



ARBITRATION AWARD

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Panelist: F.N.Bantwini

Case Number: PSHS 387-11/12

Date of Award: 20 January 2012

IN THE ARBITRATION BETWEEN

A.M. Nodunyelwa

APPLICANT

AND

Department of Health-EC:

RESPONDENT

Union/Applicant's Representative : Mr. A.M. Nodunyelwa
Union / Applicant's Address : P.O.Box 112
Lusikisiki
4820

Telephone :
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Respondent's Representative : Mr.F.Pretorius

Respondent's Address : Department of Health-EC
Corner Oxford and St James Streets
East London

Respondent's Telephone : 043 707 6700
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DETAILS OF HEARING AND REPRESENTATIONS

1. This arbitration was heard on 24 November 2011 at the offices of the respondent in Bhishe. It came before the auspices of the PHSDSBC in terms of Section 186(1) (e) of the Labour Relations Act 66 of 1995 (the LRA). Parties agreed to submit written arguments on 05 December 2011. Mr.A.M Noduyelwa appeared in person while Mr. F. Pretorius from Wesley Pretorius & Associates appeared for the respondent, the Department of Health.

ISSUES TO BE DECIDED

2. I am required to make the following determination;
 - 2(a) whether the applicant's resignation constitutes constructive dismissal or not and in the event that the dismissal is proved, I am required to determine as to whether it was fair or not and what the appropriate relief would be.
 2. (b) **Whether there was arrear salary that was being owed to the applicant or not.**

BACKGROUND TO THE DISPUTE

3. The applicant, **Mr. Alvin Mzingisi Nodunyelwa** was employed by the respondent on 12 November 1990, holding a position of Assistant Manager: Administration during the time of his resignation and was based at Madwaleni Hospital in Elliotdale. On 18 July 2011 he submitted a letter of his resignation with the respondent due to the fact that the respondent failed to pay his salary for July 2011. He was earning R220 000, 00 per annum.
4. Subsequent to this, the applicant referred a dispute regarding the alleged constructive dismissal to the PHSDSBC. When the dispute could not be resolved at conciliation level, the matter was scheduled for arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

The Applicant's evidence

5. According to the applicant's opening statement, the respondent failed to pay his salary for July 2011 after the finalization of his disciplinary hearing. This according to him made working conditions intolerable. The

applicant seeks retrospective reinstatement from the date of dismissal without a loss of benefits under the same terms and conditions that prevailed at the time of dismissal.

6. **Mr. Alvin Mzingisi Nodunyelwa**, the applicant testified as follows:
7. He started working for the respondent on 12 November 1990. During his resignation he was holding a position of an Assistant Manger: Administration and was earning R220 000,00 per annum. On 30 June 2011 he was dismissed by the chairperson of the disciplinary hearing for theft allegations. He received the chairperson's sanction on 12 July 2011 and lodged an appeal against the sanction on 13 July 2011. He resigned from the employ of the respondent on 18 July 2011.
8. The reason for the resignation was the non payment of July 2011 salary by the respondent without any notice. He had never intended to leave his employment prematurely. He could not leave without his salary as it was his sole income. The applicant further testified that he viewed lodging a grievance would be a waste of time and the respondent had dismissed him by reversing his salary.
9. Under cross-examination, the applicant testified that he tendered his resignation because the respondent failed to pay his salary for July 2011. This rendered relations between him and the respondent to be intolerable. The remedy he is seeking is retrospective reinstatement. When the respondent put to the applicant that the appeal process is not binding since he (the applicant) has resigned, the applicant's response was that he has a right to appeal against the chairperson's sanction. The applicant was referred to a letter that was written by the Superintendent General of the respondent which indicated that the applicant's resignation was a unilateral act. This letter appears on page 9 of the respondent's bundle.
10. The applicant further testified that he is aware that the employment relations between him and the respondent do not exist.
11. In closing, **Mr. Nodunyelwa** argued as follows:
12. He tendered his resignation on 18 July 2011 with the respondent because the respondent failed to pay his July 2011 salary. His resignation was accepted by the respondent. The respondent abused its powers as his salary was reversed because of the dismissal sanction that was issued by the chairperson of the disciplinary hearing in the case relating to misconduct. The respondent should have terminated his salary instead of reversing it. He does not dispute that he was charged by the respondent for theft. Subsequent to the disciplinary hearing, he was found guilty and was summarily dismissed.

13. The applicant further argued that the respondent was inconsistent in applying its discipline as Ms. Ndesi wo was also dismissed is still being paid her salary. The respondent could not justify the termination of his salary. The applicant further confirmed that he had withdrawn all other reasons for his resignation that are indicated in his resignation letter. His request is that it be found that the failure of the respondent to pay his salary was the reason for his resignation.
14. Mr. Nodunyelwa also argued that the respondent has failed to justify the actions of reversing his salary for July 2011. This violated his constitutional rights and he could not lodge a grievance as he has resigned. The respondent 2 weeks to rectify the issue of his salary as his last day was 31 July .The respondent did not tender any evidence and as such his evidence is unopposed.
15. The applicant seeks retrospective reinstatement with effect from 01 August 2011 as a remedy.

The Respondent's Case

16. According to Mr. **Pretorius** 's opening statement, the applicant and his wife, Ms. Ndesi were dismissed for theft allegations. He filed an appeal with the respondent on 18 July 2011. Five minutes after filing an appeal, the applicant resigned from the employ of the respondent and the resignation was accepted. The respondent disputes that the applicant's services were made intolerable and as such he is not entitled to the relief sought. The applicant's resignation appears on page 10 of the respondent's bundle.

The respondent did not lead evidence. In closing **Mr. Pretorius** argued as follows:

17. The applicant was dismissed by the respondent on or about 04 July 2011 for theft after a lengthy disciplinary enquiry. He lodged his appeal on 18 July 2011. It should be borne in mind that the appeal was by then out of time. On the same day (18 July 2011) the applicant submitted a resignation letter which was subsequently accepted by the respondent.
18. The critical issues for determination of constructive dismissal claims are:
 - Whether the employee brought the contract to an end;
 - Whether the reason for the employee's action was that the employer had rendered the prospect of continued employment "intolerable";
 - Whether the employee had a reasonable alternative other than terminating the contract.

19. The onus of proving the above mentioned requirements rests on the employee. The applicant's claim for constructive dismissal should fail as he has failed to meet any of the three requirements mentioned above. The applicant was dismissed by the respondent prior the date of his resignation for theft and it is on that basis that his salary for July 2011 was not paid. Although the contract between the applicant and the respondent was initially terminated by the respondent, the applicant subsequent resignation was accepted for obvious strategic reasons.
20. The applicant in his resignation letter expresses his "heartfelt" and "profound gratitude" towards the respondent for employing him in the very same letter. This is clearly not indicative of an intolerable employment relationship. The applicant came to the realization that his employment with the respondent came to an end and that by resigning it would place him in a better position than to have a dismissal record. The applicant has not submitted any evidence to the effect that the employment situation was intolerable.
21. The applicant failed to utilize the internal grievance procedure and has failed to submit any evidence in support of his belief that he felt that it would be pointless to resort to the internal grievance procedure. He (the applicant also failed to at least give the respondent a notice about his salary complaint and as such give the respondent an opportunity to investigate the situation. The respondent was entitled not to pay the applicant' salary on 15 July 2011 as he was by then dismissed. The respondent was equally entitled to accept the applicant's subsequent resignation on 18 July 2011.
22. The respondent's representative finally submitted that the applicant failed dismally to prove constructive dismissal and his claim at best can be described as opportunistic and should be dismissed with costs.

ANALYSIS OF EVIDENCE AND ARGUMENTS

23. It must be noted that the respondent did not lead evidence. This means that there was no counter evidence presented to me. After considering the evidence presented by the applicant, the following is found:
24. It is common cause that the applicant was dismissed for misconduct relating to theft on 04 July 2011. The dismissal was subsequent to a disciplinary enquiry that was conducted by the respondent. It is also common cause that the applicant lodged his appeal to the Executing Authority on 18 July 2011 and in terms of the disciplinary code of the respondent, it was already out of time. It is on these grounds that the respondent could not pay the applicant's salary for July 2011 as he was already dismissed. On the same day (18 July 2011), the applicant submitted a resignation letter.

25. The applicant has referred this case in terms of Section 186(1)(e) which provides that “Dismissal means an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee”
26. The applicant further testified that the respondent stopped paying his salary on 15 July 2011 and he was never furnished with reasons as to why his salary was not being paid. The applicant tendered his resignation on 18 July 2011 out of frustration.
27. The applicant, during the arbitration proceedings sought retrospective reinstatement and payment of July 2011 salary as a remedy.
28. The test for constructive dismissal is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship or confidence and trust between the employee and the employer.
29. The feature for successful claim for constructive dismissal is that the applicant has to prove that his situation had become so intolerable that he was unable to work. He would have continued working had the respondent not created the unbearable conditions, he resigned because he believed the respondent would reform or abandon the part of creating unbearable work environment.
30. The respondent in his opening and closing statements disputed that the applicant was never subjected to intolerable conditions and further submitted that the applicant's claim is opportunistic as he decided to resign after being dismissed so that he can have a resignation instead of a dismissal record. The applicant according to the respondent's representative failed dismally to prove his case of constructive dismissal.
31. It is trite law that a constructive dismissal is not automatically unfair. As the applicant sought reinstatement in his referral, the question that arises is if the circumstances had become so unbearable that he could no longer reasonable be expected to endure them and that there was no alternative to escape the unbearable circumstances, how could he ask for reinstatement?
32. The applicant, apart from consultation with the district as well as the provincial offices of the respondent regarding non payment of his salary, he could not demonstrate to me that he had no other alternatives

except for resigning. The respondent's behavior did not justify resignation and subsequent claim of constructive dismissal.

33. The reason why I am saying this is that the applicant did not utilize the employer's grievance procedure before resigning. **See Pretoria Society for the Care of the Retarded v Loots (1997) 10 ILJ 981 (LAC)**. Apart from the grievance procedure, the applicant could have referred a dispute to the PHSDSBC to enforce the BCEA and issue an order that his salary must be paid. The applicant could have obtained the same order from the Department of Labour. No evidence was led before me to indicate that the above mentioned options were unreasonable.
34. The applicant seeks retrospective reinstatement as well as payment of July 2011 salary as remedies. The request of non payment of a salary was not incorporated in the referral form. I am unable to make a determination or an appropriate order in terms of the Basic Conditions of Employment Act (BCEA).
35. On the basis of the above evidence and arguments, the applicant could not prove constructive dismissal and his conduct proves that he in fact resigned after he was dismissed by the respondent for theft allegations.
36. It appears that the applicant's resignation did not in anyway had an impact on his service as he was no longer an employee of the respondent due to his dismissal for misconduct on 04 July 2011. It is on this basis that his salary was not paid.


AWARD

37. I therefore make the following award:

35.1 The applicant, **Mr. Alvin Mzingisi Nodunyelwa** could not prove that he has been constructively dismissed by **the Department of Health-EC**, the respondent.

35.2 The case is dismissed.

35.3 No order as to costs is made.



Signature

Faith Ncumisa Bantwini

PHSDSBC PANELIST