



# ARBITRATION AWARD

**COMMISSIONER: CINDY LEE DICKENS**  
**CASE NO. : PSHS 311-11/12**  
**DATE OF AWARD: 16 AUGUST 2012**

**In the Arbitration between:**

**PSA obo B VAN WYK**

**APPLICANT**

**and**

**DEPARTMENT OF HEALTH: FREE STATE**

**RESPONDENT**

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## ARBITRATION AWARD

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### **1. DETAILS OF HEARING AND REPRESENTATION:**

- 1.1 An Arbitration hearing was scheduled for the 9<sup>th</sup> of May 2012 at Bophelo House, Cnr. Harvey & Charles Streets, 2<sup>nd</sup> Floor, Block A, West Wing Board Room, Bloemfontein.
- 1.2 The parties advised me that they have settled the matter and that they were at the point of signing an agreement. A meeting was arranged for the 16<sup>th</sup> of May 2012, for the parties to sign the Agreement. Department of Health did not attend. PSA was contacted on the 18<sup>th</sup> of May, where it became clear that the Agreement was still not signed. The parties requested to meet again, but were however not able to agree on a date. The matter was set down for Arbitration again on the 19<sup>th</sup> of July 2012.

1.3 The Applicant, Mr. B van Wyk, was represented by Mr. Greeff of PSA. The Respondent, Department of Health: Free State, was represented by Mr. Mapena, Senior Labour Relations Officer.

1.4 The parties requested to file Written Submissions as follows:

- The Applicant before or on the 26<sup>th</sup> of July 2012
- The Respondent before or on the 2<sup>nd</sup> of August 2012
- The Applicant before or on the 6<sup>th</sup> of August 2012.

## **2. ISSUE TO BE DECIDED:**

2.1 The Applicant has referred a dispute to the Bargaining Council relating to unfair suspension or disciplinary action short of dismissal. The Commissioner must determine whether the MEC's conduct was unfair when he took the decision that the Applicant's period of absence from work will be regarded as work without pay.

## **3. BACKGROUND TO THE ISSUE:**

3.1 The Applicant is employed by the Respondent Department as a Laundry Aid at the FSPC Laundry since the 1<sup>st</sup> of August 2008.

3.2 The Applicant was dismissed for absconding and after making a representation for re-instatement to the MEC, the Applicant was reinstated and his period of absence from duty was treated as leave without pay.

## **4. SURVEY OF EVIDENCE AND ARGUMENT:**

### **4.1 SUBMISSIONS BY THE APPLICANT PARTY:**

4.1.1 I wish to state from the outset, that not all argument presented will be set out hereunder. Only a summary of the argument is contained herein.

4.1.2 **Mr. Greeff** argued that the issue to be decided is whether the Applicant was subjected to an unfair labour practice in relation to probation, Section 186 (2) (b) of

the Labour Relations Act, and the disciplinary action short of dismissal in relation to 7 (SEVEN) months' outstanding salaries and housing allowance.

4.1.3 He held that the Applicant was appointed on the 1<sup>st</sup> of August 2008 and his probation period was completed on the 31<sup>st</sup> of July 2009. The Respondent failed to uplift the probation with no reasons provided. He stated that the Applicant had a satisfactory performance assessment and the probation was supposed to be guided by this key area of the employment relationship. He stated that at that stage the Respondent was using the probation as a form of punishment and not as a measurement of performance. He held that the Applicant received a letter confirming the completion of his Public Service Induction Programme. He held that notwithstanding this letter, the Respondent has still failed to uplift the probation of the Applicant.

4.1.4 He held that it is common cause that the Applicant absconded and was dismissed. He held that it is further common cause that PSA made representations to the MEC and then the Applicant was reinstated. He stated that in relation to the letter of reinstatement it is obvious if an employee is reinstated it will definitely run from the date of dismissal as stated in the letter of reinstatement. He held that paragraph three obviously refers to the abscondment period of the Applicant that he was absent that will be treated as leave without pay. He held that the Respondent wrongly interpreted this paragraph and treated the Applicant's reinstatement as a re-employment making the 7 (SEVEN) months from a current date of re-employment without pay. Mr. Greeff held that this is unfair and the Applicant lost out on 7 (SEVEN) months' salary and also the housing allowances he was entitled to during the 7 (SEVEN) months period. He stated that the period in question is from the 1<sup>st</sup> of March 2009 to September 2009. He stated that the Applicant went back to work during October 2009. Mr. Greeff held that the Respondent's conduct was very unfair.

4.1.5 Mr. Greeff held that they are seeking relief to the effect that the Respondent's actions are unfair as far as it relates to the probation. He requested that the probation be uplifted backdated from the 1<sup>st</sup> of August 2009. He also requested that the interpretation of the PSA of the letter of reinstatement be found to be correct. He also requested that the Respondent be ordered to pay the 7 (SEVEN) months'

salary and housing allowance calculated from the 1<sup>st</sup> of March 2009 to the 30<sup>th</sup> of September 2009.

#### 4.2 SUBMISSIONS ON BEHALF OF THE RESPONDENT:

4.2.1 I wish to state from the outset, that not all argument submitted will be set out hereunder. Only a summary of the argument is contained herein.

4.2.2 **Mr. Mapena** held that it is not in dispute that the Applicant's probation took longer than expected. He argued that a directive from Ministerial Communiqué instructed that all officials should be subjected to a formal induction and in the Free State Department of Health had to embark on a provincial tours to run with the programme and, as stated by the Applicant's representative, a confirmation letter from the Premier's office came on the 14<sup>th</sup> of July 2009, and his probation has been confirmed by HR, the Applicant would start earning his salary from the 15<sup>th</sup> of September 2009.

4.2.3 He argued that the Respondent would like to raise a point in limine that in essence the Council lacks jurisdiction to arbitrate on the issue of alleged outstanding salaries owed to the Applicant.

4.2.4 Mr. Mapena argued that from the 16<sup>th</sup> of March 2009 until after the pronouncement of the MEC the Applicant did not render any service to the Respondent. He held that the letter clearly defines the period of absence from duty and the Applicant only resumed duty in October 2009.

4.2.5 He stated that it is their plea to consider the point in limine and make a determination and rule in favour of the Respondent.

#### 5. ANALYSIS OF EVIDENCE AND ARGUMENT:

5.1 The dispute which has been referred to the Bargaining Council relates to an unfair labour practice, Section 186 (2) (b), for ease of reference I will quote the relevant Section:

*'186 (2) Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving –*

*(a) ...;*

*(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;*

5.2 It is common cause that the Applicant's services were terminated due to the fact that he absconded. It is further common cause that he appealed to the MEC and the MEC took a decision to reinstate the Applicant. The MEC further stated that the period of absence from duty will be treated as leave without pay.

5.3 Mr. Mapena has raised an issue to the effect that the Bargaining Council does not have jurisdiction to hear this matter as the dispute is about a salary dispute.

5.4 I have considered the submissions of Mr. Mapena and find that the Bargaining Council does have jurisdiction to hear the dispute as the dispute goes about the decision taken by the MEC. The MEC took a decision to set aside the deemed dismissal and replaced the sanction with that of reinstatement, without pay for the period of absence.

5.5 It is this disciplinary action short of dismissal which is being placed in dispute.

5.6 This brings me to the question of whether the Employer's conduct was unfair.

5.7 Mr. Greeff has placed the following aspects in dispute:

- That the Respondent's actions were unfair in relation to the Applicant's probation;
- That the Applicant's probation should be uplifted backdated from the 1<sup>st</sup> of August 2009; and
- That the Respondent interpreted the letter of the MEC incorrectly and that the Applicant should receive his salary and housing benefits for the 7 (SEVEN) months during which he absconded, calculated from the 1<sup>st</sup> of March 2009 to the 30<sup>th</sup> of September 2009.

- 5.8 Mr. Greeff held that the Applicant was appointed on the 1<sup>st</sup> of August 2008 and that his probation was completed on the 31<sup>st</sup> of July 2009. He held that the Respondent failed to uplift the probation with no reasons provided.
- 5.9 It must be noted that the Applicant absconded from the 1<sup>st</sup> of March 2009 and that he was therefore absent from duty for 5 (FIVE) months of his probation period. I am satisfied that the Respondent's conduct was not unfair in reinstating the probation period, due to the Applicant's prolonged absence.
- 5.10 This brings me to the question of whether the MEC was wrong in finding that the Applicant's period of absence from duty will be treated as leave without pay. Mr. Greeff also went further to state that the Respondent failed to interpret the letter of the MEC correctly and that they should have interpreted the word reinstatement to include all the Applicant's benefits and salary for the 7 (SEVEN) months during which he absconded.
- 5.11 I have perused the letter of the MEC dated the 22<sup>nd</sup> of September 2009 and will set out the relevant sections thereof, for ease of reference:

*"Dear Mr. B van Wyk*

***Your representation for re-instatement in terms of Section 17 (3) (b) of the Public Service Act 103 of 1994, as amended: Discharge from the Public Service on account of abscondment: Free State Psychiatric Complex Laundry.***

- 1. I refer to the above matter, in particular, your representation for re-instatement in terms of Section 17 (3) (b) of the Public Service Act, 1994, as amended.*
- 2. You are informed that after due consideration your representation against your discharge from the Public Service on account of abscondment, I have decided to approve your reinstatement at the Free State Psychiatric Complex effective from the date of your dismissal.*
- 3. The period of absence from duty will be treated as leave without pay.*

4. *If you are not satisfied with the outcome of this application you are advised of your right to refer a dispute to the Public Health & Social Development Sectoral Bargaining Council within 30 (THIRTY) days.*”

5.12 The question which has to be answered is whether the Respondent interpreted the letter incorrectly when they elected not to pay the Applicant his salary and housing allowance for the 7 (SEVEN) months which he absconded. Mr. Greeff argued that “reinstatement” means that he should receive his benefits and salary for the period during which he was unemployed.

5.13 In making this determination we have to look at the definition of the word “reinstatement”. Grogan, in *Workplace Law*, Ninth Edition, p 129, he states the following:

*“Reinstatement, in its ordinary meaning suggests that the period of service between dismissal and resumption of service is deemed unbroken...”*

5.14 I am in agreement with Mr. Greeff that where there is an order for reinstatement, there should be no break in the employee’s service with the employer. The employee’s date of employment with that specific employer will be from the 1<sup>st</sup> date that he commenced employment.

5.15 This brings me to the question of whether the Employer, Arbitrator or Judge has a discretion in making a decision, Award, or Court Order in relation to the back pay awarded to that employee.

5.16 In the matter of *Equity Aviation Services (Pty) Ltd. v CCMA & Others (2008) 17 CC 1, 11, 1* the Court found that retrospectivity is in the discretion of the decision maker.

5.17 It goes without saying that the MEC in this matter had a discretion in stating whether the Applicant should be paid for the period during which he absconded.

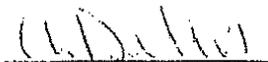
5.18 The MEC’s decision is clearly set out in his letter that the Applicant’s period of absence from duty will be treated as leave without pay.

- 5.19 It is common cause that the Applicant absconded from his workplace for the period 1 March 2009 till 30 September 2009. It is further common cause that he did not render any services for this period.
- 5.20 No reasons were furnished by the Applicant or his representative as to why the Applicant should receive his salary and / or benefits for the period during which he failed to render any services.
- 5.21 I cannot fault the MEC or find his conduct unfair in finding that the Applicant's absence should be treated as leave without pay.
- 5.22 As the Applicant failed to render any services, he cannot claim payment for the period during which he was absent.
- 5.23 Taking into consideration that it is the taxpayers' money which is used to pay his salary, it would be frowned upon should he receive his salary and benefits where he rendered no service.

**6. AWARD:**

- 6.1 I can not find that the Respondent's conduct was unfair as far as it relates to this matter.
- 6.2 No order as to costs is made.

**SIGNED AT BLOEMFONTEIN ON THIS 16<sup>th</sup> DAY OF AUGUST 2012**



**SENIOR COMMISSIONER  
C L DICKENS  
PHSDSBC**