ARBITRATION AWARD

Case Number: **PSHS425-11/12**
Panelists: **Malusi Mbuli**
Date of Award: **18-05-2012**

In the **ARBITRATION** between

SAMA obo Dr. M. Bhatti

(Applicant)

And

Department of Health - EC

(Respondent)

HEADNOTE:

Applicant was subjected to a disciplinary enquiry and was dismissed after he was found guilty of fraud, insubordination and unauthorized liaison with the media.

Applicant denied the allegations that were levelled against him but pleaded guilty to unauthorised liaison and argued that he did not know that liaison with the media was prohibited in the company. He held that his dismissal was substantively unfair. The applicant did not dispute the procedural fairness of his dismissal.

Applicant's dismissal was procedurally and 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 in Port Elizabeth.

2. The applicant, Dr. M. Bhatti, attended the hearing and was represented by Mrs. V. May, an official of the applicants trade union SAMA.

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 14th of May 2012 and was finalized on the same day and the parties also submitted their closing arguments on the same day.

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 as a Principal Medical Officer and was later dismissed by the respondent for misconduct in that he committed fraud, was insubordinate to his superiors and that he liaised with the media without due authorization.

7. The applicant dispute the 2 allegations leveled against him, admits that he liaised with the media but did not know that he was doing something that is prohibited by the company.

8. He then argues that his dismissal was substantively unfair. The applicant does not dispute the procedural fairness of his dismissal.

9. 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 witness, Dr. Aydin Vehbi testified that he is now working at the Port Elizabeth Hospital Complex as a Director Clinical Services and at the time of the incident he was a Medical Superintendent at Dora Nginza Hospital. He stated that the applicant was employed as a Principal Medical Officer at Dora Nginza Hospital and was employed full time by the Department of Health.

11. He stated that the applicant was expected to perform duties for 40 hours per week and also do community overtime for 16 – 20 hours overtime and the employee must be present on duty as a contractual agreement between himself and the employer. He testified that sometimes full time doctors are expected to perform sessional duties and those sessional duties can only be performed with the permission and authorization of a superior and in the case of the applicant he was there one who was suppose to approve sessional duties for the applicant. He also testified that if the sessional duties are not authorize they cannot be paid through the persal system.

12. He submitted that the applicant went to Lettitia Bam to perform sessional duties without his authorization and he was paid for overlapping duties when he was not physically there at the Lettitia Bam because he was working at Dora Nginza at the same time. He averred that the applicant claimed for the services that were rendered at Lettitia Bam whilst he was working full time at Dora Nginza for the same hours that he claimed for at Lettitia Bam.

13. He stated that this conduct by the applicant has been happening since April 2009, discovered in October 2009 and sometimes in reality it means that the applicant work about 36hrs in a shift. He reiterated that the applicant cannot be working in two places at the same time.

14. With regard to insubordination he testified that around January 2010 there was restructuring that was happening at Dora Nginza Hospital because of the quality of care that was expected for the rape victims because of the urgency of their situation when they have to be referred to court. He submitted that Dr. Bhatti was employed as Principal Medical Officer and was not allocated at the Rape Crisis Center even though he was sometimes performing duties there. He stated that the duties at the Rape Crisis Center were performed by nurses for the National Prosecuting Authority and Dr. Bhatti and other medical officers were re-deployed back to another section within the casualty.

15. He stated that he instructed Dr. Bhatti to report at the casualty department on the 04th of January 2010 and Dr. Bhatti refused to report for duty at the casualty department. He testified that he know that Dr. Bhatti did not report at casualty on the 04th of January 2010 because he did not sign the attendance register at casualty, did not see any patient at casualty on the date in question and when he physically went to the casualty department Dr. Bhatti was not there and he also got a report that he did not report at the casualty. He stated that Dr. Bhatti was in and out and was basically working the way he wanted to work and even when he was instructed by Dr. Pretorius he refused to carry out some of the instructions given to him.

16. He averred that he called Dr. Bhatti to a meeting between them and the meeting became a heated one and the applicant walked out of the office without them finalizing the business he was was called for and when he was leaving he passed an insult to him saying “fuck you” in front of his secretary as well as the clerk working at the Paediatrics Department. He stated that the applicant then opened a case of assault against him and he was surprised because there was no J88 form that was filled and there were no injuries that were sustained by the applicant. He averred that case did not proceed.

17. He stated at cross examination that the applicant was not allowed to arrange a replacement for himself and was not allowed to ask someone to work in his place and claim for work that was done by another person. He testified that it was unacceptable and unethical for another doctor to substitute the other doctor and do work in his place.

18. He stated that Dr. Bhatti had about 17 years of service with the department and was aware of the policies of the department because he was also inducted when he came to the department. He submitted that Dr. Bhatti has been charged with poor work performance and has asked to be removed from the casualty department, however he had to go the because of the restructuring that was happening. He submitted that Dr. Bhattis medical condition was also taken into account when a decision to redeploy him was taken. He told the hearing that any reasonable employee would have complied with the instruction that was given to Dr. Bhatti.

Submissions by the applicant

19. The applicant, Dr. M. Bhatti, stated that he used to work for the respondent as a Principal Medical Officer and was dismissed by the respondent on the 01st of September 2011 after he was found guilty of fraud, insubordination and unauthorized liaison with the media. He confirmed that he was working at Dora Nginza Hospital and that he was reporting to Dr. Vehbi who was the Medical Superintendent at Dora

Nginza Hospital at the time of the incident. He also confirmed that he used to do sessional assignments at Lettitia Bam and other hospitals at the time in question.

20. He confirmed that sometimes he would book himself at Lettitia Bam and other hospitals for sessional assignments during the time he was also assigned to work same hours on a full time basis at the Dora Nginza Hospital. He stated that this exercise did not amount to duplication of work because if he books himself at the other hospital for sessional work at the same time he would organize another doctor to fill in his place and work for him in the sessional assignment.

21. He stated that in the circumstances he was not physically there at the sessional assignment but would claim and pay the doctor who worked in his place. He testified that this is a practice that has been going on for some time and does not see anything wrong with the practice because he had a mutual understanding with the doctor who works in his place for that sessional work.

22. He confirmed that the arrangement between him and the doctor who worked in his place was not approved by the superiors and was just an arrangement between the doctors and he was not the only doctor who was doing that arrangement. He however did not produce evidence to that effect or at least the names of the doctors who did that saying that those doctors would also be dismissed. He confirmed again that the sessional work that they were doing at Lettitia Bam and the other hospitals was not authorized by the management of the Department of Heath which is their full time employer.

23. With regard to the charge of insubordination he stated that he complied with the instruction that was given to him by Dr. Vehbi and Dr. Pretorious and he reported at the casualty department where he was instructed to to report but did not know that he was supposed to fill in the attendance register. He stated that he was unhappy with the decision of Dr. Vehbi to put him at the casualty section because of his health condition that was known to the employer and that his health condition was not taken into account when a decision to redeploy him was taken.

24. He confirmed that he was at the Rape Crisis Center on the 04th of January 2010 and indicated that the Rape Crisis Center was part of the casualty department. He stated that he was frustrated and stressed by the fact that Dr. Vehbi did not listen and did not attend to his grievance and he then went to the media to report him. He confirmed that he pleaded guilty to the charge of liaison with the media and indicated that he did not know that he was doing something wrong but was just voicing out his anger because he felt he was not treated fairly.

25. He confirmed having a meeting with Dr. Vehbi but denied that he walked out of the meeting and also denied swearing at Dr. Vehbi and also denied the insult that he is alleged to have uttered. He testified that he was not told that the practice of arranging a session with the doctor to work under his name was prohibited by the employer.

26. The applicants representative then closed their 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 does not dispute the procedural fairness of his dismissal and the employer has therefore followed the correct procedure in dismissing the applicant. With regard to the substantive issue, the applicant was charged and found guilty of fraud, insubordination and unauthorized liaison with the media at a disciplinary inquiry. Such transgressions are regarded as a serious acts of misconduct by the respondent.

30. The applicant denies the 2 allegations leveled against him and argues that his dismissal was substantively unfair. The employer then called 1 witness to prove that the applicant committed fraud and was insubordinate to his superiors.

31. With regard to the charge of fraud it is alleged that the applicant arranged sessional work that was not authorized by his superiors, arranged someone to work in his place at another hospital without authorization, claimed the amount for that sessional work as if he has physically performed that sessional work himself and according to him paid the doctor who worked under his name.

32. The employer argues that the doctor cannot be in two places at the same time and in order for the doctor to be able to perform sessional work such session must be approved by the superiors in order for them to adjust the persal system to pay the doctor. He said the doctors were not allowed to arrange such sessions

themselves as it would be impossible to manage the situation and that the doctor who worked in the place of another cannot be held responsible for what happened because he was not working under his name.

33. He stated that what the applicant did cannot be monitored and amounted to fraud on the part of the applicant because he was paid for the duties that he did not perform but were possible performed by someone else. The argument of the employer in this regard makes perfect sense and the conduct of the applicant amounted to fraud at least on a balance of probabilities and cannot be condoned especially in the public health environment in which the applicant was working.

34. The applicants defense that he did not know that it was wrong for him to record that he has worked at two different places at the same time and that he did not know that he cannot arrange the doctor to work in his place without permission is unacceptable and cannot be a justification for what the applicant did. The applicant in his position as a Doctor and Principal Medical Officer in the public health institution knew or is at least expected to have known that what he did was fraud, wrong and prohibited by the employer.

35. With regard to insubordination charge the employer witness testified that the applicant did not report for duty at the casualty after he was instructed to do so. He produced the attendance register for the day and the duty sheet that records the work done by each doctor and the name of the applicant did not appear in those documents.

36. He called the casualty section and also physically went to the casualty but he could not find the applicant. The applicant says he reported for duty and did not know that he was expected to sign the attendance register and work sheet. From the evidence led in this arbitration hearing it is clear that the applicant did not report for duty at the casualty as instructed without any valid reason and was therefore insubordinate to his superiors.

37. The applicant pleaded guilty to the 3rd charge of liaison with the media and his defense that he did not know that what he was doing was wrong is also unacceptable. The employer witness presented a clear and coherent evidence which was not disputed by the applicant and even thou not corroborated stands out to be the true reflection of what happened during the time of the incident.

38. 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 fraud and the results of failure by the employees to carry out reasonable instructions in a public health

environment., the example that he portrays to other employees and the general interest of the employer as a public institution.

39. I am of the firm opinion that the applicant committed fraud and was also insubordinate to his superiors 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 Tow (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.

40. 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.

41. 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 followed a fair procedure and that his dismissal was procedurally fair.

42. This means that the dismissal of the applicant was procedurally and substantively fair.

43. I therefore make the following award.

AWARD

44. The dismissal of the applicant, Dr. M. Bhatti, by the employer, Department of Heath, was procedurally and substantively fair.

45. The applicant is therefore not entitled to any relief.

Signature: _____

Commissioner: **Malusi Mbuli**