



# ARBITRATION AWARD

Case Number: PSHS330-11/12

Panelists: Malusi Mbuli

Date of Award: 01-08-2012

In the **ARBITRATION** between

M. P. Daniels

(Applicant)

And

Department of Health - EC

(Respondent)

## HEADNOTE:

Applicant was subjected to a disciplinary enquiry and was dismissed after he was found guilty of assault and insubordination.

Applicant denied the allegations that were levelled against him and held that his dismissal was substantively unfair. The applicant also disputes the procedural fairness of his dismissal.

Applicant's dismissal was procedurally unfair but substantively fair.

## **DETAILS OF THE HEARING AND REPRESENTATION**

1. The matter came before the PHSDSBC for arbitration in terms of section 191(5) (a) (iii) of the Labour Relations Act No 66 of 1995 ("the Act"). It was set down for an arbitration hearing at the P.E. Hospital Complex on the 28<sup>th</sup> of May 2012 and the 26<sup>th</sup> of July 2012 in Port Elizabeth.
2. The applicant, Mr. M. P. Daniels, attended the hearing and represented himself.
3. The respondent Department of Health was also present at the hearing and was represented by Mr. Q. van der Merve, an official of the respondent.
4. The matter proceeded on the 28<sup>th</sup> of May 2012 and was finalized on the 26<sup>th</sup> of July 2012 and the parties agreed to deliver their closing arguments on the 30<sup>th</sup> of July 2012.

## **ISSUE TO BE DECIDED**

5. I am required to determine whether or the dismissal of the applicant was unfair, and if so, I must determine the appropriate remedy in terms of section 193 and 194 of the Labour Relations Act 66 of 1995, as amended.

## **BACKGROUND TO THE ISSUE**

6. Prior to the dispute the applicant was employed by the respondent at the East Cape Medical Depo as a Receiving Pharmacist and was later dismissed by the respondent for misconduct in that he assaulted a fellow employee and was insubordinate to his superiors.
7. The applicant dispute the allegations leveled against him and argue that his dismissal was substantively unfair.
8. The applicant also argues that his dismissal was also procedurally unfair because the matter proceeded in his absence when he had conveyed a message to the authorities that he was supposed to attend the criminal trial on the same matter on the date of the hearing.
9. He then argues that his dismissal was procedurally unfair. He referred a dispute to the PHSDSBC in terms of section 191 (5) (a) (iii) of the Labour Relations Act 66 of 1995 as amended, alleging that the respondent has unfairly dismissed him.

## **SURVEY OF EVIDENCE**

### **Submissions by the respondent**

10. The respondent's 1<sup>st</sup> witness, Vusumzi Dumezweni testified that he work for the respondent at the East Cape Medical Depo and on the 07<sup>th</sup> of July 2012 the day in question, he arrived at work and attempted to open the door. Whilst he was opening the door Mr. Daniels was standing and waiting for the door to open and he passed a silly comment that people who are in charge of the Depo are not educated.
11. He stated that Mr. Daniels told him that he was referring to him and he told him that he was not a boy and continued to open the door. He stated that he used an indecent language and swore at him. He testified that Mr. Daniels then came behind him and punched him and he moved back and the security by the name of Lindikhaya separated them. He stated that only the three of them saw what happened.
12. He stated that he was opening the door in the morning when they resumed work because he was instructed to do so by the manager. He stated that they never had a good relationship with Mr. Daniels and sometimes Mr. Daniels would tell him to go and sheet and would treat him badly.
13. He stated that he was hit by the applicant and he sustained injuries and was taken to the doctor for medical attention.
14. The employer representative then called their 2<sup>nd</sup> witness Miss. Sharlene February who testified that at the time of the incident on the 07<sup>th</sup> of July 2012 she was working as a security supervisor and was stationed at the respondents East Cape Medical Depo.
15. She stated that on the day in question she was closer to the door of the stores and Vusumzi Dumezweni was trying to open the store for the staff members to enter when he heard a conversation between Mr. Daniels and Vusumzi whilst Vusumzi was deactivating the alarm.
16. He testified that whilst Vusumzi was now activating the alarm up the stairs, Mr. Daniels ran towards him and she heard Vusumzi screaming. When she looked towards them Mr. Daniels was hitting Vusumzi and Vusumzi was trying to cover himself. She stated that when that was happening one of the security guards by the name of Lindikhaya ran towards them and separated them and she also tried to help.

17. She testified that after they were separated they noticed that Vusumzi was bleeding and she went to organize a first aid box to help him. She told the hearing that after they had given first aid to Vusumzi he went to the doctor and Mr. Daniels went to his workplace.
18. She stated that Vusumzi did not hit Mr. Daniels and she does not know why Mr. Daniels was hitting Vusumzi. She testified that the injuries that Vusumzi sustained were at the face and also stated that there was visible blood from Vusumzi and she used the cotton wool to wipe out the blood.

### **Submissions by the applicant**

19. The applicant, Mcinezeli Phillip Daniels testified that he used to work for the respondent as a Receiving Pharmacist at the East Cape Medical Depo before he was dismissed by the respondent for misconduct. He stated that his position was Senior at the Depo and was reporting to Sithembiso and Jabulani and he considered himself a manager even though he was not considered as such by his superiors.
20. He stated that on the 07<sup>th</sup> of July 2009 the Depo was opened by Vusumzi and whilst Vusumzi was opening the Depo he jokingly said to Vusumzi he must have been promoted and that is why he was opening the Depo. He testified that after he had passed the joke the applicant started swearing at him and he first ignored him.
21. He testified that he went inside with Lindikhaya the security guard who was there and Vusumzi started swearing at him with his mothers private parts in Xhosa saying (Undiqhela kakubi msunu kanyoko) and he asked him why he was swearing at him. He stated that the victim then shouted him inviting him for a fight. He then approached him and he hit him first and after he hit him he decided to hit him back and he screamed at that stage.
22. He testified that the the security guard then separated them and then Vusumzi kept on swearing at him. He stated that after the incident Jabulani came with Vusumzi to take the pictures and he himself suffered minor injuries. He stated that Glen then came to him at about 3pm in the afternoon to find out what happened.
23. He confirmed that the witness Sharlene February was present at the scene and was part of the crowd that was outside but was in full view of the incident because she saw it through the glass. He stated that Vusumzi was a General Assistant and there was no way that a general assistant would have keys when there are other people who are senior to him.

24. He confirmed that his comment might have angered Vusumzi and that when he hit him he was reminded of his old boxing days, hit him with the right hook and the natural human element is not removed from him because he is at work.
25. He testified that he could not deny that the injuries that Vusumzi sustained could have been cause by his blow and he also confirmed that he never received any treatment because he had minor injuries.
26. The applicant then closed his case.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

27. Section 185 of the Act provides:-

‘Every employee has the right not to be:

(a) Unfairly dismissed.

28. The Act recognizes three grounds for termination of the employment relationship between parties. These grounds are the conduct of the employee, the capacity of the employee and the operational requirements of the employer’s business. The employer has the onus to prove that the dismissal of the applicant was procedurally and substantively fair.
29. In this dispute the applicant dispute the procedural fairness of his dismissal and the employer has therefore has to proved that he has followed the correct procedure in dismissing the applicant. The applicant argues that on the day when the disciplinary was scheduled he was also expected to attend a criminal trial and he communicated that to the authorities.
30. He states that instead of postponing the matter the chairperson proceeded with the disciplinary hearing as if nothing was communicated and this was unfair. The applicant even produced the court paper indicating that the criminal trial was scheduled on the same day as the disciplinary hearing and there was no evidence that was led by the employer to dispute that fact and that the applicant communicated that he was also due to attend trial.
31. In this regard there was no way that the applicant could have honored both processes and the failure by the chairperson to postpone the matter and wait for the applicant to state his case constitute a procedural irregularity.

32. The applicants dismissal is not automatically unfair on the substantive issue because there was that procedural irregularity and I still have to look at the substantive fairness of the applicants dismissal. The applicant was charged and found guilty of assault and insubordination. Such transgressions are regarded as serious acts of misconduct by the respondent. There was no evidence that was led by the employer on the charge of insubordination and because the employer bare onus to prove that the dismissal of the applicant was substantively fair I am satisfied that the employer has not proved that the applicant was insubordinate.
33. The applicant also denies the allegation of assault leveled against him and argues that his dismissal was substantively unfair. The employer then called 2 witnesses to prove that the applicant assaulted the victim or complainant Vusumzi. Both witnesses testified that the applicant assaulted Vusumzi and that Vusumzi did not assault the applicant.
34. On the applicants side he testified on his own and does not dispute that he assaulted the victim but his defense is that it was a fight. He says he was also assaulted by Vusumzi but sustained minor injuries and did not receive medical attention. He confirms that the injuries sustained by Vusumzi could have been caused by his blows.
35. There was no report that was received by the management indicating that Vusumzi hit the applicant but what was testified by the 2 employer witnesses is that the applicant just went back to his work station and continued with his work. The applicant also testified that he was reminded of his olden boxing days and that he is a human being even though he is at work.
36. He seems to argue that the victim provoked him by swearing at him with his mothers private parts, this is not denied by the victim and I am happy for this admission because it shows that there was truth on the part of the victims even though I am not saying that the applicant has attempted to deceive the hearing. The applicants defense that he was provoked cannot be accepted at the workplace as this would be a wrong example to the other employees.
37. The applicant also testified that he regarded himself as part of management and it means that he was senior and in a position of responsibility. The least that the applicant could have done was to report the applicant for swearing at him and or charge him if he was in a position to do so.
38. The issue that I have to deal with in this award is whether the applicant assaulted the victim and all the witnesses have answered this question to say that the victim was assaulted by the applicant. The 2

employer witnesses presented a clear, coherent and corroborative evidence indicating that the applicant assaulted the victim and the victim was covering himself.

39. I have no reason to disbelieve the evidence of these witnesses and accept the applicants defense. The only conclusion I can draw from the evidence of the witnesses summarized above is that the applicant had a problem with the victim given responsibility whilst he was junior to him and decided to assault him because he was more powerful than the victim and could over power him.
40. The applicant from presentation of his case does not seem to understand the reason for the prohibition of assault at the workplace and did not show any form of remorse and as a result cannot be trusted. In coming to the conclusion whether the applicant's dismissal was fair or not I have to apply a reasonableness test on a balance of probabilities. In applying such a test I have considered the negative effect that the offense has at the workplace, the consequences of allowing the employees to commit assault in a public health environment., the example that he portrays to other employees and the general interest of the employer as a public health institution.
41. I am of the firm opinion that the applicant assaulted the victim and that the rationale that I have used in coming to this conclusion is one that qualifies when we talk about reasonableness and weighing the interests of both parties as directed in the Constitutional Court decision in ***NEHAWU v/s University of Cape Town (2003) (CC)*** where the Court held that the arbitrator is expected to have regard to the interest of both parties in coming to a conclusion whether the conduct of the employer was fair or not.
42. In this dispute the interests of the employer far outweigh those of the applicant. The applicant also tried to justify his wrongdoing throughout the processes leading up to and including this arbitration hearing and therefore cannot be trusted.
43. The employer's version insofar as it relates to substance is accepted and the applicants version is rejected and this means that the employer has managed to discharge its onus in terms of section 192 (2) of the Act. Section 188 of the Act requires that a dismissal must not only be for a fair reason, but also effected in accordance with a fair procedure. I accept the applicant's version that the employer has not followed a fair procedure and that his dismissal was procedurally unfair.
44. This means that the dismissal of the applicant was procedurally unfair but substantively fair. The only issue that is left for me to decide is the relief to be granted to the applicant. Reinstatement is out of question because the the applicants dismissal was only procedurally unfair and cannot be reinstated on procedural grounds.

45. In the circumstances minimum compensation would be an appropriate remedy and I therefore make the following award.

## **AWARD**

46. The dismissal of the applicant, Mr. M. P. Daniels by the employer, Department of Health, was procedurally unfair but substantively fair.

47. The respondent is ordered to pay compensation to the applicant in the amount of R96 978,30 which is an amount equivalent to 2 months remuneration calculated at R48 489,15 per month which is an amount which the applicant earned per month as at the date of his dismissal.

48. The respondent will pay the amount referred to in paragraph 47 above to the applicant not later than the 31<sup>st</sup> of August 2012.

Signature:



Commissioner: **Malusi Mbali**