



ARBITRATION AWARD

Panellist/s: Joseph Mphaphuli
Case No.: PSHS155-10/11
Date of Award: 30-Apr-2011

In the ARBITRATION between:

NEHAWU obo Jameson PJ

(Union / Applicant)

and

Department of Health – Western Cape

(Respondent)

Union/Applicant's representative: Mr Frolicks
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Worcerter

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Respondent's representative: Mr Nginase
Respondent's address: Private Bag x 24
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DETAILS OF HEARING AND REPRESENTATIONS

This is an award in terms of Section 138 (7)(a) of the Labour Relations Act 66/1995 ("The Act") as amended. The arbitration hearing was conducted in terms of Section 191 of the Labour Relations Act 66/1995.

The proceedings were conducted at the Respondent's premises in Bredasdorp on 19 April 2011.

Mr Nginase a labour relations officer in the service of the Respondent appeared on behalf of the Respondent. Mr Frolicks an official of an employee organisation appeared on behalf of the Applicant. The Applicant was also in attendance.

The proceedings were mechanically recorded.

ISSUE IN DISPUTE

Whether the dismissal was for a fair reason and was effected in accordance with a fair procedure as contemplated by Section 188 and Schedule 8 of the Act, if not, what remedy was appropriate.

BACKGROUND TO THE DISPUTE

The Respondent conducted its business in the emergency medical services. The Respondent's premises were located in Bredasdorp. The Applicant was appointed on 01 January 1990. The Applicant served in the capacity of ambulance emergency assistant. The Applicant was remunerated at R 138 801.00 per annum. His dismissal took place on 14 May 2010. His dismissal was for a reason related to conduct.

Only the substantive fairness of the dismissal was contested, namely the appropriateness of the dismissal penalty.

The Applicant Party favoured reinstatement in the event of a successful application.

FACTORS OF COMMON CAUSE

It was undisputed that the Applicant acted in breach of discipline, namely that the Applicant was insubordinate. The pre-dismissal procedure was not at all disputed.

SURVEY OF EVIDENCE AND ARGUMENT

The Applicant took oath and gave evidence. The incident took place on 01 January 2010. He was on night duty and posted on ambulance duty. He received a call from the control room. According to the call he was assigned a patient transfer duty. This in respect of two patients who were to be transferred from one hospital to another. He resisted the call because there was another employee on duty who could have taken the call.

The employee in question was his supervisor. The supervisor eventually impressed upon him to take the call. He still did not feel that it was fair for him to take the call. The supervisor eventually took the call himself.

He had been in the service of the Respondent for over twenty years. He had an unblemished disciplinary record and an excellent performance record.

To the best of his recollection similar infractions were not treated as harshly as was the case in his matter.

He recalled that one Mrs Barlow currently in the Respondent's service was charged and found guilty of similar misconduct. The employee was on standby duties on 23 August 2010.

The employee was called to pick up a cancer patient from his house. The crew on duty was away on another assignment. The employee refused to proceed to pick up the patient and suggested that the patient could wait for the crew on duty to return. The patient died en route to hospital. The patient was transported by unqualified lay people as there was no assistance from EMS.

ANALYSIS OF EVIDENCE AND ARGUMENT

The onus to establish the fairness or otherwise of a dismissal in actual dismissal disputes rest with the dismissing party, invariably the employer is the dismissing party. To establish the fairness of a dismissal the employer party must lead evidence to prove that there was misconduct, that is in cases where misconduct was the reason for dismissal as it was the case in this matter. Where the existence of misconduct has been proved, the employer party must proceed to prove that the misconduct was a fair reason to dismiss.

In terms hereof it must be proved that the misconduct was grave or that the affected employee had an inclination to commit misconduct and that corrective disciplinary action had not succeeded in reforming the employee.

If an employer's evidence meet with the requirements herein above stated, the conclusion that the dismissal was substantively fair will be inevitable.

The existence of misconduct was not in dispute. The only disputed issue was whether dismissal was an appropriate penalty and whether the Respondent was consistent in its approach to the application of discipline.

The answer to these questions can only be given with reference to the duties and obligations of parties in an employment relationship. An employment relationship is a relationship of performance. Employees have a duty to perform their duties and to submit to the authority of employers.

Subordination is the chief characteristic of an employment relationship and distinguishes an employment contract from other forms of contracts of equality. In an employment contract an employer occupies a senior position.

The seniority status entitles an employer to give an employee work instructions. An employee is under obligation to carry out the instructions provided the instructions are fair and reasonable. Failure or refusal to carry out an instruction constitutes misconduct, namely insubordination.

Refusal to carry out an instruction constitutes grave misconduct. Refusal to carry out an instruction is a material breach of an employment contract and entitles the innocent party to withdraw from the contract. In contractual terms refusal to carry out an instruction amount to repudiation of a contract.

The Applicant's conduct was a demonstration of belligerence. The misconduct took place in circumstances that did not suggest justification. The Applicant's conduct undermined management's duty to manage and could not be treated in a lenient manner.

The fact that the Applicant had an exemplary service record and a lengthy one at that did not compensate for the gravity of the misconduct.

The Applicant Party raised issue with the Respondent in as far as consistency was concerned. At most the Applicant simply made vague, wild and unsubstantiated claims in this regard. The claims were not in any way supported by facts or evidence.

Having determined that the misconduct was grave and that the inconsistency claim in respect of the Respondent's approach to similar matters was unfounded, it is my conclusion that the dismissal penalty was just and equitable.

AWARD

1. The dismissal was not unfair.
2. I dismiss the application for an unfair dismissal.

A handwritten signature in black ink, appearing to read 'Joseph Mphaphuli', written in a cursive style.

Joseph Mphaphuli
Signed
PHSDSBC Panelist
30 April 2011