



ARBITRATION AWARD

**PHSDSBC
PUBLIC HEALTH AND
SOCIAL DEVELOPMENT
SECTORAL BARGAINING
COUNCIL**

Panelist/s: Advocate Ronnie Bracks
Case No.: PSHS38-10/11
Date of Award: 14th April 2012

In the ARBITRATION between:

HOSPERSA obo Nkutha VP

(Employee)

and

Department of Health- Gauteng Province

(1st Respondent)

Employee Representative: HOSPERSA obo Nkutha VP
Employee's address: Cnr Pasteur & Frikkie Meyer Boulevard
Vanderbijlpark
1900
Telephone: 016 950 6065
Telefax: 016 950 6034
E-mail: _____

Company/Employer representative: Department of Health- Gauteng Province
Company's address: Private Bag 085
Marshalltown
2107
Telephone: (011) 355-3517
Telefax: (011) 355-3808
E-mail: _____

DETAILS OF HEARING AND REPRESENTATION

- A. The Arbitration was scheduled over various days culminating on the 3rd April 2012. The Arbitration was scheduled for hearing at the Respondent's office at Bank of Lisbon Building 14th Floor, cnr Sauer and Market Streets, Johannesburg.
- B. The Employee was represented by Mr. S'busiso Khanyeza, a union official. Ms. Madonsella, the Labour Relations Officer of the Employer represented it. *The proceedings were recorded both manually and electronically*

ISSUE TO BE DECIDED

- C. Whether or not the Respondent committed an unfair labour practice by the disciplinary sanction it imposed on the Applicant.

BACKGROUND TO THE ISSUE

- D. The Applicant is employed by the Respondent at the Sedibeng District Health Services as Assets Manager earning R13 200 per month. He was charged with two accounts of misconduct and found guilty; the sanction was that as alternative to dismissal he would be suspended without pay.
- E. He appealed against the sanction on the 5th October 2009. However when the appeal was heard and upheld the sanction was increased as he was then also given a final written warning valid for 6 months.
- F. The matter was referred to Council on the 8th April 2010 when it was Conciliated and remained unresolved. There were various attempts thereafter to settle the matter resulting in numerous postponements.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

- G Documents were submitted.

As noted previously the proceedings were digitally recorded therefore what appears hereunder constitutes a summary of the evidence deduced by the parties in so far as is relevant for the purpose of this arbitration; it is by no means a minute of what transpired in the course of the proceedings.

Employees' Evidence:

Vusi Phillip Nkutha after being sworn in testified as follows:

- H He referred the dispute because he was dissatisfied with the outcome of his disciplinary hearing. He explained in detail how he was appointed. This being a matter of record it is not repeated.
- I After his appointment he embarked on stocktaking during September. During the course of this he requested both a laptop and cell phone. He was told to use one which was initially allocated to the Meyerton clinic.

- J He said at the same time he received notification that the cell phone of Olga Mthethwa went missing. He was told then that he must close the case. He refused to do so and started an investigation. His investigation revealed that there was negligence. But he was instructed by Mr. Maoba to close the case.
- K The second incident involved a heater where the procedure was not followed in respect of its repair and he refused to agree to its repair. The lady then reported the incident to Maoba who then told the lady involved that she should bring the heater to him. He was then instructed to repair the heater despite the procedure not being followed.
- L The third incident was the delivery of items on a Saturday to the office of Maoba. It was noted that some of the items had almost reached their expiry date. They were instructed to take delivery of the items. Then after the expiry date they were told to dispose of the items. He said that this had resulted in him being charged and that it resulted in losses to the company. He said that he was insistent that the company responsible should pay for the losses but Maoba intervened. Despite him raising the issue with the authorities there was no resolution.
- M As a result of the above, some time in October he was called to an emergency meeting at which he was told that some of his duties were to be taken from him. He started questioning this but no reason was given for this except that he should concentrate on Transit. He lodged two grievances but was advised that by Nhlapo that the grievances would not be considered as they were in the process of investigating him. He followed this with another grievance. He was then given the allegations raised against him which included vulgarity.
- N The person bringing the charges was under Maoba's influence. The witness then gave a detailed account of his challenges with the IT department; how he was locked out. He also explained the investigation. He then proceeded to detail what transpired at the hearing and the irregularities thereat which included the presentation of unsupported evidence.
- O He also explained how during his suspension a camera went missing and that a case was made against him. He said that this was surprising as in the past Maobo had written off lost cameras. The cameras were locked in a safe. He went to the director to query the inconsistencies but was told that this charge would be added onto the same case.
- P In respect of the sanction he said the initial outcome was suspension without pay. He then lodged an appeal but was prevented from doing so. He explained in detail the difficulties he had experienced and how he was prevented by the security from having access to his office and his computer.
- Q He further gave a detailed account of the difficulties he had in returning to his office after he had lodged his appeal. Further, the outcome of his appeal upheld the initial sanction but in addition it imposed a further sanction of a final written warning valid for six months. He then decided to refer his matter to Council.
- R In addition he explained the irregularities that occurred during the hearing including the chairperson communicating with Maobo before the outcome. In terms of his responsibilities he was subject to the PFMA which held him accountable for all asset losses and wasteful expenditure. However, the actions of Maobo were contrary to the act and therefore he could not comply with instructions which were not in accordance with the procurement procedures.

S Under cross examination and re-examination nothing significant was revealed.

Employer's Evidence

The Respondent called one witness who testified after being duly sworn in:

Khotso Mokoena, the Applicant's Supervisor, testified as follows:

- T The Applicant reported to him as the person in charge of the supply chain. The Applicant was instructed by Maobo to create a data base of all cell phones in the district. He could not trace some of the phones in particular one number that they could not get through to. The Applicant informed Maobo about this. Maobo then instructed his secretary to trace the number and it was discovered that the number belonged to the Applicant. When he got to Maobo's office he found the Applicant there. He did not know how the Applicant got the cell phone. He heard afterward that the Applicant was charged.
- U All the matters relating to the Applicant were handled by Maobo and some of the accounts for that cell phone totaled R3 000. In a statement it was written that Violet was the person responsible for the phone but she had since resigned.
- V The witness was subjected to vigorous and extensive cross-examination which is all a matter of record and will therefore not be repeated.

CLOSING ARGUMENT

ARGUMENT BY Applicant:

- W The Applicant's representative submitted that the Respondent has not presented any evidence to counter the evidence of the Applicant. In fact only one out of all the charges was made reference to by the Respondent's witness.
- X The treatment of the Applicant was an unfair labour practice since in terms of Resolution 2 of 1999 the appeal committee was not entitled to amend the sanction.
- Y The representative prayed that the outcome should be in favour of the Applicant and that he should be reimbursed the amounts which he was not paid during his suspension.

ARGUMENT BY Respondent:

- Z The Respondent's representative submitted that the Applicant was properly charged as he had used the Respondent's assets for private calls which totaled almost R10 000.
- AA The matter was dealt with in a substantively and procedurally fair manner as the Applicant was clearly guilty of misconduct. The Respondent did not give preferential treatment to any of its staff hence he had to go through the process; if he had not used the resources he would not have been charged.

BB The Applicant was dismissed; however, instead of dismissal he was suspended without pay. The representative prayed that the sanction should be upheld.

ANALYSIS OF EVIDENCE AND ARGUMENT

1. Section 186 (2) defines “Unfair labour practice” as meaning any unfair act or omission that arises between an employer and an employee involving –
 - (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
 - (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
2. It is clear from the evidence that a disciplinary hearing was held at which the Applicant was dismissed. However, the dismissal was commuted to 3 months suspension without pay. The Applicant appealed the outcome and on appeal the sanction was changed to include also a final written warning.
3. In its evidence the Respondent only dealt with the first charge and even then could not present direct evidence regarding it. In his evidence the Respondent’s witness clearly stated that when he got to Maobo’s office the Applicant was already there; he did not know how the Applicant got the phone and only heard of the charges afterward. He also could not clearly state what the accounts were that the Applicant was supposed to have run up.
4. I have considered this and fail to understand why the Respondent failed to call Maobo because he was the person to whom the Applicant was reporting and the one who brought the charges.
5. In *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC) the following quotation appeared at page 1131 at paragraphs 78 and 79:

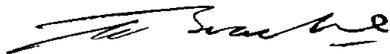
“In approaching the dismissal dispute impartially, a commissioner will take into account the totality of the circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.”
6. I have considered all the facts and when the circumstances are considered, I concur with the Applicant that the Respondent had committed an unfair labour practice when it suspended him as an alternative to dismissal and further when the appeal committee amended the sanction.
7. In addition our courts have also stated that suspension should be considered as alternatives to dismissal. In this regard I wish to refer to *South African Breweries Limited v Woolfree and Others* (C407/98) [1999] ZALC 8 (11 January 1999) where it stated “The imposition of suspension without pay as a disciplinary penalty is because the employee has committed some form of a disciplinary breach. An employer is entitled to take action against employees who misconduct themselves. Once the employer has decided that instead of terminating the contract of employment it will simply suspend it for a period it is not acting unlawfully. In fact section 19 is irrelevant to this scenario as no tender of services or performance by the worker takes place or is required.”

- 8 However, in this case the Respondent failed to prove that the Applicant should in the first place have been dismissed as it presented no evidence that the Applicant had in fact breached a rule of the Respondent which could lead to dismissal.

- 9 In the present case, it is my view that even if the Applicant were guilty of the offence as alleged by the Respondent, to issue both a final written warning and suspension without pay is clearly too harsh in the circumstances and the Respondent's conduct is unfair.

AWARD

- 1) The Respondent (***Department of Health- Gauteng Province***) is ordered to pay the Applicant (**Vusi Phillip Nkutha**) the amount of R34 596 (Thirty Four Thousand Five Hundred and Ninety Six Rand), which is the equivalent of 3 (Three) month's salary.
- 2) The Respondent is further ordered to remove the final written warning from the Applicant's record.



Adv. RONNIE BRACKS

- 3) The above order is to be complied with within 21 (twenty one) days of this award being served on the Respondent.

PSHSBC Panelist