



ARBITRATION AWARD

Panellist/s: Leslie Martin
Case No.: PSHS305-10/11
Date of Award: 3-May-2011

In the ARBITRATION between:

P.A.W.U.S.A. on behalf of C. H. Sieas

(Union / Applicant)

and

Department of Health- Western Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

The arbitration took place at the offices of the Department of Health, 4 Dorp Street, Cape Town on 16 February 2011, 30 March 2011 and 12 April 2011. The applicant, Mr. Clarence Henry Sieas (Sieas), was represented by Ms. F. September, an official of PAWUSA. The respondent, the Western Cape, was represented by Mr. X. Nginase, its labour relations officer.

During the arbitration proceedings Mr. Njhongo Duma was sworn in as English /Isixhosa interpreter and Russell Aubrey Collopp as English/Afrikaans interpreter.

ISSUE TO BE DECIDED

Was the dismissal of Sieas fair?

BACKGROUND TO THE ISSUE

Sieas worked for the respondent from 1 December 1987 until 28 April 2010 when he was dismissed for misconduct. At the time of his dismissal Sieas was a driver and earned R6,000.00 (six thousand rand) per month.

Sieas was dismissed for making a derogatory racist remark towards a security officer, a certain Mr. Sikuna Myz Ndzengwa (Ndzengwa), who works for Blue Whale Security, an external service provider providing security services at the Mowbray Maternity Hospital. The alleged incident occurred on 15 October 2009.

SURVEY OF EVIDENCE AND ARGUMENT

Each party handed a bundle of documents into evidence.

The applicant recorded objections to documents contained in the respondent's bundle viz. pages There were no objections recorded by the respondent to any of the applicant's documents.

It was common cause between the parties that there were 2 security guards involved in the incident on 15 October 2009.

Sieas was also suspended but the suspension was later withdrawn upon motivation by the applicant party.

Further common cause was that Sieas' trade union had requested a re-hearing of the matter and that the respondent had informed it that there was no such procedure at the respondent's but that an appeal should be lodged. Sieas' notice of his dismissal reflects the telefax number of the appeal authority.

Sieas was not part of the investigation conducted into the incident by the respondent.

It was also common cause between the parties that only one security guard testified at the disciplinary hearing.

Ndzengwa, Gavin Africa (Africa) a driver at the Hospital, Yagya Hendricks Hendricks) a driver at the hospital and Mzwandile Mzanele Bhabi (Bhabi) a security guard from Blue Whale Patrol at the time of the incident testified under oath for the respondent while , Mary Lucretia Vyver (Vyver) the supervisor of the drivers affirmed that she would speak the truth.

Sieas testified under oath on his own behalf. Deon Given Trompetter (Trompetter) an employee in the respondent's linen bank and who was previously a driver's assistant and Vincent Dyers (Dyers) a driver also testified under oath for Sieas.

THE EVIDENCE:

On 15 October 2009 Nszengwa had entered the drivers' canteen (the canteen), in order to warm his food. Sieas then prevented Ndzengwa from warming his food contending that the canteen was only for use by the drivers.

According to Ndzengwa there were 4 people (3 drivers and a linen department employee) in the canteen at that time.

Sieas then addressed Ndzengwa, using the word "Kaffir" telling him he could not warm his food there. At the same time Sieas pushed Ndzengwa from the canteen and swore at him.

Later Ndzengwa reported the incident to Vyver who wrote out a statement for him regarding what happened. He had also himself expressed in writing what had occurred. Neither of these written documents contained a reference to the word "Kaffir"

Ndzengwa had in error omitted to do so and Sieas had been calling him "Kaffir" for some time already.

Ndzengwa had also not mentioned it to the investigating officer, and perhaps mistakenly so, that Sieas had called him "kaffir".

While nobody had given Ndzengwa permission to use the canteen, he had been warming his food there ever since he started working at the hospital. He had also never seen a notice in the canteen prohibiting unauthorized persons from entering the canteen.

When Africa was in the canteen at around 10H00 on 15 October 2009 present were himself, Hendricks, Sieas and Trompetter. This was confirmed by Hendricks, who at the arbitration identified the security guard involved in the incident as Bhabi.

When the security guard entered the canteen Sieas told him that they, he referred to them as "Kaffirs", could not warm their food in the canteen. Sieas and the security guard both manhandled each other and swore at each other. Thereafter the security guard left.

According to Africa only one security guard had entered the canteen that morning and that was Ndzengwa. He had not seen the other security guard enter because he had by that time left for the toilet.

Africa also had not reflected in his written statement that Sieas had used the word "Kaffir" as he was uncomfortable with writing down such a derogatory term. Hendricks too did not write the word in his statement as it was too crass and ugly a word to write. He had preferred to say it to the investigating officer. He had been told by Vyver that he could do so when the investigating officer arrived.

Although Africa had not testified at the disciplinary hearing he had decided to testify at the arbitration in order to "cover himself". He had been told by his trade union representative that he could be disciplined were he not to testify at the arbitration.

Trompetter had furthermore testified that when Africa, Hendricks, Sieas and himself were present in the canteen it was Bhabi who had entered and who had had the altercation with Sieas.

He confirmed too that Bhabi had sworn at Sieas in Isixhosa.

According to Vyver Ndzengwa had told her that at the time of the incident Sieas had used foul language towards him and Bhabi had told her that Sieas had addressed him as "Zuma Kaffir" and used foul language and wanted to hit him. Ndzengwa had on the other hand told her that Sieas had called him a "Kaffir" on another occasion.

Bhabi was not present at the disciplinary hearing as he was not working at the hospital at the time. The disciplinary hearing was thus in relation to the incident involving Ndzengwa. While Bhabi could therefore not testify at the disciplinary hearing his statement was handed in.

According to Vyver all persons rendering a service to the hospital could use the canteen.

Bhabi confirmed that on 15 October 2009 when he had entered the canteen to warm his food Sieas had called him "Zuma Kaffir" and had sworn at him. He denied that he had sworn at Sieas in Isixhosa.

According to Bhabi he had entered the canteen that day before Ndzengwa had done so.

According to both Hendricks and Africa the guards were allowed to enter the canteen to warm their food. The contrary view was held by Sieas and Trompetter.

Sieas furthermore appealed against the sanction of dismissal and did so on 3 May 2010.

ANALYSIS OF EVIDENCE AND ARGUMENT

Although there was much evidence led at this arbitration regarding persons authorized or not to enter the canteen I found most of this to be irrelevant as the charges could be brought whether or not a person was or was not authorized to enter the canteen.

I am of the same view regarding the evidence led in respect of the alleged theft of food and items of drivers in the canteen and which events led to the drivers suspecting the security guards of perpetrating these alleged transgressions.

In dealing with the crux of this dispute I find it a matter of grave concern that the charges pertain to Sieas' uttering racist remarks towards Ndzenzwa and that Ndzenzwa himself had not in fact made this allegation in either of his written statements and during the investigation, presumably to the investigating officer.

The most likely conclusion that one can arrive at as I do, on the failure of Ndzenzwa himself, to allege that he had been addressed by Sieas with reference to a derogatory racial term is that Sieas had not used the word "Kaffir" when addressing Ndzenzwa on 15 October 2009.

The testimony of Africa too is doubtful as he testified to an incident between a security guard and Sieas that tallies with the testimony of Hendricks, Sieas and Trompeter regarding the incident between Sieas and Bhabi. His testimony is in fact contradicted by that of Ndzenzwa himself that there was no manhandling of each other between him and Sieas.

Africa's motivation for coming to testify at this arbitration also raises doubt in respect of the truthfulness of his testimony. He had clearly come to testify for fear of disciplinary action being taken against him were he not to do so. His testimony impresses me as that of a man afraid of testifying contrary to what he would perceive of as favourable to the employer.

From the testimony of Hendricks, Sieas and Trompeter that Africa, Trompeter, Sieas and Hendricks were present in the canteen when the security guard had entered and that it was Bhabi, it is more likely that Africa had witnessed the interaction between Sieas and Bhabi and not between Sieas and Ndzenzwa. On a balance of probabilities Africa, who had also himself testified that he was present only at the incident with one of the guards, I must conclude that he was not present when Ndzenzwa had entered the canteen but rather when Bhabi had done so.

A consideration of the entire body of evidence suggests that the witnesses to the incident in the canteen on 15 October 2009 had most likely witnessed an incident between Sieas and Bhabi. There is accordingly insufficient evidence for me to conclude on a balance of probabilities that Sieas had addressed Ndzenzwa using the word "Kaffir".

It is worthwhile but not essential for the purposes of determining this dispute to consider the interaction between Sieas and Bhabi. In this regard the evidence shows an interaction between Sieas and Bhabi in which there was an altercation involving swearing by both of them and allegations of racist and derogatory remarks by both of them. These alleged remarks were that of a reference to Bhabi by Sieas as a "Kaffir" and to Sieas by Bhabi of "malawu". This latter term apparently means "coloured pig" according to the applicant party.

This information was however clearly not available to the investigating officer as Sieas apparently had not formed part of the investigation. In this matter such omission of Sieas from the investigation cannot however be laid solely at the door of the respondent as Sieas failed to submit his own written statement by not to complete the audi alteram partem form.

His failure to so participate in the disciplinary processes of the respondent lays him open to the suspicion of wanting time to consider his response and perhaps to simultaneously fabricate one. This is however not a valid reason for the investigating office not to include Sieas in the investigation.

Furthermore, although Sieas had lodged an appeal the evidence shows clearly that such appeal had been forwarded to the wrong fax number and not that indicated on the notice of dismissal forwarded to him. In the final analysis there is in fact no clear evidence of the respondent having received Sieas' appeal. This is so notwithstanding the strong belief that the applicant party has that the respondent did receive the appeal.

In this regard I can only conclude that Sieas was negligent in properly finalizing his dispute internally.

In conclusion and having considered all the evidence presented at this arbitration I find that the dismissal of Sieas was unfair substantively. The evidence shows however that Sieas had been afforded a substantially fair procedure in that he had been afforded an opportunity to state his case. He had been afforded an opportunity to call and cross examine witnesses and sufficient time to prepare his defence.

In the light of the above it would be appropriate to reinstate Sieas into the position he held prior to his dismissal. It would also be appropriate to make in addition thereto an order sounding in money. In making this latter award of compensation it would be appropriate to take into account the contribution of Sieas himself to his dismissal especially his failure to properly appeal internally against his dismissal.

Award:

In making this award I have taken into account the provisions of the Labour Relations Act 66 of 1995 as amended in particular sections 193 and 194.

I therefore order the respondent to reinstate Sieas into his position as a driver by no later than Monday 16 May 2011. Such reinstatement will be on the same terms and conditions previously enjoyed by Sieas.

I also order the respondent to pay Sieas compensation equivalent to the salary he would have received for 3 months in the amount of R18,000.00 (eighteen thousand rand) by no later than Monday 16 May 2011 after which, if not paid, it will attract interest at the legal rate of interest. This is just and equitable in all the circumstances.

COMMISSIONER: L. MARTIN



Panellist/s: **Leslie Martin**
Sector: **Public Health & Social Development**