



# ARBITRATION AWARD

Panellist/s: Paul Kirstein  
Case No.: PSHS317-11/12  
Date of Award: 4-Nov-2011

In the ARBITRATION between:

**IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL  
BARGAINING COUNCIL (HELD AT MOGWASE)**

CASE NO: PSHS<sub>317</sub>-11/12

In the matter between

NEHAWU obo M NDLOVHU

Applicant

And

DEPARTMENT OF HEALTH: NORTH WEST  
PROVINCE

Respondent

**ARBITRATION AWARD**

## **DETAILS OF HEARING AND REPRESENTATION**

1.

The arbitration was conducted on 6 and 27 October 2011 at Mogwase, North West Province. The applicant appeared in person and was supported by an official of NEHAWU. The respondent was represented by M Adoons, an official in the employment of the respondent. The applicant submitted a bundle of documents marked bundle "A". The respondent submitted bundles of documents marked bundle "R", "R1" and "R2". The arbitration was mechanically recorded. The applicant submitted written heads of argument on 2 November 2011.

## **ISSUE IN DISPUTE**

2.

The applicant contends that her dismissal on 1 July 2011 was substantively and procedurally unfairly.

## **SUMMARY OF EVIDENCE**

3.

The first witness on behalf of the respondent was D J Hofman, a Senior Manager: Legal Services and Professional Conduct employed at the South African Pharmacy Council. Hofman indicated that the applicant was conditionally registered with the

Pharmacy Council on 11 February 1998. The registration continued until 14 October 2010. On 14 October 2010 the Pharmacy Council deregistered the applicant for failure to pass the professional examination. Hofman referred to the legal requirements in terms of the Pharmacy Act 53 of 1974. In a letter dated 19 October 2010 the South African Pharmacy Council informed the applicant regarding the deregistration status. During cross examination Hofman could not indicate whether the mentioned letter was sent to the applicant via registered mail. Hofman indicated that the registration of the applicant was limited and conditional. Hofman confirmed that the applicant paid her registration fees but indicated that payment does not supersede the Council's decision to deregister the applicant as a pharmacist.

4.

The next witness on behalf of the respondent was E Mmusi, a Director: Corporate Services. Mmusi confirmed that the applicant's services were terminated due to the deregistration of the applicant as a pharmacist by the South African Pharmacy Council. Mmusi could not dispute the indication that the applicant has paid her registration fees up until February 2011.

5.

The applicant testified and referred to her registration history at the Pharmacy Council. The applicant compared her registration with other pharmacists who have obtained qualifications in foreign countries. The applicant obtained her qualification in Russia. The applicant referred to the efforts she had made to have herself registered at the Pharmacy Council. The applicant was eventually registered by the Pharmacy Council in 1998. The applicant referred the B. Pharm (Honours) degree obtained at the University of Potchefstroom. The applicant wrote the examination required by the Pharmacy Council in October 2007. The applicant failed the examination. The applicant referred to the registration fees she had paid during 2010. The Pharmacy Council regarded the registration card as proof of renewal. In November 2009 the Pharmacy Council sent to the applicant a registration certificate that expired in July 2010. The applicant was informed by the Pharmacy Council to write examination in June 2010. The applicant referred her transfer to a sub-district. The applicant complained about information that the Pharmacy Council disclosed to the respondent. The applicant wrote her examination in June 2010 and indicated that she was well prepared to do the examination. The result of the examination was released on 24 August 2010. The Pharmacy Council released results to the respondent. The applicant did not pass the examination. On 16 August 2010 the CEO suspended the applicant without benefits. The applicant objected to the suspension. The benefits were reinstated in December 2010. The applicant referred to an investigation conducted by the

respondent regarding the deregistration. The applicant pursued an unfair suspension dispute. The conciliation meeting was set down on 25 May 2011. The chief director and sub-divisional manager handed to the applicant a letter of an intention to terminate the applicant's services. The applicant indicated that the letter purported to be sent from the office of the MEC. The applicant referred to differences in the notice of intention and a letter sent from the MEC's office in Mafikeng. The applicant referred to a letter she wrote regarding a relative who has passed away. According to the applicant the letter fuelled the anger against her. On 1 July 2011 the applicant was issued with a letter terminating her service. The applicant indicated that the termination letter was also from the office in Rustenburg. The applicant indicated that her services should have been terminated by the HOD. According to the applicant NEHAWU contacted the office of the MEC. The MEC indicated that an appeal should be lodged with the office of the MEC. The MEC indicated that he is not aware of the dismissal. The applicant's salary was stopped on 15 August 2011. The applicant indicated that in terms of the procedures an employee's services cannot be terminated until the MEC has dealt with the appeal. No response was received from the MEC regarding the appeal. The applicant seeks retrospective reinstatement and referred to other remedies she wants to be granted.

The applicant subpoenaed L L Oelofse, an Assistant Manager: Pharmaceutical Services to testify on her behalf. Oelofse confirmed that an employee (Van der Merwe) was employed as a pharmacist. It was established that Van der Merwe did not conclude the community service requirement. Van der Merwe obtained all the academic qualifications. Van der Merwe's salary was reduced and she was allowed to do the community service. The applicant indicated that Oelofse could also have assisted her regarding the registration issue. Oelofse indicated that Van der Merwe has all the recognised qualifications. It was not possible to assist the applicant because the applicant needs to pass the examinations.

7.

The applicant subpoenaed M Rakau, a Chief Director of the Region to testify. Rakau indicated that she is not aware why the notice to attend and the termination letter were sent from her office in Rustenburg. According Rakau the letter was sent by the MEC. Rakau indicated that the uniqueness of the matter warranted the MEC to intervene. The MEC terminated the applicant's services. Rakau indicated that the matter does not relate to disciplinary action and therefore the disciplinary process is not applicable.

## **ANALYSIS**

8.

It is common cause that the applicant's services were terminated on 1 July 2011 although the applicant received remuneration until 15 August 2011. The applicant contends that her dismissal was substantively and procedurally unfair. It was at the commencement of the arbitration put on record that the following procedural issues are in dispute:

- The applicant is a shop steward and the union was not informed of any process against the applicant;
- An investigation was conducted but no disciplinary hearing was conducted;
- A letter of dismissal was received from the Rustenburg sub-division and not from the MEC's office;
- An appeal was lodged but no outcome was received;
- The suspension of the applicant's salary.

With regard to the substantive unfairness it was put on record that applicant was dismissed for not being registered as a pharmacist. According to the applicant she was registered.

9.

In a letter dated 19 October 2010 the South African Pharmacy Council informed the applicant that her limited registration with the Council was not renewed. The applicant claimed that she did not receive the letter. In a letter dated 25 January 2011 the South African Pharmacy Council informed the respondent of the following:

*"Council confirms that the matter regarding Ms P M Nhlovu's registration status with Council was considered at the Council meeting on 13 and 14 October 2010. Council resolved that her limited registration with Council not be renewed, however, that she be afforded an opportunity to write the Professional Examination like all other foreign qualified pharmacists in terms of Regulation 17 of the Regulations relating to the registration of persons and the maintenance of registers (GNR. 1157 published on 20 November 2000) of the Pharmacy Act, 53 of 1974.*

*Ms Ndhlovu's initial limited/conditional registration with Council commenced on 11 February 1998. This conditional registration has been extended until 11 February 2009 to enable her to write the professional examination and pass. The last examination she wrote was in June 2010 and she was not successful."*

10.

The applicant's contention that she was indeed registered and that the respondent could not terminate her services, is not accepted. The payment of a registration fee in these circumstances does not confirm registration. It is common cause that the applicant did not pass the required examination in June 2010. The respondent cannot allow an employee to conduct duties as a pharmacist if such employee is not registered in terms of the Pharmacy Act, 1974. The applicant indicated that the



respondent could have assisted her as it was done in the case of Van der Merwe. The case of Van der Merwe is different to the case of the applicant. Van der Merwe complied with the academic qualifications. The outstanding issue with regard to Van der Merwe was the community service period. It is doubtful if the applicant would have accepted an alternative post if it was offered to her. The applicant was and still is persistent in her view that she is indeed registered as a pharmacist.

11.

It is common cause that the applicant received on 25 May 2011 a notice from the respondent of the intention to terminate her services. The applicant was afforded an opportunity to respond to the intention. The applicant responded to the intention in a letter dated 26 May 2011. In a letter of the respondent dated 30 May 2011 the following is stated:

1. *Reference is herewith made to our letter dated 25 May 2011 inviting you to make representations regarding the Department's intention to terminate your services on the grounds that you are not registered to practise as a pharmacist in terms of the Pharmacy Act of 1974.*
2. *Reference is also made to your letter dated 26 May 2011 which letter attempts to mitigate or present representations as contemplated in my letter under reference.*
3. *Take note that my office has considered your representations and has come to the conclusion that they do not provide sufficient proof of your registration to practice as a Pharmacist in terms of the above Act and that any other matter you raise can only be addressed between yourself and the Pharmacy Council and not the Department.*
4. *Further issues raised in the said letter are considered irrelevant to the main cause of this action.*
5. *I hereby therefore, as the Executive Authority of the Department, confirm the termination of your services with immediate effect and further that any other*

*obligations that may be in existence between yourself and the Department shall be addressed in due course."*

12.

The applicant contends that the notice of intention and the termination letter have not emanated from the office of the MEC. The applicant referred to an example of a letter emanating from the office of the MEC and indicated that the appearance and address of the letter differs from what she received. Rakau confirmed that it was indeed the MEC that terminated the applicant's services. An appeal was lodged at the MEC office. If the MEC was not aware of the termination of the applicant's services, the probabilities are that the MEC would have interfered. It cannot be concluded on the appearance of the letterhead that the applicant's services were not terminated by the MEC. The evidence of the applicant that the MEC indicated to an official of NEHAWU that he is not aware of the termination of her services is hearsay evidence and not accepted.

14.

Section 188 of the LRA states the following:

*"1. A dismissal that is not automatically unfair, is unfair if the employer fails to prove –*

- (a) that the reason for dismissal is a fair reason –*
  - (i) related to the employee's conduct or capacity; or*
  - (ii) based on the employer's operational requirements; and*
- (b) that the dismissal was effected in accordance with a fair procedure."*

The termination of the applicant's services is not related to the applicant's conduct. The failure of the applicant to secure registration from the Pharmacy Council relates to the capacity of the applicant to conduct her duties. The respondent cannot allow the applicant to conduct her duties as a pharmacist without registration at the Pharmacy Council and therefore a fair reason existed for the termination of the applicant's services. The procedural issues the applicant referred to that were not complied with, relates to the termination of services based on misconduct. The applicant's services were not terminated due to misconduct. The respondent complied with the *audi alteram* principle. The respondent proved on a balance of probabilities that the dismissal of the applicant was substantively and procedurally fair.

## **AWARD**

1. The application is dismissed.
2. No order as to costs.

SIGNED AT PRETORIA ON THIS THE 3rd DAY OF NOVEMBER 2011



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PH KIRSTEIN

ARBITRATOR