



ARBITRATION AWARD

Panellist/s: Colin Rani
Case No.: PSHS249-11/12
Date of Award: 20-Nov-2011

In the ARBITRATION between:

TIMOTHY VISSER

(Union / Applicant)

and

Department of Health – Provincial Government Western Cape

(Respondent)

Union/Applicant's representative: Mr. W Field
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Respondent's representative: Mr. F Rodrigues
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DETAILS OF HEARING AND REPRESENTATION

- [1] The matter was scheduled for and heard as an arbitration process on 13 October 2011 in Athlone. Mr W Field represented the applicant and Mr F Rodriques represented the respondent. The proceedings were finalised in the time allocated save only for heads of argument that were submitted in writing. An extension of the 14-day period in which the award needed to be issued was sought and granted to 21 November 2011. The proceedings were digitally recorded.

BACKGROUND TO THE DISPUTE

- [2] The applicant is employed as an employee of the respondent and he holds the position of Chief Executive Officer of the Eerste River Hospital. He was called to the office of the respondent's director (Dr Giovanni Perez) on 10 June 2011 and was handed a letter titled "Intended suspension from Service as a Precautionary Measure". The letter stated that there were four serious allegations against him and that pending investigations into the allegations, the respondent intended suspending the applicant from duty with immediate effect as a precautionary measure. The letter afforded the applicant an opportunity to submit reasons if he was of the opinion that he should not be suspended.
- [3] The applicant delivered a response to the letter of intended suspension on 13 June 2011 wherein he set out in essence why he contended that he was not guilty of serious misconduct. The applicant exclusively addressed the merits of the charges and not the issue whether he should be suspended or not.
- [4] The applicant received a letter on 14 June 2011 that he was suspended with full emoluments with immediate effect pending the outcome of the investigation.

ISSUE TO BE DECIDED

- [5] I am required to determine whether the respondent committed an unfair labour practice in suspending the applicant.

SURVEY AND ANALYSIS OF THE EVIDENCE

- [6] The applicant presented evidence in person and he called no further witnesses. Dr Perez testified on behalf of the respondent and no further witnesses were called. I have deemed it proper, for purposes of this brief award, to deal with the survey and the analysis of the evidence simultaneously. I do not see the need to summarise and or analyse the evidence presented in any detail other than dealing with the issues relevant to the issue that needs to be determined.
- [7] The applicant's first challenge to the fairness of his suspension is the procedural fairness thereof in that he claims that he was not granted a genuine opportunity to make representations as to why he should not be suspended pending the investigation into the allegations against him. I must state immediately that the applicant's allegation in this regard is not accepted, as he was very clearly given the opportunity to submit reasons why he should not be suspended. The applicant is not an uneducated person and he can be expected to have known what was required from him when handed the letter of intended suspension. He was not asked to comment on the merits of the charges and the fact that he chose to do so can only be laid before his own door. To now claim that the respondent did not afford him an opportunity to give reasons why he should not be suspended is clearly not in line with the very clear evidence that he was in fact afforded such an opportunity.
- [8] I do not agree that the respondent, when they realised that the applicant did not provide reasons why he should not be suspended but rather addressed the merits of the allegations, ought to have granted the applicant a further opportunity to do so. He was given a fair opportunity to do so and he cannot now claim procedural unfairness simply because he did not read or allegedly did not understand what was expected from him. I have already stated that the applicant is not an uneducated individual and he as such can reasonable be expected to have known what was required from him when handed the letter of intended suspension.
- [9] The applicant further challenged the substantive fairness of his suspension on essentially two grounds. The first challenge is that the respondent did not apply its mind to whether or not there existed a valid reason for the applicant's suspension and that the reasons given for the suspension are not valid reasons under the circumstances. The second challenge is that the suspension is unlawful in that the maximum period stipulated in the Disciplinary Code has been exceeded and is excessive.

- [10] I will deal with the second challenge, i.e. that the period of suspension has been exceeded, first. I am unable to accept the applicant's submissions that this issue should be determined as part of the dispute that was placed before me. It is common cause that the period of suspension has not as yet been exceeded at the time that the dispute was referred for conciliation. It is trite that the only dispute that may be arbitrated is the one that was referred for conciliation. Since the suspension has not as yet exceeded the prescribed time period at the time of the referral, this dispute was never referred for conciliation and I accordingly lack jurisdiction to determine the fairness of the suspension based on the time period for suspension having been exceeded. This dispute must be referred as a new dispute that arose and the dispute must be conciliated before it can be arbitrated.
- [11] This then leaves me with the substantive challenge to the suspension that the respondent did not apply its mind to whether there existed a valid reason for the applicant's suspension and that the reasons given by the respondent are not valid reasons in the circumstances. I have carefully considered the evidence and submissions presented and I am in agreement with the applicant's submissions in this regard. I do not believe that there was a valid and or fair reason for the applicant to be suspended, as no reliable evidence has been led that the applicant's continued presence in the workplace might be prejudicial to the investigation and or that his continued presence might endanger the well-being or safety of staff of his department and or that his continued presence might endanger the safety of the property of the state (as per the reasons stated in the letter of suspension dated 14 June 2011). Dr Perez conceded as much during his testimony except insofar as the applicant's continued prejudice might be prejudicial to the investigation.
- [12] Insofar as the respondent made reference to a computer having been tampered with, I am unable to place any reliance on such evidence insofar as it was proffered to justify the applicant's suspension. There therefore remains no valid and or fair reason as to why it was necessary for the applicant to be suspended. I may also state here that I also agree that the allegation that the applicant's continued presence may be prejudicial to the investigation has not been shown to be a reasonable belief. The investigation could have proceeded and could have been concluded whilst the applicant remained in his employment without the need to be suspended.
- [13] It is to be noted that, in terms of the Disciplinary Code and Procedure for the Public Service it is not sufficient for an employee to be suspended based only on the employee allegedly having committed a serious offence. It is a stated requirement that the employer must believe that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct or endanger

the well-being or safety of any person or state property. This, as I have already stated above, the respondent failed to show.

[14] The applicant in the matter before me clearly has a long service history with the respondent and the respondent ought to have taken the utmost of care in deciding whether there was really a need for the applicant to be suspended. As was stated in **SAPO Limited v Jansen Van Vuuren NO and Others** [2008] 8 BLLR 798 (LC), a message must be sent to employers that they should refrain from hastily resorting to suspending employees when there are no valid reasons to do so. The Court stated that suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. I believe that the Labour Court's cautionary words are very much relevant to the dispute before me.

[15] It is therefore my finding that the applicant has discharged the onus of proving that the respondent committed an unfair labour practice in suspending him from his employment. I believe that, since there was no justifiable and or fair reason for the applicant's suspension in the first place, the respondent should be ordered to allow the applicant to resume his duties with immediate effect, i.e. as at the date of this award being issued and received by the parties. I have also considered whether the respondent should be ordered to pay any compensation as a result of the fact that the applicant was suspended with no justifiable and or fair reason and the impact that this had on the applicant's reputation. I believe that compensation in the amount of R 50 000-00 should be more than sufficient to compensate the applicant for the unfair suspension, given the fact that the applicant was at all times suspended on full pay.

AWARD

[16] The applicant's suspension was substantively unfair.

[17] I therefore make the following order:

[17.1] The respondent is ordered to allow the applicant to resume his normal duties with immediate effect.

[17.2] The respondent is further ordered to pay to the applicant compensation of R 50 000-00 arising from his unfair suspension. This amount is to be paid to the applicant on or before 30 November 2011.

Adv. C de Kock
(Panelist)