ARBITRATION AWARD

Panellist/s: **Paul Kirstein**
Case No.: **PSHS126-11/12**
Date of Award: **1-Mar-2012**

In the ARBITRATION between:

IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL BARGAINING COUNCIL (HELD AT GEORGE)

CASE NO: PSHS126-11/12

In the matter between

G APRIL — **First Applicant**

P ADENDORFF — **Second Applicant**

And

DEPARTMENT OF HEALTH: WESTERN CAPE — **Respondent**

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1.

The arbitration was set down on 23 February 2012 in George. The applicants were represented by advocate Malgas. The respondent was represented by F Rodriques, an official in the employment of the respondent. The respondent submitted a bundle of documents marked bundle "A". The arbitration was mechanically recorded.

ISSUE IN DISPUTE

2.

The applicants contend that their dismissal on 15 November 2010 was substantively unfair. The procedural fairness of the dismissal is not in dispute.

SUMMARY OF EVIDENCE

3.

D P de Koker, employed by Fidelity Services, testified on behalf of the respondent and indicated that Fidelity Security provided security services at the George hospital during the relevant incident on 14 June 2010. On 14 June 2010 a security meeting was conducted at the George hospital on request of Lotter, the director of

the George hospital. After the meeting an inspection was conducted and it was observed that a security camera was closed with tape. The applicants were observed in one of the store rooms. De Koker went to call Lotter. A water trail was noticed from the store room to a vehicle. De Koker referred to photos he had taken of the water trail and the vehicle. A stainless steel pot was in the back of the vehicle. The applicants returned to the vehicle. The foreman of the workshop confirmed that the stainless steel pot belonged to the George hospital. The second applicant indicated to Lotter that the first applicant asked him to remove the pot. The first applicant said that he needed the money. The applicants pleaded guilty to a criminal charge.

4.

The next witness on behalf of the respondent was N Lotter, the director of the George hospital. Lotter referred to the meeting conducted on 14 June 2010 with Fidelity Security regarding security issues. Lotter was called after a meeting to observe a vehicle in the parking area. Lotter saw the stainless steel pot in the vehicle. Lotter indicated that a new similar pot value is R58 000.00 and estimated the value of the pot in the vehicle at plus minus R10 000.00. Lotter confirmed that the pot in the vehicle belonged to the George hospital. The second applicant informed Lotter that the first applicant asked him to remove the pot. The first applicant indicated that he needed the money and wanted to sell the pot. The

second applicant was on leave on 14 June 2010. Lotter gave a description of the pot and indicated that it was not possible for one person to remove the pot. The pot was condemned but some of the parts of the pot could still be used. The pot could have been placed on tender and staff can tender to purchase the pot. Lotter confirmed that the applicants pleaded guilty on a criminal charge. The applicants were not suspended after 14 July 2011. Lotter indicated that the services of Adendorff as an artisan was required. Locks of the change room were changed. Lotter indicated that the applicants cannot be trusted.

5.

The first applicant testified and indicated that he is an artisan assistant employed at the George hospital. The first applicant was employed at the George hospital for 3 years. The first applicant indicated that he did not request the second applicant to assist him to remove the pot. The first applicant does not know why the second applicant was at the George hospital during his period of leave. The first applicant accompanied de Koker and Adendorff where he saw the water mark on the floor leading to the vehicle and the pot. The first applicant denied that he me made any admissions during a discussion with Lotter. The first applicant indicated that he has a vehicle and there was no reason why he should call the second applicant. The first applicant indicated that his wife is employed and he has no financial problem. The

first applicant indicated that he was not suspended and conducted normal duties until his dismissal. The first applicant seeks reinstatement.

6.

The second applicant testified and indicated that he was employed at the George hospital in the capacity as an artisan. On 14 June 2010 the first applicant called the second applicant to assist him to remove the pot. The first and the second applicants loaded the pot in the second applicant's vehicle. The intention was to sell the pot for scrap metal. The second applicant indicated that the pot was discarded and was of no value. The second applicant confirmed that he was not suspended and was employed until his dismissal. The second applicant referred to his personal circumstances. The second applicant seeks reinstatement.

ANALYSIS

7.

It is common cause that the applicants were dismissed on 15 November 2010. The applicants contend that their dismissal was substantively unfair. The procedural fairness of the dismissal is not in dispute. It is common cause that a stainless steel pot belonging to the George hospital was found on 14 June 2010 in the vehicle of the second applicant. On behalf of the respondent de Koker and Lotter indicated that the second applicant admitted that he was requested by the first applicant to

assist him with the removal of the stainless steel pot in an effort to sell the pot. It was indicated that the first applicant needed the money. The version of the second applicant at the arbitration confirmed the evidence presented by De Koker and Lotter. Both witnesses on behalf of the respondent and the second applicant implicated the first applicant. The version of the first applicant that he was not involved in the removal of the stainless steel pot is rejected. The applicants pleaded guilty to a criminal charge relating to the removal of the stainless steel pot. The allegation of misconduct contained in the notice to attend a disciplinary hearing reads as follows:

"On 14 June 2010 you were found in possession of a property belonging to George hospital, a large stainless steel pot in the parking garage without authorisation of management."

It was submitted on behalf of the applicants and specifically the first applicant that he was not found in possession of property belonging to the George hospital. In the case of **MUTUAL CONSTRUCTION COMPANY TVL (PTY) LTD** [1] the court dealt with the issue when the formulation of disciplinary charges would give rise to an unfair dismissal. The test was whether the employee understood the charges against him and whether he was able to conduct his case properly. In the case of **FIRST NATIONAL BATTERY (PTY) LTD** [2] the Labour Court took the view that a dismissal was not necessarily unfair solely because the employer had "mislabelled" the disciplinary offence the employee faced. The applicants were aware what the allegation of

[1] **Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & Others** [2010] 5 BLLR 513
[2] **First National Battery (Pty) Ltd v CCMA & Others** [2010] 5 BLLR 534 (LC) and **National Commissioner of the SAPS v Safety and Security Sectoral Bargaining Council** (Unreported JR2938/09)

misconduct was. There is no indication that the applicants were prejudiced because of the possible mislabelling of the allegation of misconduct. It is common cause that the applicants were not suspended after the incident on 14 June 2010. It has correctly been submitted by the respondent that a precautionary suspension has a specific purpose and that it is not a requirement that once an incident happened that an employee must be suspended. Lotter's explanation why the applicants were not suspended is rational and reasonable. The applicants' services were still required. Precaution was made with regard to the change of the locks.

8.

It is common cause that the stainless steel pot was condemned. The stainless steel pot although condemned had some value to the respondent. The version of the applicants that there could have been no financial loss to the respondent is rejected. In the case of **DE BEERS CONSOLIDATED MINES LTD** [3] a strict approach was justified with regard to dishonest conduct in the workplace where the following was stated:

"[13] It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust. In De Beers Consolidated Mines Ltd v CCMA & others [2000] 9 BLLR 995 (LAC) para 22, the court, per Conradie JA, held the following regarding risk management:

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. That is

[3] **De Beers Consolidated Mines Ltd v CCMA & Others** [2009] 9 BLLR 995 (LAC), also followed in **Shoprite Checkers (Pty) Ltd v CCMA & Others** [2008] 9 BLLR 838 (LAC)

why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise."

In the case of **TOYOTA SOUTH AFRICA MOTORS (PTY) LTD** [4] it was held that serious acts of misconduct such as gross dishonesty would render factors such as length of service and a clean disciplinary record irrelevant in determining the appropriate sanction to be applied and came to the conclusion that a high premium is placed on honesty in the workplace. On the evidence presented at the arbitration it is clear that the applicants harboured a dishonest intention to remove the stainless steel pot for personal gain. The evidence of Lotter that the employment relationship has been destroyed was not put in dispute. The respondent proved on a balance of probabilities the allegation of misconduct. The sanction of dismissal was appropriate and fair.

AWARD

1. The application is dismissed. The dismissal of the applicants on 15 November 2010 was substantively and procedurally fair.

2. No order as to costs.

SIGNED AT PRETORIA ON THIS THE 27th DAY OF FEBRUARY 2012.

[4] **Toyota South Africa Motors (Pty) Ltd v Radebe & Others** [2003] 3 BLLR 243 (LAC) and **Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others** [2008] BLLR 241 (LC)

PH KIRSTEIN (ARBITRATOR)