



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **KM Moodley**

Case No: **PSHS11-17/18**

Date of Award: **29 August 2017**

In the matter between:

Pawusa obo Njapha AK

Applicant

and

Department of Health- Kwazulu Natal

Respondent

DETAILS OF THE HEARING AND REPRESENTATION

1. The Arbitration commenced on 06 June 2017 and was concluded on 03 August 2017, at the boardroom, Umfolozi Hospital, Empangeni.
2. The Applicant was represented by Mathonzi AS of PAWUSA. The Respondent, Department of Health- Kwazulu Natal was represented by its official, Khumalo VD.
3. The proceedings were mechanically recorded and all witnesses testified under oath. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter. No Points in Limine were raised by either of the parties.
4. The Respondent tabled bundles of documents, i.e. Bundles A to D. The Applicant tendered bundle E as its bundle of documents. The bundles were introduced and accepted as evidence by both parties.
5. No objection was raised to Commissioner Moodley presiding over the Arbitration.

ISSUE TO BE DECIDED

6. The issue to be decided is whether the dismissal of the Applicant was unfair, and if so what the remedy should be.
7. Applicant sought reinstatement to his previous post, with retrospective effect and with full back pay. The Respondent disputed that the dismissal of the Applicant was unfair and sought that the matter be dismissed.

COMMON CAUSE ISSUES

8. The common cause issue agreed upon by the parties is that the Applicant is responsible for processing the removal of bodies from the mortuary as part of the Applicant's duties.

ISSUES IN DISPUTE

9. The dismissal of the Applicant procedurally and substantively is / is not unfair.

BACKGROUND TO THE DISPUTE:

10. Applicant was appointed by Respondent as a Mortuary Services Assistant at the Umfolosi Hospital, in June 2007, and at the time of his dismissal, the Applicant was earning a salary of R10, 858, 00 per month.
11. On 19 August 2016, the Applicant appeared before a disciplinary inquiry. He was found guilty and subsequently dismissed.
12. The Applicant believed that his dismissal was procedurally and substantively unfair. The Respondent was of the view that the dismissal was not unfair.
13. Applicant then referred a dispute to the Bargaining Council.

SURVEY OF EVIDENCE AND ARGUMENTS

14. The following is only a synopsis of the crucial evidence led by witnesses and is not intended to be a detailed record of their evidence in chief.

RESPONDENT

WITNESS 1: J Mdluli

15. Mdluli, the Assistant Director-Systems for the Respondent, testified that the Applicant was his subordinate and was employed at the Mortuary department.
16. On 19 May 2016, he received a call from the PRO of the hospital asking him if coffins were being sold at the hospital. He informed her that it was not so.
17. She then told him that one Mthethwa had informed her that he had bought coffins from the hospital's mortuary.
18. He together with Dlamini and Mthethwa then went to the mortuary where they asked the Applicant to "...show us the coffins that he was selling." Inside the mortuary the Applicant opened a cupboard where they saw 2 coffins inside.
19. Mdluli then asked the Applicant to open the storeroom where a baby coffin was found inside. Mdluli then asked the Applicant if these coffins were the ones that he was selling from the mortuary and he replied "Yes".
20. Mdluli then confiscated the coffins and removed them to his office. To date these coffins are still in his office and no one has come to claim these coffins back from him.
21. Mdluli testified that it is not the policy of the Respondent to sell coffins from the mortuary, and neither is it the policy of the Respondent to store coffins on behalf of private funeral parlours. Neither was there any agreement in place with private funeral parlours to store their coffins on the premises of the respondent. Therefore, the coffins should not have been found on the premises of the respondent.
22. Furthermore, as he was the senior official in charge of the mortuary, he had no knowledge about the coffins, and neither did he give permission for the coffins to be kept there.

WITNESS 2: ZN Mathaba

23. Mathaba was employed as a driver at Empangeni Transport and he testified that on 17 February 2015 he met the Applicant when he went to the mortuary to identify the body of his deceased baby. The Applicant asked him if he had a coffin with which to collect the body. When he replied "no" the Applicant informed him that the hospital had coffins for sale at R250. Mathaba gave the Applicant R250 in cash for the coffin. No receipt was issued to him for the sale of the coffin.

24. According to Mathaba's religious belief, there was no need for a coffin to be used, but he paid for the coffin anyway as he did not want to delay the burial.
25. The Applicant then placed the body into the coffin and loaded the coffin into the car of Mathaba, after issuing him with a certificate authorizing the removal and transportation of the body.
26. It was only when his brother in law had a similar experience at the mortuary in 13 May 2016 that Mathaba began to question whether "... the hospital was selling coffins because they were 'finishing off' the children in order to sell more coffins.

WITNESS 3: K Dlamini

27. Dlamini was employed as a PRO at the hospital and she testified that on 19 May 2016 a very distraught Mr Mthethwa complained to her about the service he received from the Applicant at the mortuary.
28. Dlamini testified that Mthethwa had told her that the Applicant had requested for R300, 00 from him for a coffin. Mthethwa paid the Applicant R300, 00 but did not receive a receipt for the payment.
29. Dlamini immediately called the Supervisor of the Mortuary, one Mdluli to ask him whether the hospital was selling coffins at the mortuary. Mdluli replied "no"
30. She then accompanied Mdluli and Mthethwa to the mortuary where the Applicant pointed out the 3 x coffins in the cupboard and one in a steel cupboard in the store room.
31. Dlamini testified that it was not the policy of the hospital to sell coffins, as this portrayed a very negative image of the hospital in that the public could think that the hospital was killing off its babies in order to sell more coffins.

WITNESS 4: B Mthethwa

32. Mthethwa, the complainant in this matter is employed by Transnet to monitor its buses. He is also the brother in law of witness, Mathaba, and he had accompanied him when Mathaba met with the Applicant to collect the body of his deceased baby. He stated that Mathaba paid R250 to the Applicant for a coffin.
33. On 13 May 2016 at around 14h30 he went to the mortuary to secure the release of the body of his deceased baby, but the Applicant was not there.
34. He later found the Applicant at the nearby Engen garage and promised to pay him the R40 taxi fare if he assisted him immediately. The Applicant agreed to this.

35. Applicant then asked him for R300, 00 for a coffin before he could release the body. Mthethwa then gave the Applicant R300, 00, and the body was released to Mthethwa together with a certificate authorizing the removal and transportation of the body.
36. He did not receive a receipt for this payment.
37. Mthethwa did not feel happy about the treatment he received from the Applicant so he decided to report the incident to the local TV station. They in turn advised him to report the matter to the hospital first. He then approached Dlamini with his complaint.
38. Together with Mdluli and Dlamini he went to the mortuary where the Applicant showed them coffins stored in the cupboard and in the storeroom.
39. Mthethwa testified that the reason why he wanted to expose his experience at the mortuary was because he felt that the hospital was deliberately ill treating its patients because it wanted to sell more coffins. His religion did not permit him to use a coffin but because the Applicant told him that the body would not be released without a coffin, he was forced to pay R300, 00 for a coffin that he did not want. He believed that this was not conduct that should be tolerated by the public.

APPLICANT

WITNESS 1: SK Sibiya

40. Sibiya, the owner of Isipho Funeral Services, testified that he knew the Applicant as he interacted with him regularly at the mortuary. He stated that the hospital borrowed a stretcher from him from time to time whenever it was needed.
41. The hospital also borrowed a baby coffin from him and never returned it to him. He never charged the hospital for borrowing the items.
42. Sibiya testified that he received a call from one Mdluli requesting him to bring in some samples of baby coffins. He duly complied by bringing in different kinds of coffins to show Mdluli.
43. He telephoned Mdluli several times to get the coffins back but Mdluli told him that he was still busy with the coffins and would get back to him, but Mdluli did not do so.
44. To date he still did not get 4 of his coffins back.

45. Sibiya testified that as the coffins belonged to him he still wanted the coffins to be returned to him.

WITNESS 2: AK Njapha (Applicant)

46. Njapha was appointed by the Respondent as a Mortuary Service Assistant at the Umfolozi hospital. He knows Sibiya in the course of his duties as he attends to him when releasing bodies from the mortuary.

47. He testified that the coffins found in the mortuary were borrowed from Sibiya by Mdluli. Mdluli had informed him that he had borrowed the coffins from Sibiya but he did not know the reasons why Mdluli had borrowed the coffins, as he did not ask him. As Mdluli was his immediate supervisor, the Applicant did not think it necessary to question him about it. It was also not unusual for Mdluli to borrow other things as well, e.g. the stretcher, whenever it was needed.

48. He testified that he had never sold coffins at the hospital and that the Respondents witnesses were lying.

“They are lying. They are all liars.”

49. Whenever family members come to the hospital to fetch bodies, they are required to come with their own coffins as the bodies would not be released without being placed into a coffin.

50. He denied that he had a business relationship with Sibiya, or that he had received R250, 00 from Mathaba, or R300, 00 from Mthethwa for the sale of coffins to them.

“I never sold them coffins. They are lying.”

ANALYSIS OF EVIDENCE AND ARGUMENT

51. I found Dlamini, Mathaba and Mthethwa to be credible and reliable witnesses. They presented their evidence in a clear, concise and systematic manner. Their evidence was easily corroborated with the evidence of other witnesses. I therefore had no difficulty in accepting their evidence.

52. Dlamini testified that she, in the presence of Mdluli, Mthethwa and the Applicant, saw coffins in the cupboard and in the store room of the mortuary of the Respondent. These coffins however, did not belong to the respondent and should not have been stored in the mortuary without authorization.

53. This version was duly corroborated by Mdluli. (The ownership of the coffins therefore was not in dispute). I therefore accept that coffins not belonging to the Respondent, were stored in the mortuary
54. Sibiya testified that it was at Mdluli's request that he had simply loaned samples of the baby coffins to Mdluli. The coffins were not returned to him, to date, even though he had requested for it to be returned to him.
55. I find this version of Sibiya highly unlikely and very difficult to accept.
56. The sale of coffins forms an essential part of the funeral parlour business of Sibiya. One would have expected Sibiya to have been more forceful in trying to reclaim the baby coffins from the Respondent, if indeed he had 'lent' the coffins to Mdluli. Other than simply stating that he had telephoned Mdluli to return the coffins, no evidence was led to show that he had pursued this course of action more forcefully.
57. Mdluli on the other hand denied that he had ever asked Sibiya to bring samples of coffins to the mortuary. What could he have gained from doing this? If he had intended to sell coffins from the mortuary he would have had to have the full co-operation of the Applicant for such a plan to succeed. Without the co operation of the Applicant any plan to sell the coffins would fail. I therefore accept Mdluli's version that he did not ask Sibiya to bring sample coffins to the mortuary.
58. I found the Applicant to be rather evasive and not a credible witness. When the Applicant was confronted by Mdluli, Dlamini and Mthethwa about the coffins found in the mortuary, the Applicant did not point out Mdluli as being the individual who requested for the sample coffins.
59. Even in the written statement of the Applicant he failed to mention that Mdluli had requested for the sample coffins. On the contrary, when Mdluli requested the Applicant to furnish him with a written statement about the incident, the Applicant replied that he needed to consult with his union first. Only then did he furnish Mdluli with a written statement. And a very scant one at that.
60. Even though the Applicant sought the advice of his union before he drafted his statement, nowhere in the statement does the Applicant mention the role played by Mdluli, yet Mdluli is alleged to have played a substantial role in this matter. It was only during his evidence in chief that the Applicant stated that Mdluli had "borrowed" the coffins.

61. Additionally, I also found it difficult to accept that the Applicant, as the Mortuary Services Assistant, did not ask Mdluli the reasons why the coffins were “borrowed” and what they were needed for.
62. It is more likely that Sibiya supplied the coffins to the Applicant with the explicit intention of the coffins being sold to bereaved families when they arrived at the mortuary to collect the bodies of deceased children.
63. Mthethwa and Mathaba were credible and reliable witnesses who had nothing personal to gain from pursuing this matter to the extent that they did. On the contrary they must be commended for the time and sacrifices made by them, as responsible citizens, in pursuing this matter right up to the time of this arbitration.
64. I found that the experiences of Mthethwa and Mathaba at the hospital were substantially similar. The fact that they were related by marriage assisted in exposing the ‘sale’ of coffins at the mortuary as they were able to compare their experiences with each other because of their close relationship.
65. Mthethwa and Mathaba had both lost their children at the hospital at different times. On both occasions, when they arrived at the mortuary, the Applicant told them that they could not remove the bodies without a coffin. They informed the Applicant that according to their religious faith they did not require a coffin but the Applicant informed them that the bodies would not be released without a coffin. Mthethwa and Mathaba eventually paid the Applicant R300 and R250 respectively, for coffins and the bodies were then released by the Applicant. They were not issued with receipts for the payments.
66. Mthethwa and Mabatha had no reason to fabricate their experience at the mortuary. Instead they came across as honest citizens who were clearly aggrieved, that at such a low point in their lives, i.e. on the death of their children, they had to endure the treatment that they did, at the hands of the Applicant.
67. Mthethwa was so aggrieved that he initially went to the local TV station to expose the matter, but was redirected by them to the hospital management where he made out a written statement outlining the incident.
68. Clearly this was not the action of someone who would fabricate the incident for ulterior purposes.
69. The Applicant, on the other hand, had everything to lose, in this matter. He attempted to implicate Mdluli by alleging that Mdluli had requested for loan coffins from Sibiya. He conveniently omitted to disclose this vital piece of information

when he was confronted by Mthethwa, Mdluli and Dlamini. He did not disclose this when he drew up his statement. This begs the question as to 'why' he did not disclose such vital information at the appropriate time.

70. As I am faced with two conflicting versions as to whether or not the Applicant did charge Mthethwa and Mathaba R 300 and R250 respectively for the purchase of coffins at the mortuary, I am required to decide his matter on a balance of probabilities.

71. As I have found Mthethwa and Mathaba to be credible and reliable witnesses, I find on a balance of probabilities, that the version put to me by the Respondent is more probable than the version put to me by the Applicant.

72. I therefore find that it is probable that the Applicant did charge Mthethwa and Mathaba R 300 and R250 respectively for the purchase of coffins at the mortuary. I therefore find the Applicant guilty of the charges levelled against him, and I propose to rule accordingly.

73. After considering the mitigating and aggravating factors in this matter, I find that the Respondent argued, successfully in my view, that dismissal is an appropriate sanction in this instance. Dlamini pointed out that the incident had tarnished the image of the hospital tremendously, as the public had the perception that the hospital was deliberately 'killing' babies to sell more coffins. Therefore, the trust relationship between the Respondent and the Applicant had broken down completely.

74. In view of the seriousness of the charges levelled against the Applicant, and the complete breakdown of the trust relationship between the Applicant and the Respondent, I find that dismissal is an appropriate sanction, and I intend to rule accordingly.

75. The procedural fairness of the dismissal in respect of the delay in finalising the disciplinary inquiry speedily was argued by the Applicant, but I do not believe that the delay was such that it prejudiced the Applicant substantially.

CONCLUSION:

76. I find that the dismissal of the Applicant, procedurally and substantively, was not unfair.

AWARD

77. I make the following award:

77.1) I find that the dismissal of the Applicant, AK Njapha, procedurally and substantively, is not unfair.

77.2) The applicant's claim is dismissed.

77.3) I make no order as to costs.



COMMISSIONER: KM MOODLEY