



ARBITRATION AWARD

Panelist/s: Bhekinlanhla Stanley Mthethwa
Case No.: PSHS223-10/11
Date of Award: 14-Apr-2011

In the ARBITRATION between:

HOSPERSA obo Sokane Obakeng Jacob
(Union / Applicant)

and

Department of Health: NW
(Respondent)

Union/Applicant's representative: JJ. Barnard.
Union/Applicant's address: P.O. Box 1784
Klerksdorp
2570
Telephone: (018) 462-3692
Telefax: (018) 462-1362

Respondent's representative: M. Adoons
Respondent's address: Private Bag X 2064
Mmabatho
2735
Telephone: (018) 388-2040
Telefax: (033) 384-5521

Details of hearing and representation:

1. The matter was scheduled for arbitration on 14 March 2011 at the Department of Health and Social Development Sub-District Offices in Ventersdorp. Mr. JJ. Barnard a trade union representative from HOSPERSA represented Mr. Obakeng Jacob Sokane (hereinafter referred to as the Applicant) and Mr. M. Adoons represented the Department of Health (hereinafter referred to as the Respondent). The proceedings were digitally recorded.
2. Having presented their respective cases, parties agreed to submit heads of argument by 22 March 2011 but only did so on 30 March 2011. The last day of this arbitration is thus 13 April 2011.

Issues to be decided:

3. The issue to be decided is whether or not the dismissal of the applicant was substantively and procedurally fair.

Background to the issue:

4. The applicant was appointed as an Administration Officer on 8 December 2003. He was earning R132 384.00 in annual remuneration when he left employment. He continued in that capacity until the 1st of June 2010 when his services were terminated for an alleged misconduct.

Summary of evidence and arguments:

5. All witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The respondent led evidence of Mr. Ishmael Motsamai Moloi, Ms Suzan Gaolatheope Modisakgosi and Mr. Trevor Simon Tebogo Tawana. The applicant also testified. Their evidence may be summarized as follows;

Respondent's case:

6. The respondent contended that the applicant was dismissed for misconduct in that on 10 November 2008 he assaulted another employee while on duty, conducted himself in improper, disgraceful and unacceptable manner and displayed disrespect towards others in the workplace. As a result of the commission of the said offences the applicant was charged, found guilty and dismissed. It is on these bases that the respondent contended that the applicant's dismissal was substantively and procedurally fair.

The respondent called three witnesses in support of its case.

First witness-Ishmael Motsamai Moloji

7. Mr. Moloji testified as follows:
8. This matter involved an alleged misconduct against Mr. Sokane who was employed as a Transport Officer serving both the sub district office and the hospital. The alleged misconducts levelled against the employee/officer were as follows: (1) assaulting another employee while on duty, (2) improper, disgraceful and unacceptable manner, (3) giving false statements while being investigated, (4) displaying disrespect towards others in the workplace and; (5) contravening public service code of conduct in the workplace. The hearing was held on 24 April 2009 at Ventersdorp Sub-District Office.
9. Based on the above charges the sub-district office deemed it necessary to appoint the investigating officer to establish as to whether grounds existed to proceed with the charges of misconduct against the officer. The investigation was consequently concluded and the hearing was held according to the above charges. The hearing was to establish as to whether the processes of both procedural and substantive fairness existed and that they were properly followed to arrive at the charge(s), and therefore for the hearing to establish and recommend the appropriate sanction with regard to the matter. The hearing was further supposed to ensure that both parties were given a fair opportunity to present their sides of the story. The employee pleaded not guilty to the charges.
10. The employer representative introduced the case and led the evidence of Mr. Tawana who indicated that the accused slapped TD Letsoge while there were four other people in the room. The witness also confirmed his presence when the accused assaulted TD Letsoge. Under cross-examination the accused did not ask any questions to the witness. The second witness was Ms. Modisakgosi. She indicated that the accused slapped Letsoge once and was requested to stop. The accused went on to slap Letsoge again even when he was asked not to do so. Under cross-examination the employer representative wanted to know the number of people who were in the room during the incident. In response it was stated that there were five present but only four people who saw the incident as the other person was busy and did not see the incident.
11. The employee representative presented a defence and indicated that there was no proof that the offence was committed. He stated that they were not furnished with the investigation report, there were contradicting statements from the witnesses, and for example, one witness was indicating they were three people and another witness indicated that they were four. Charge three should be removed from

the charge sheet. The second witness denied that the accused communicated with Mr. Tawana, in general all the witnesses were not credible, and hence the case should be dismissed. The representative requested the accused to explain what transpired on the day in question. The accused stated that he heard footsteps behind him while walking outside the boardroom. He then turned around and saw TD Letsoge doing something very close to him as he was following him. He assumed that Letsoge was measuring his height with his hands. He also assumed that he was attacking him and then he pushed Letsoge. The accused called Moepeng as a witness. He testified that he was inside the boardroom when the incident took place and he could not see it. Under cross examination no questions were asked to the witness.

12. In analysing evidence he found that the first witness was not challenged regarding her testimony. There was corroboration between the two witnesses and thus the matter was fully substantiated. He found that there was unwelcomed contact to TD Letsoge by the accused. The accused tried to argue that the incident took place outside and not in the registry. It was very clear that the incident happened inside the registry. The accused had slapped Letsoge and he was asked to refrain but he did it again. This version was never challenged. It is very clear that the accused displayed a bossy attitude, and dominance to all other colleagues present at that time. The accused continued to launch a personal and physical attack to Letsoge thereby tarnishing his dignity and integrity. The accused failed to uphold the prescripts of the code of conduct in that he fought a fellow employee while on duty and continued even when advised to stop. Even when the accused thought that he was attacked he had no right to fight back when there was no threat or contact to him. There was no remorse shown by the accused as he believed there was nothing wrong in what he did. Charges 3 and 5 were removed as there was no proof to substantiate them. The accused was then found guilty on charges 1, 2 and 4.
13. In aggravating circumstances it was found that the accused as a senior employee he was expected to lead by example. His seniority was not supposed to mean superiority over other peoples' lives. He should have known that he was supposed to lodge a grievance against Letsoge when he thought he was attacking him. It was very clear that the accused assaulted Letsoge while on duty. The type of the offence committed was a dismissible offence. The employer representative recommended 3 months suspension without pay and a final written warning.
14. In mitigating circumstances it was submitted that the accused did not have any disciplinary record since his appointment in the year 2003. He was a bread winner in his family with a mother and three sisters to look after. He was currently having a car and a bond to pay. He was also having an expecting partner. There were no major problems at the workplace; the trust relationship was not broken after the incident.

He demonstrated some form of remorse. He was further prepared to make a formal apology and accept a serious warning and counselling.

15. In conclusion he found that there was some degree of acceptance that the accused assaulted Letsoge. The accused did not show any form of remorse as he was adamant that he had just pushed Letsoge and it was outside the building. The incident took place inside the building and there were high probabilities that the accused was trying to lie in his favour. The accused tried to strengthen his case with a witness who did not have a clue of what happened. This case has shown that the accused did not show any sign of being corrected from this unacceptable attitude. Assault on its own renders the employer/employee relationship damaged. Other officers could not discharge their functions freely in the presence of the accused with his fighting attitude. He then recommended that the accused should be dismissed from the public service.
16. He had followed the correct procedure in prosecuting the case and the applicant had committed a dismissible offence. The assault render working relationship damage; in this instance it was very clear that if an employer condones an attitude of fighting; it will be difficult for other officers to function with somebody who can easily fight with other officers and be given a 3 month suspension or a written warning.

Second witness – Suzan Gaolatlheope Modisakgosi

17. Ms. Modisakgosi testified as follows:
18. On 10 November 2008 she was acting as a switch board operator. There was a function at the boardroom. The applicant brought food that was left over from the function. When Thabo (Letsoge) and Trevor (Tawana) were approaching the switch board door the applicant slapped Thabo. She was sitting straight direct to the door and her view was not hindered. She asked the applicant not to assault Thabo but he proceeded hitting him.
19. She reported the matter to Thabo's supervisor through a text message. She did not report the matter to the police because the matter could have been resolved within the department. The department has its own procedures and she could have not jumped the management and go to the police station.

Third witness – Trevor Simon Tebogo Tawana

20. Mr. Tawana testified as follows:
21. On the day in question they were in the office with Thabo. There was a meeting in the boardroom for the sub-district office. Suzan (Modisakgosi) called them to come and collect food from the registry. On their way to the registry Thabo missed the door where Suzan was and he nearly entered the boardroom by mistake and they then laughed at that incident.
22. The applicant was getting out of the bakkie. When he approached them he said you are taking me for granted son (“o wa ntlwaela”). They were not sure whether he was talking to him or Thabo. He then asked who he was talking to and he said he was talking to Thabo.
23. The applicant then told Thabo that he will discipline him. That is when the applicant slapped Thabo and Suzan tried to stop the applicant. The applicant then left the boardroom. He was using an open hand when he slapped Thabo four times. The incident happened inside the registry. He did not report the matter to the police.

Applicant's case:

24. It was the applicant's case that he did not commit an offence in the manner alleged. Further that the respondent breached its code of conduct in prosecuting its case. The chairperson was biased and did not apply his mind to the facts before him. It was on these bases that that the applicant contended that his dismissal was both procedurally and substantively unfair.

The applicant testified on his own and did not call any witness.

25. He testified as follows:
26. They had a meeting at the sub-district offices at about 13h45 he was sent by the Sub-District Manager to go and check whether the caterers had arrived with the food. When he went out of the boardroom he turned to his right because he was going to the reception.
27. After turning to the right he noticed some footsteps behind him and they were very close. He decided to turn and check. He found the guy doing some funny things and he was trying to measure his height. That guy was a total stranger to him. He asked that guy what he was doing. The guy responded in a cheeky manner. He then pushed the guy away and walked away

28. After a week or so he got a letter from his supervisor stating that he had assaulted a fellow employee. He was requested to give his response in writing and he did so. He was never suspended and he was coming to work up until the date of his dismissal.
29. He only saw Thabo and he did not see another person. He had a relationship with Thabo's supervisor and it ended before the incident. He thought witnesses were used by his ex-girlfriend (Thabo's supervisor) to get back at him. He did not use the word "o wa ntlwaela". He did not challenge that version because he thought his representative would challenge it. It was not true that he said "o wa ntlwaela".
30. On the 10 November 2008 he was at the sub district offices for interview meeting, at around 13h00 he went out of the boardroom to check if the caterers had arrived. After getting out of the boardroom he heard the footsteps behind him and when he turned around it was this guy, Thabo Letsoge, he found this guy imitating his movements and making demonstration of measuring his height. He then asked him what he was doing and the guy got cheeky and nasty. He got closer and asked him once more and he got nastier and he told him that he needed to be disciplined and pushed him. So like any other human being he reacted; if that was an assault and he thought the guy was insulting and discriminating.

Analysis of evidence and arguments:

31. It is common cause that if there is a dismissal, the employer bears the onus in terms of section 192 (2) of the LRA to prove that the dismissal of the employee was fair. On the other hand section 188 (1) provides that a dismissal is not unfair if the employer proves that the reason for dismissal was for a fair reason based on the employee's conduct (and that the dismissal was effected in accordance with a fair procedure).

The allegation that the applicant assaulted another employee at the workplace

32. The applicant was charged and found guilty for assaulting another employee while on duty, as well as for improper, disgraceful and unacceptable conduct and displaying disrespect towards others in the workplace. The applicant's defence was that he did not commit offence in the manner alleged. He had just pushed Thabo Letsoge away after finding him measuring his height. The sanction of dismissal did not fit the offence; it was too harsh. The respondent had also failed to follow fair procedures as provided for in the disciplinary code. On the other hand the respondent maintained throughout this arbitration hearing that the applicant assaulted Thabo Letsoge.

33. Mr. Adoons argued that the employer had proved on a balance of probabilities that assault had taken place and there was no push as alleged by the applicant. I agree with that proposition. Not only was Modisakgosi's evidence plausible, but it was corroborated by Tawana regarding the assault. Apart from a minor inconsistency regarding how many times Letsoge was hit; instead; the number of attacks were confirming rather than undermining the authenticity of their testimony. They reacted impressively to an exacting cross-examination by Mr. Barnard. They were consistent in what the applicant did to Letsoge and the events that led to the assault. They both testified that Modisakgosi asked the applicant to stop but he did not stop assaulting Thabo. The applicant's version was not believable. The applicant's defence was riddled with contradictions; at one stage during his opening statement the assault to Letsoge was not serious, the next time he did not assault Letsoge and the sanction meted out was too harsh. It is highly unlikely that somebody that did not assault someone would argue along these lines. This type of defence is consistent with someone who is desperately trying to cover up his deeds and along the way making adjustments. Therefore, I find the respondent's witnesses clear and consistent, whereas the applicant's testimony was inconsistent, illogical and lacking in credibility.
34. The applicant also denied that he ever said "o wa ntlwaela" to Letsoge. He also denied that there were other employees present when the incident took place. According to the applicant they were only two with Thabo Letsoge. Surprisingly, these versions were never put to any of the respondent witnesses (more specifically, Modisakgosi and Tawana) when they were giving evidence and therefore I cannot attach any weight to it. I also find it very hard to believe that the applicant's dismissal had anything to do with his ex-girlfriend as he wanted me to believe. The applicant failed dismally to substantiate this line of defence. Therefore, this version must be rejected out of hand and it lacked substance. Instead, there was corroboration from all three respondent witnesses that the applicant was dismissed for assaulting Letsoge on 10 November 2008. Even if the applicant's version could be accepted that he only pushed Thabo; that is an offence; pushing is an assault. In my view the applicant's offence should be viewed in a serious light since pushing is not different from assault. Accordingly, I find the applicant guilty of the assault.
35. One of the invariable consequences of assault and fighting at the workplace is that there is an immediate impact on the employment relationship and the employer's business. Relationships are strained and there is distraction from work. For these reasons the Code of Good Practice: Dismissal lists physical assault on the employer, a fellow employee, client or customer as misconduct which could warrant dismissal for a first offence. Even where the assault takes place away from the workplace, it can impact on work relationships in a damaging way. In [*Foschini Group \(Pty\) Ltd v CCMA & others \(2001\) 22 ILJ 1642 \(LC\)*](#) such an assault was held to justify dismissal. In my view assault by a senior employee

on a junior employee is especially destructive of workplace relationships, effectively destroying trust and the potential for an on-going relationship. In the circumstances of this case I find dismissal on the assault charge alone was appropriate sanction. In my view it is neither nor there that the respondent did not call the victim during the disciplinary hearing and the arbitration hearing. That is just an academic argument not taking this matter anywhere. Therefore, the applicant cannot rely on this issue as defence.

The allegation that the applicant's dismissal was procedurally unfair

36. It was argued on behalf of the applicant that his dismissal was unfair because the respondent had breached Resolution 2 of 1999, as amended. The chairperson of the enquiry failed to make pronouncement within five days as provided for in the said Resolution. However, this attack was not developed further during his evidence-in-chief. In my view that contention does not hold water and it should be rejected. I concur with the respondent's representative that a delay in issuing a disciplinary hearing outcome does not affect the validity or fairness of the sanction. In my view the absence of any evidence in this regard from the applicant was a clear indication that there were no defects in the disciplinary procedures.
37. Therefore, I find on a balance of probabilities from the evidence presented at this arbitration hearing by Moloï that the principles of natural justice were observed prior and during the disciplinary of the applicant.
38. Accordingly, I am satisfied that the respondent followed a reasonably fair procedure in respect of the dismissal of the applicant in the present dispute.

Appropriateness of sanction

39. The respondent's representative contended that the relationship between the parties had strained and destroyed. On the other hand the applicant's representative argued that since the applicant was not suspended until his dismissal that was a clear indication that the relationship has not been strained.
40. Despite that there was no evidence led in this regard but I do not agree with the applicant's contention. In my view the nature of the offence (assault) is sufficient to strain the relationship between the parties. Secondly, it could be very difficult to enforce discipline in the workplace if the applicant could be

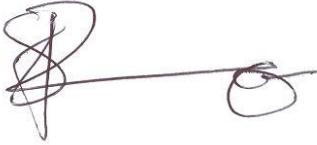
reinstated and issued with a warning as suggested by the applicant's representative. In fact that would make a mockery of the respondent's disciplinary code and the discipline in the workplace.

41. Finally consideration must also be given to the personal circumstances of the applicant. He had been in the respondent's employment for almost 6 years. I think that constitutes a lengthy record of service but it does not warrant special consideration in mitigation. Instead, that works against the applicant; he ought to have known better that he would be held accountable for his wrongful deeds. I have also noted that the applicant has not been able to find alternative employment in the last 10 months since his dismissal, which would represent considerable hardship to himself and his dependants. However, if I weigh up the hardship against the offence he committed I am unable to find that the hardship outweighs these factors to warrant a finding that the dismissal was unfair. In my view no employee, can expect to be forgiven for assaulting other employees in the workplace.
42. The applicant did not show remorse during this arbitration hearing and that further undermined the working relationship and such conduct erodes the trust relationship. I am mindful of the hardship that this dismissal has brought to the applicant, but having weighed up the above factors I believe that the dismissal was for a fair and valid reason. In fact the applicant was the author of his own demise; you cannot just decide to beat up your colleague at work and expect mercy in dealing with the incident.
43. Having taken all the factors into consideration as required by schedule 8 of the LRA and Sidumo's case, I find that the gravity of the offence committed by the applicant is one that under the circumstances warrants dismissal and I make the following award.

Award:

44. Dismissal of Mr. Obakeng Jacob Sokane is confirmed, as both substantively and procedurally fair.
45. The applicant's application is dismissed and he is not entitled to any relief.
46. No order for costs is made.
47. This file should be closed.

DONE AND SIGNED IN JOHANNESBURG ON THIS 13TH DAY OF APRIL 2011.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a horizontal line and a smaller, circular flourish at the end.

Arbitrator: Bhekinhlanhla Stanley Mthethwa

DETAILS OF HEARING AND REPRESENTATION

ISSUE TO BE DECIDED

BACKGROUND TO THE ISSUE

SURVEY OF EVIDENCE AND ARGUMENT

ANALYSIS OF EVIDENCE AND ARGUMENT

AWARD

Panellist/s: **Bhekinlanhla Stanley Mthethwa**
Sector: **Public Health & Social Development**