETERSEN (Applicant)

and

DEPARTMENT OF HEALTH- WESTERN CAPE (Respondent)

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was scheduled for and heard on 6 April 2017; under the auspices of the Public Health & Social Development Sectoral Bargaining Council at Western Cape College of Nursing in Cape Town. The applicant; Mr Petersen, was represented by a Union Official, Mr Jacobs from PSA. The respondent, Department of Health –Western Cape, was represented by a Senior Labour Relations Officer, Mr Solomon.

2. I proceeded with the matter in terms of Section 138(5) (b) (i) of the Labour Relations Act 66 of 1995, as amended ('the Act"). The proceedings were digitally recorded and typed notes were taken. Both parties submitted bundles of documents which are not in dispute and are admitted as they purport to be. The parties submitted their closing arguments on 18 April 2017.

BACKGROUND

3. The applicant was employed by the respondent on 1 January 2009 as a Senior Administration Clerk in Grooteschuur Hospital. He earned a monthly salary of R12000.00 [twelve thousand rand] prior to his dismissal on 20 December 2016.

4. The applicant admitted that he had absented himself from work as per the charge of the respondent but he is of the view that the respondent was aware of his plight. At the disciplinary hearing he requested to be given a final written warning and to admit himself to the rehabilitation centre. This was supported by the respondent representative at the disciplinary hearing.

5. Subsequent to that he attended the rehabilitation programme as from 21 June 2016. During the disciplinary hearing he showed remorse as he admitted that he was in the wrong due to the drug problem. The respondent agreed to his proposal but he was surprised when he received a sanction of dismissal. If, he succeeds with his dispute, he requested to be reinstated or alternative be placed in a different section or component within the department.

6. The respondent stated that the applicant was charged with the following misconduct:

    1. Charge 1: *it is alleged that you committed an act of misconduct as contained in Annexure A of Resolution 1 of 2003 , in that you took uncommunicated leave on:*
        a. *28 January 2016*
        b. *22 April 2016*
        c. *3, 4, 5,6,9,10,13,16,17,18 May 2016.*
    2. *Charge 2: it is alleged that an act of misconduct as contained in Annexure A of resolution 1 of 2003, in that you took unauthorised leave on:*
        a. *5, 6, 7, 8,11,14,15,20,21,22, 25,26,28,29 January 2016.*
        b. *1,2,3,4,5,9,10,12,15,16,17,18,19,22,23,24,25 February 2016.*
        c. *2, 4, 7,8,9,16,18 March 2016.*
        d. *5, 6,7,8,12,14,15,18,22 April 2016.*
        e. *3,4,5,6,9,10,13,16,17, 18 May 2016.*
    3. *Charge 3: it is alleged an act of misconduct as contained in Annexure A of Resolution 1 of 2003, in that you left the workplace without permission on :*
        a. *4, 19 January 2016.*
        b. *30 May 2016.*

7. The applicant pleaded guilty to the above charges and the respondent took into consideration that his disciplinary record and counselling sessions hence the decision to dismiss was meted out.

ISSUE TO BE DECIDED

8. I am required to determine whether or not the applicant's dismissal was fair.

SURVEY OF RESPONDENT'S EVIDENCE AND ARGUMENTS

9. **Mr Noel Weeder** stated that he is employed by the respondent as a Manager at Medical Records in Grooteschuur Hospital and he presented the following evidence under oath. His department supplies clinical notes to doctors and nurses who treat patients. Clinical notes are a patient's medical history and are very important for further treatment. He has been in the department for a period of eleven years and the applicant worked under him as from 2009.

10. In 2009 the applicant experienced health and social problems and he referred him to Employee Assistance Programme. On numerous occasions he was referred to this programme and including ICAS. The applicant attended three sessions for his personal and domestic issues. A surgery was done to him as well. This also affected his work through absenteeism. In December 2012 he was again referred for Employee Assistance Programme for domestic problems. His behaviour changed positively but such was short lived.

11. In 2013 the applicant admitted that he had substance abuse problem. During that period he was referred to the Employee Assistance Programme. He personally spoke to him and that he needed to be rehabilitated. Subsequent to that he gave him the consent forms. The rehabilitation centre requires people to come out voluntarily for a treatment. In practice, employees should not be forced to admit to be treated. The applicant had to make an appointment on his own but he refused to do so instead he said he could manage his problems on his own.

12. The reason he did not want to be admitted to a rehabilitation centre was because he felt the cost for the programme was high and he did not want to leave his girlfriend. The applicant continued with the behaviour of being absent without leave.

13. In 2014 he was in a process to charge him for misconduct but the applicant approached his fellow colleagues and begged them to approach him in order to be given a second chance. However, he agreed to this arrangement to give him a second chance. His behaviour did not improve instead it got worse hence he charged him with misconduct. The applicant was consistently coming to work excessively late at 9:00 or

10:00 or 11:00. On 28 September 2015 the applicant was issued with a written warning for unauthorised leave.

14. At one stage the applicant attended an outpatient treatment programme but it did not work as per the report of a Social Worker, Ms Halford. Instead, the report painted a blink picture that he was constantly using drugs.

15. Sometimes, he would phone in to indicate he was coming late but he would not come to work at all. The files would be arranged for the applicant to proceed with his work but he would not come to work at all. This action resulted to the department unable to assist the patients on those days. He took leave without permission even though he had no leave credits. When he had leave credits and he took leave without permission, they would just convert them to unpaid leave and without penalising him.

16. He constantly spoke to the applicant about his bad behaviour and that this would lead to a dismissal. However, the applicant always promised to improve his behaviour but the situation got worse. On 29 October 2015 he issued him with a final written warning for unauthorised leave. The applicant continued with his indiscretions.

17. In May 2016 he requested the applicant to be formally charged. He often discussed the implication of not coming to work and that such would lead to dismissal. After the disciplinary hearing the applicant took unauthorised leave which meant that he was not prepared to mend his ways. The history of the applicant shows that he did not want to correct his behaviour, not even, after the hearing. He refused to be assisted and be rehabilitated. The applicant was granted sufficient opportunity to attend the rehabilitation centre but, unfortunately, he still continued with his bad behaviour. He is not sure that the applicant's behaviour will ever change based on his records. All the sections have staff shortage and if the applicant is reinstated and he becomes absent, the department will suffer operationally. He is not sure whether there is any section that may accept him with his condition.

18. **Mr Rowan James** stated he is employed by the respondent as a Deputy Director at Finance Directorate and he presented the following evidence under oath. He was appointed to preside over the disciplinary hearing of the applicant. Both the initiator and the applicant's representative asked for a sanction of final written warning and the applicant to admit himself to the rehabilitation centre after the applicant had pleaded guilty to the charges. He believes that he was not bound by the plea bargain or any agreements reached by the parties.

19. His role was to deal with the matter fairly and come to an appropriate sanction. Having weighed the disciplinary records, the offer to rehabilitate, the deplorable absenteeism and the assistance given to the applicant, he decided that dismissal was the appropriate sanction in the circumstances.

SURVEY OF APPLICANT'S EVIDENCE AND ARGUMENTS:

20. **Mr Jonathan Petersen** stated that he is the applicant in this matter and he presented the following evidence under oath. At the disciplinary hearing he pleaded guilty to all charges. However, he did not have a chance to go through the rehabilitation programme because he was not given a chance to complete the programme. There was a proposal of a final written warning and to agree that he would attend a rehabilitation centre in Observatory and to complete the fully programme.

21. After the hearing he booked himself into the rehabilitation centre and he has completed the programme and he is a changed person. Presently, he is not working and the dismissal has put on him a financial strain. He has girlfriend and children who are depended on him for financial support. This dismissal has led to him to suffer from depression and he is undergoing counselling sessions. Previously, the drug problem was not cured is because he was still close to his family. The working environment was not good as well as he did not have a desk.

22. **I will refer to cross-examination and closing arguments where necessary in my analysis.**

ANALYSIS OF EVIDENCE AND ARGUMENT

23. The respondent bears the onus in terms of Section 192(2) of the Labour Relations Act 66 of 1995, as amended ("the Act"), to prove on balance of probabilities that the dismissal was effected with a fair procedure and a reason.

24. In determining the fairness of dismissal I must consider item 7 of the Code of Good Practice on Dismissal. The Code states that an arbitrator must consider whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace; and if a rule or standard was contravened, whether or not the rule was a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer and dismissal was an appropriate sanction for the contravention of the rule or standard and the CCMA arbitration Guidelines.

25. There is a rule in the workplace regulating absenteeism and he does not dispute that he was aware of this rule. There is no dispute about the reasonability of the rule and its application thereof. Absenteeism can be divided into late coming, absences from an employee's workstation and absences from the workplace itself for short periods.

26. Employees have a fundamental duty to render service, and their employers have a commensurate right to expect them to do so. Generally, employees are expected to be at their workplaces during working hours unless they have an adequate reason to be absent. Even absence for reasons beyond the employee's control may constitute a ground for termination when the period of absences becomes unreasonable.

27. It is common cause that as from 2009 the applicant had encountered domestic problems and including abusing illegal drug substances. Clause 6 of Resolution No 12 of 1999 states that " *if the investigation conducted by the employer suggests that the employee's ill health is as a result of alcohol or drug abuse , the employer may:*

    a. *counsel the employee;*
    b. *encourage the employee to attend rehabilitation;*
    c. *establish a formal rehabilitation program which the employee will be expected to follow or ;*
    d. *terminate the employment of the employee after following a fair procedures, if the behaviour is repetitive.*

28. Clause 7 of Resolution No 12 of 1999 states that " *if the employee fails to follow the formal program or to attend rehabilitation or to address the problem of alcohol or drug abuse , the employer must give the employee or the employee's representative a written report and consult again with the employee. After consulting with the employee the employer may consider whether to terminate the employment of the employee after the normal disciplinary process is concluded".*

29. It is common cause that the applicant was assisted as required by Clause 6 of the Resolution. The applicant was assisted through the Employee Assistance programme. Evidence also shows that he attended an outpatient treatment programme. Apparently, these programmes failed to rehabilitate him.

30. It is also common cause that the applicant refused to admit himself to a rehabilitation centre as the other programmes were not helping him. At that stage the respondent was left with one option but to invoke Clause 7 of the Resolution. It was at that stage that the services of the applicant should have been terminated as he did not want any further assistance into his problem. Mr Weeder's evidence shows that the applicant's absence at work affected negatively the operations of his section. Obviously, this placed unfair burden to other employees and more so that the section has a shortage of staff.

31. The applicant's challenge to his dismissal is premised on the fact that there was an agreement between the initiator and his representative which stated that he should receive a final written warning and admits himself to a rehabilitation centre. According to him failure by the presiding officer to follow the terms of the agreement

renders the dismissal unfair. It is trite law that the presiding officer's decision, in the public sector, is binding and final and may only be appealed. I agree with Mr James that a plea bargain does not bind a presiding officer unless the respondent recalls a presiding officer or the disciplinary process is terminated by authorised person.

32. In this case the presiding officer was not recalled or the disciplinary hearing was not terminated hence the presiding officer concluded the process. If, indeed a presiding officer were to just accept any plea bargain that will makes a mockery of his or her appointment to preside and determine the matter. Having considered this issue I find that the presiding officer was correct to determine the matter as he saw it fit. This was in line and in accordance with his appointment as a presiding officer.

33. Be as it may the issue that is before me is whether or not the dismissal was fair. It is common cause that the applicant pleaded guilty to all charges which were levelled against him. In this regard I have taken into account that he refused the assistance of rehabilitation, he was on final written warning, the respondent endured his bad conduct for a period of seven years, when faced with the dismissal it was only then he was prepared to be succumb to rehabilitation, these factors outweigh his financial woes and his employment security.

34. In **De Beers Consolidated Mines Ltd V CCMA & Others (2000) 21 ILJ (LAC)** at 1058F –G it was stated "*Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise*".

35. Following De Beers case supra I therefore find that there is no compelling evidence submitted to require me to interfere with the sanction of dismissal by the respondent as the actions of the applicant were destructive in nature and had hampered the operations of the respondent which had gone to the heart of the employment relationship. It is clear to me that he benefited immensely to this relationship because he was kept to it for a long time receiving remuneration, even though this was prejudicial and unproductive to the respondent.

36. Having considered the evidence before me I find on balance of probabilities that the respondent has discharged the onus that the dismissal of the applicant was for a fair reason.

AWARD

37. I find that the applicant's dismissal was fair. The application is hereby dismissed.

Arbitrator: Thuthuzela Ndzombane