



ARBITRATION AWARD

Panellist/s: Bella Goldman
Case No.: PSHS369-10/11
Date of Award: 5-Sep-2011

In the ARBITRATION between:

NEHAWU obo Sisinyane Wilhelmina Lewis

(Union / Applicant)

And

Department of Health - Western Cape

(Respondent)

Union/Applicant's representative: Anwa Meniers, Union Official
Union/Applicant's address: First Floor, Dumbarton House
Cape Town
8001

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Respondent's representative: Russell Collop, Assistant Director: Labour Relations

Respondent's address: Private Box x3
Tygerberg
7505

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DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an arbitration hearing at the respondent's offices in Cape Town on 4 July 2011, the matter was part heard and continued in Athlone on 18 August 2011. Ms Anwa Meniers, Union Official represented the applicant. Mr Russell Collop, Assistant Director: Labour Relations Manager represented the respondent. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

2. I have to decide whether or not the employee's dismissal was procedurally and substantively fair in terms of the Labour Relations Act 1995 as amended (LRA).

BACKGROUND TO THE ISSUE

3. The respondent employed the applicant at Tygerberg Hospital as a Professional Nurse from January 2009 until 30 June 2010 when she was dismissed for incapacity as a result of a latex allergy which resulted in her not being able to perform all her duties. The applicant was informed on 21 May 2010 that her dismissal would be effective as from 30 June 2010. The applicant at the date of dismissal was earning R124, 365.00 per annum.
4. The reasons for termination were:
 - *Your ability to produce and maintain adequate patient care in the ward is restricted to administrative tasks due to your latex allergy condition;*
 - *You cannot assist the doctor with electro convulsive therapy and lumbar punctures due to you're your latex allergy condition;*
 - *You are unable to resuscitate patients and cannot work alone on day or night duty as required from a registered nurse;*
 - *You cannot take blood pressure, cannot enter the treatment room, cannot accompany patients and cannot function independently;*
 - *You cannot function in any Nursing environment hence you cannot execute your scope of practice as a registered nurse.*
5. The applicant was left the Durbanville Mediclinic in order to take up her position at Tygerberg. It is common cause that when she was interviewed for the position at Tygerberg she informed her employer

that she had a latex allergy and that Tygerberg Hospital is not a latex free environment. It was also not disputed that an environment which is not latex free is reportable in terms of the Occupational Health and Safety Act and its regulations

6. The applicant is challenging her dismissal substantively on the basis that when she was employed she disclosed her latex allergy and that the respondent thus had a duty to accommodate her and render her working environment latex free which is also a legal requirement. The applicant is also challenging her dismissal procedurally on the basis that she was denied an appeal on the basis that at the time of her dismissal she was on probation when she was not.
7. The applicant has not found an alternative permanent position and is doing agency work. In terms of remedy she seeks to be reinstated.

SURVEY OF THE EVIDENCE AND ARGUMENT

8. I have considered all the evidence and argument, but because the LRA (section 138(7)) requires an award to be issued with brief reasons for the findings, I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

Documentary Evidence

9. The parties submitted bundles of documents in evidence which were agreed as being what they purported to be. The bundles were marked 'A', 'B' and 'C'.

Employer's Evidence

The respondent called one witness, Sylvia De la Rofe, Assistant Manager who gave evidence under oath. The following is a summary of her testimony:

Sylvia De la Rofe

10. The witness is employed in the Obstetrics Department and interviewed the applicant. She confirmed that the applicant was transferred to the Psychiatry Department as a result of her latex allergy in view of the fact that the Psychiatric Department has a lower prevalence of latex.
11. The witness stated that the applicant's services were terminated because in terms of the duties she could perform in the psychiatric unit she could not be used optimally and could not work independently and could

not perform the functions of a registered nurse. The witness stated that the applicant was in lieu of termination offered a transfer to Groote Schoor hospital but turned it down, this was not disputed.

12. The witness confirmed that the applicant disclosed her allergy at the interview but not the fact that she is a type 1 sufferer and that a type 1 latex allergy is the most serious latex allergy and can be life threatening.

Employee's Evidence

The applicant gave evidence and called two witnesses all of who gave evidence under oath. The witnesses were: Emilia Malloi, Shop Steward and Ashraf Ryklief, Health and Safety Coordinator for the Industrial Health Resources Group at UCT. The following is a summary of the testimonies:

Emilia Malloi

13. The witness gave a synopsis of the sequence of events. The applicant disclosed her latex allergy before she was appointed to the post. She worked in the labour ward for two to three months but could no longer work there as a result of her allergy. She was then sent home for about a month whilst an alternative placement was sought. She was then placed in a psychiatric ward which was supposed to be latex free, part of which was.
14. In April 2010 the applicant contacted the witness and informed her that Miss Henry and Miss Theron; Deputy Director called her to a meeting and asked her to resign, the witness advised her not to resign. Until that point the applicant was represented by a different union.

Sisinyane Wilhelmina Lewis

15. The applicant was previously employed at Durbanville Mediclinic where she was initially employed in theatre. In May 2006 she was diagnosed with a latex allergy as a result of which she was transferred to the recovery ward of maternity section which Mediclinic cleaned up so that it was latex free.
16. The applicant in 2008 applied for a post at Tygerberg in the maternity section. When she was interviewed for the post she disclosed her latex allergy. She was then appointed to the position with effect from 1 January 2009. The applicant stated that as she had disclosed her allergy she assumed that the hospital would ensure that she was placed in a latex free environment. The applicant's reason for moving from the Mediclinic was that the salary at Tygerberg was higher and that she would receive better training with respect to midwifery.

17. The applicant was initially placed in the labour ward where she immediately developed the symptoms of her latex allergy which were inter alia swelling of the lips, closing of the throat, puffy eyes and itchy skin. The applicant was then placed in the high care section of maternity where she was given latex free gloves and did not have to wear a mask. The applicant still suffered from symptoms of her allergy, she took antihistamines which caused her to feel drowsy.
18. After a month she was moved to the recovery room of the maternity section where for a while she experienced no symptoms of her allergy. One night whilst working in the recovery room she experienced an adverse reaction as result of her allergy as a result of an anaesthetist coming in wearing latex gloves. She had to be injected with phenergan. She complained about the incident but got no feedback.
19. One night she was instructed to work in the labour ward as well as the recovery ward as the labour ward required assistance. The applicant informed the night supervisor Sister Kotze that she could not work there as it was not latex free. She went to work in the labour department where she suffered a bad allergic reaction and had to have emergency medical treatment administered to her.
20. The applicant referred to a report from Dr Meintjies, a specialist in Occupation Medicine from Tygerberg which said she had to be transferred from the labour ward as a result of her latex allergy. She was then told to stay at home until an alternative placement was found. She was at home from early April to early 6 May 2009. The applicant was then told to report for duty at the Psychiatric Department as from 6 May 2009 which she did. Sister Williams the Nursing Head of the Psychiatric Department was unaware of the applicant's transfer or of the fact that she had a latex allergy.
21. The applicant worked in the Psychiatric Department from May 2009 until she was dismissed. She worked in the wards but as a result of her allergy she did not give injections or assist Doctors with procedures. Her duties were to give medication, nurse patients and attend doctors' rounds.
22. In January 2010 Ms Hendricks the area manager called her to a meeting with Mrs Theron where and was told to sign documents in terms of which was asked to resign, the applicant refused to sign the documents
23. On 2 February 2010 a meeting was held between the applicant and management, the purpose of which was to consider extending her probationary period which until this point had been extended. The minutes of that meeting reflect that the applicant was not working optimally as a registered nurse as a result of her latex allergy and it was decided to **terminate** her probationary period. In May 2010 she was told by Mrs Joseph Labour Relations Officer to come to meeting when she was given her termination letter. The letter

stated that her representations at the meeting of 2 February 2010 had been considered but that it was decided to terminate her services with effect from 30 June 2010 as a result of the fact that she could not perform her functions as a registered nurse. The applicant appealed the decision but was informed that as she was dismissed whilst on probation she had no right to an appeal. The applicant stated that she was not on probation when her services were terminated and hence she had the right to appeal the decision to terminate her services.

24. Under cross examination the applicant confirmed that she suffered from type 1 latex allergy which is the most serious type of the allergy that can be life threatening. She also confirmed that as far as she was aware both Groote Schoor and Red Cross hospitals are latex free.
25. The applicant stated that she could have returned to Durbanville Mediclinic where she was previously employed but did not. At the time of the hearing doing agency work at Durbanville Mediclinic. The applicant confirmed that she was offered a transfer to Groote Schoor but turned it down. On the first day of the hearing, 4 July, the applicant stated that she did not want to be transferred to Groote Schoor as it was too far to travel to but when the hearing resumed on 18 August 2011 she was prepared to accept transfer to Groote Schoor as she stated that she had since found out that the public transport was available and that it would not take as long as she initially thought to travel to Groote Schoor.

Ashraf Ryklief

26. The witness confirmed that Tygerberg Hospital has been identified as a high risk latex allergy environment where there is a high prevalence of latex. In terms of relevant legislation the employer has a duty to maintain a safe working environment for its employees. He referred to the respondent own Health and Safety policy which inter alia states that the employer must maintain a safe working environment for its employees.
27. The witness also referred to a letter from Dr Meintjies sent to the applicant's Supervisor and Manager of the applicant. In that letter he states that a latex allergy is a reportable disease in terms of the Occupational Health and Safety Act and that the applicant should be transferred to a latex free environment.
28. Further the witness referred to a report dated October 2002 from the University of Stellenbosch, professor Cilliers Head of the Department of Dermatology and Ms de Beer Chief Medical Technologist, Department of Technology to the Chief Director of Tygerberg at the time, Dr Adams. That report inter alia stated that the incidence of latex allergy at the hospital had increased since 2000 and that latex allergy is a notifiable

occupation disease and that in terms of the Occupational Health and Safety Act the employer must provide a safe working environment for its employees, which in this instance meant providing a latex free environment for its employees. The report went on to stress that any form of non compliance can hold serious legal complications implications for the hospital. None of the evidence of the witness was disputed.

29. The parties submitted argument in support of their respective cases which I will refer to where necessary in my analysis.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

30. In a case where unfair dismissal is alleged it is for the respondent to prove on a balance of probabilities that the dismissal was fair.

31. If an applicant is dismissed for incapacity Schedule 8 of the LRA requires the dismissal to be substantively and procedurally fair.

32. If an applicant is dismissed for incapacity or injury, Schedule 8: items 10 and 11 are applicable. Item 10 requires the employer to conduct an investigation into the extent of the incapacity or injury. In the process of investigation the employee should be given an opportunity to state a case and be assisted by a trade union representative or fellow employee. Item 10(4) states that *Particular consideration should be given to employee who are injured at workThe courts have indicated that the duty of the employer to accommodate the incapacity of an employee is more onerous in these circumstances.*

33. Item 11 states:

Any person determining whether a dismissal arising from ill health or injury is unfair-

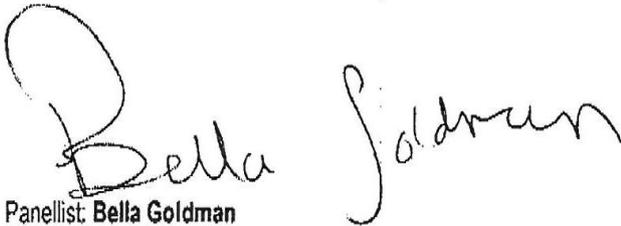
- i. whether or not the employee is capable of performing the work; and*
- ii. if the employee is not capable-*
 - (i) the extent to which the employee is able to do the work;*
 - (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or where this is not possible, the extent to which the employee's duties might be adapted and*
 - (iii) the availability of any suitable alternative work.*

34. In terms of substantive fairness I find on the evidence before me that the respondent adhered to the procedural aspect of Schedule 8 of the LRA referred to above but I find that the respondent could have done more to make a working area latex free for the applicant given the fact that it was aware of the applicant's condition and given that the hospital by not being latex free is in breach of legislation.
35. It was common cause that the applicant disclosed to the respondent when she was interviewed that she had a latex allergy and that the respondent was aware that Tygerberg is not a latex free environment. It was not disputed that a latex environment is reportable in terms of the relevant legislation. The respondent argued that the applicant stated that she had a latex allergy and did not disclose that she had a type 1 allergy and had she done so she would not have been appointed. No evidence was led to substantiate this claim, she did disclose her allergy and the respondent could have enquired further into the type of allergy she had but chose not to. I do not find that the applicant intentionally withheld this information from the respondent and / or that there was any intention by the applicant to misrepresent her condition.
36. The respondent argued that it would cost Rmillions to render the Tygerberg environment latex free and that I do not have the jurisdiction to order that it be latex free and that this would be a function of the Department of Labour which I do not dispute. The fact that the applicant could not perform her functions as a registered nurse as a result of her latex allergy was also not disputed. Given the fact that Tygerberg is in breach of legislation by not being latex free and that the applicant disclosed her latex allergy, the respondent was under a legal duty to render the applicant's environment latex free and for this reason I find her termination to be substantively unfair.
37. However during the termination process the applicant was offered a transfer to Groote Schoor Hospital which if not completely latex free is a substantially more latex free than Tygerberg. The applicant refused this transfer at the time but at the last date of the hearing agreed to the transfer. Given that the applicant disclosed her allergy and that Tygerberg is in breach of legislation by not rendering its environment latex free and that the applicant now wished to be transferred to Groote Schoor Hospital I am going to order that she be transferred to Groote Schoor Hospital.
38. Given the fact that the applicant initially refused the transfer and has done little to mitigate her loss; she on her own version could have returned to permanent employment at the Durbanville Mediclinic I am not going to order that she receive back pay.
39. In terms of procedural fairness the documentary trail indicates that the applicant was on probation until 2 February 2011 when it was decided not to extend her probationary period and thus at the time of her

dismissal she was no longer on probation thus she should have been allowed to appeal the decision to terminate her services. For this reason I find that the applicant's dismissal was procedurally unfair. However I am not going to order compensation with regard thereto on the basis that I do not believe that the appeal would have resulted in the applicant being reinstated to Tygerberg and thus she was not prejudiced and on the basis that she was given a notice period of some six weeks.

AWARD

40. I find the applicant's dismissal to be both procedurally and substantively unfair and the respondent, the Department of Health Western Cape is ordered to reinstate the applicant, Sisinyane Wilhelmina Lewis as from 1 October 2011 and place her at Groote Schoor Hospital in a latex free environment. The respondent is ordered to contact the applicant within five days of receipt of this award and inform her where and at what time she is to report to at Groote Schoor Hospital on October 2011



Panelist: **Bella Goldman**

Sector: **Public Health & Social Development Sectoral Bargaining Council**