



PHSDSBC
PUBLIC HEALTH AND
SOCIAL DEVELOPMENT
SECTORAL BARGAINING
COUNCIL

ARBITRATION

AWARD

Panellist/s: Silas Ramushwana
Case No.: PSHS 347-11/12
Date of Ruling: 12 May 2012

In the ARBITRATION between:

J T A ZWANE

(Union / Applicant)

and

DEPARTMENT OF HEALTH-KWAZULU NATAL

(Respondent)

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DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the arbitration between J TA Zwane, the applicant and Department of Health-KZN, the respondent.

The arbitration was held under the auspices of the Council in terms of Section 191(5) (a) of the Labour Relations Act 66 of 1995, as amended (the Act). The award is issued in terms of section 138(7) of the Act.

2. The arbitration hearing took place on the 12th of March 2012 and the 3rd of March 2012 at the Provincial Hospital, Newcastle. The applicant was represented by Ms A Naidoo, attorney whilst the respondent was represented by Mr M Khumalo from the Labour Relations. The process was manually and electronically recorded.

ISSUE TO BE DECIDED:

3. The issue to be decided is whether or not the dismissal of the applicant in terms of Section 191 of the LRA was substantively and procedurally fair.

BACKGROUND OF THE DISPUTE:

4. It was common cause that applicant was employed by the respondent as a Tradesman Aid on 1 February 1996 earning R90 444, 00 per annum and was dismissed on 30 April 2011.
5. In the belief that his dismissal was unfair, applicant referred an alleged unfair dismissal dispute to the Commission in terms of section 191 of the LRA.
6. The applicant is challenging both the substance and procedure of his dismissal.
7. The applicant sought, as a remedy, retrospective reinstatement as provided for in section 193 read with section 194 of the LRA.
8. The respondent, on the other hand, contended that it had fair reasons to terminate his services.
9. The respondent, sought, as a remedy, that the matter be dismissed.

SURVEY OF ARGUMENTS & EVIDENCE:

10. All witnesses gave evidence under oath. This is a summary of evidence presented. . Bundles of documents were submitted by both parties. Their evidence may be summarized as follows;

OPENING REMARKS:

11. Respondent indicated that it will prove that there was a misconduct committed and it was dismissible.

12. Applicant, indicated that he will submit that the charges were not clear, he was not given reasons for the dismissal and he had no previous warning.

RESPONDENT'S CASE

The respondent called three witnesses in support of its case.

13. **Mr N Dookie** testified as the Artisan Superintendent that his duties are to run the maintenance department at the hospital and supervise the team working with him. He testified that he knew the applicant for a long time. When the applicant started working with him, he was a very good person but after sometimes he developed a drinking habit which led him in not performing his work, coming to work being drunk and leaving work early. He spoke to him several times and counselled him but he could not change even after interventions by the medical superintendent. The applicant was retrained and promoted to a senior position but it could not assist with anything. The applicant was booked to a rehab but there were no changes. He was informed of consequences of his actions. The situation deteriorated until he developed fits and could not function properly. It is his evidence that he went to extent of approaching his family to assist the applicant. The union also intervened but with no success. The applicant would be

absent for work with no reason. He was charged and the hearing was fairly and properly conducted. He was dismissed and reasons were given to him.

14. **Ms A Van Molendorf**, HR Practitioner, Staff Relations, she testified that her duties includes assisting and advising management on discipline, policies and procedures and grievances. She knew the applicant, she meet him in 2006 when she was trying to assist together with his supervisor. The applicant had a gross problem in absenteeism and attending work being under the influence of alcohol. The respondent followed the Disciplinary Code in addressing the applicant's problem. The applicant was counselled, EAP intervened and the family was also brought in. He was referred to a rehabilitation centre and when he came back, he continued with his drinking problem. The applicant was given a Final Written Warning and the trade union also informed him to stop drinking. It reached a stage where he could not function without alcohol. The respondent tried everything in order to assist the applicant but there were no changes. At no stage did the applicant approach the respondent for medical boarding. She submits that the applicant was also dismissed previously and according to the Code, the offences he committed are dismissible offences.

APPLICANT'S CASE:

15. **Mr J TA Zwane** testified in his capacity as the applicant .that he did not sign any form for medical boarding as that was done by his supervisor. He stated that indeed he had a Final Written Warning in March 2011 and did not get another one from that point. It is his submission that he was never informed that his job was not up to scratch and there were no tests conducted on him to verify whether he was under the influence of alcohol or not. He was not given reasons for the dismissal by the respondent.

Under cross-examination, the applicant would state that he could not remember things but at a later stage would remember. He conceded to the fact that he was dismissed for attending work being under the influence of alcohol. Further that he stated the fact that he has no one to blame and that drinking alcohol made him lose his

job. He agreed that he had a problem of coming to work under the influence of alcohol from 2006. He stated that there is no employer who could tolerate his deeds as he was given enough time to change but he could not. He could not attend the rehab for the second time as he did not pay the police clearance fee.

CLOSING REMARKS

16. Respondent closed its case by stating that the dismissal of the applicant was procedurally and substantively fair. Everything was done to assist the applicant with no success. The applicant was also booked in a rehabilitation centre. He was dismissed according to the Disciplinary Code, Resolution 1 of 2003. The applicant agreed that the respondent assisted him and he cannot blame anyone. The applicant's evidence was contradictory and that he was not a credible witness.

17. Applicant concluded the dispute by submitting that procedurally, the charges were not clear and the applicant was not given reasons for dismissal. Substantively, the respondent was supposed to follow the incapacity route not misconduct one. There was no progressive discipline even if he was given a Final Written Warning at some stage. There was no consistent in applying the rule.

ANALYSIS OF ARGUMENTS & EVIDENCE:

18. Parties in this dispute agree that there is a dismissal and I'm required to determine whether the Applicant's dismissal was substantively fair or not. The applicant is not challenging any procedural defects. The point of departure in this dispute will be to focus on the provisions of Section 188(1) of the Labour Relations Act No. 66 of 1995 as amended which stipulates two requirements for fair dismissal for misconduct. In the first instance, it requires that the dismissal must be substantively fair. It does this by requiring that there must be a reason for dismissal namely, misconduct, and that reason must be fair. In the second instance, the section requires that a dismissal for misconduct must be procedurally fair.

19 It is important to note that my scope is to determine whether the dismissal of the applicant was for a fair reason or not and I am not required to defer to the decision of the employer. In cases of this nature, I am guided by Item 3 (5) of the Code of Schedule 8 of the LRA which reads as follows:

“When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.”

17. The Constitutional Court in ***Sidumo & Others v Rustenburg Platinum Mines Ltd [2007] 28 ILJ 2405 (CC)*** has reinforced the guideline in the Code. It was held that Commissioners must consider the following factors: The importance of the rule and the employer’s reasons for dismissal as well as the basis of the of the employee’s challenge to the dismissal: the harm caused by the employee’s conduct; the extent to which additional training and instruction may result in the employee not repeating the misconduct; the effect of dismissal on the employee and long service record of the employee. It was demonstrated by the respondent, that the applicant had alcohol drinking problem which affected his work attendance. He was charged with: Being drunk on duty and gross absenteeism. It was testified that the applicant was booked at a rehab centre, intervention were made with his family and the union also assisted him but nothing changed. He was also issued with a Final written warning.

20. The applicant’s evidence was contradictory, he would say he did not remember things and later he would remember. His evidence did not dispute the respondent’s evidence. He acknowledged that he had a problem with alcohol, the respondent assisted him at all costs, he cannot blame anyone for his actions and there is no employer who can tolerate his actions.

21. As to the claim that the charges were not clear, there was no evidence to prove contrary as the charges were very clear as appears on the charge sheet. The applicant was presented with the outcome of the hearing as per by the bundle. The respondent followed the provisions of the Code as per Resolution 1 of 2003. The matter before me is a misconduct one not incapacity due to ill health or other reason, therefore the route taken by the respondent in addressing the applicant’s conduct is to be correct. The applicant claimed that he had at some stage through his supervisor applied for medical boarding and there was no proof as to the claim. Progressive discipline was adhered to by the respondent as there was a previous Final Written Warning against the applicant. There was no evidence before me which substantiate the fact that there was any inconsistent in the application of the rule. It is with no doubt that the respondent’s witnesses were credible, reliable and consistent in their testimonies.

22. I therefore find the version of the respondent’s to be probable than the evidence of the applicant. Procedurally, there was no evidence before me to prove that the respondent deviated from normal process which would result in procedural irregularities. It is just and equitable to hand the award as below.

AWARD:

23. I am persuaded that the dismissal of the applicant, **Mr J T A Zwane**, by the respondent, **Department of Health-Kwazulu Natal**, is substantively and procedurally fair.

24. This application is dismissed,

25. No order as to costs.



Panellist: Silas Ramushwana