



ARBITRATION AWARD

Panelist/s: Bhekinhlanhla Stanley Mthethwa
Case No.: PSHS448-10/11
Date of Award: 16-Sep-2011

In the ARBITRATION between:

PSA obo Mangele, Z.T
(Union / Applicant)

and

Department of Health: KZN
(Respondent)

Union/Applicant's representative: D. Govender.
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Respondent's representative: S. Shezi/M. Khumalo
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Details of hearing and representation:

1. The matter was scheduled for arbitration on 6 July 2011 and remained part heard and was heard again on 22 August 2011 at Eshowe Hospital in Eshowe. Mr. D. Govender a trade union official from PSA represented Miss. Z.T. Manqele (hereinafter referred to as the Applicant) and Messrs. SM Shezi and M. Khumalo represented the Department of Health (hereinafter referred to as the Respondent). The proceedings were digitally recorded.
2. Having presented their respective cases, parties agreed to submit heads of argument by 30 August 2011 and only did so on 2 September 2011. The last day of this arbitration is thus 16 September 2011.
3. At the commencement of the arbitration proceedings the respondent applied for postponement on the grounds that its representative, Mr. M. Khumalo was not available. The applicants' representative objected to the application on the grounds that both parties had agreed on this date when the matter was postponed last time. After hearing arguments from both parties I issued *ex tempore* ruling and determined the application in the following terms:

“(a) there was no valid reason why the respondent’s representative was not available;

(b) the applicant would suffer prejudice if this application succeeds;

(c) both parties were properly notified of the hearing and they agreed to reconvene on 6 July 2011; and

(d) in light of the above reasons this application is refused and the matter shall proceed as scheduled”.

Issues to be decided:

4. The issue to be decided is whether or not the dismissal of the applicant was both procedurally and substantively fair.

Background to the issue:

5. The applicant was appointed as a Facility Information Officer in March 2001. She was earning R140 000 in annual remuneration when she left employment. She continued in that capacity until the 10th of May 2010 when her services were terminated for an alleged misconduct.

Summary of evidence and arguments:

6. All witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The respondent led evidence of Messrs. Henry Mduduzi Sibiyi and Siyabonga Mfana Ndabandaba. The applicant also testified. Their evidence may be summarized as follows;

Respondent's case:

7. The respondent contended that the applicant was dismissed for misconduct in that she failed to report for duty for more than 30 consecutive days. Therefore, the applicant's services were terminated for an unauthorised absence and she was deemed to have been discharged from the Public Service on account of misconduct with effect from 4 May 2010. On 13 April 2010 she was issued with an ultimatum to report for duty on 15 April 2010 or apply for incapacity leave. When the applicant failed to comply with this ultimatum her services were terminated in terms of section 17(5)(a)(i) of the Public Service Act, ("the PSA"). It was on this basis that the respondent contended that the applicant's discharge was by operation of law; as such there was no dismissal.

The respondent called two witnesses in support of its case.

First witness – Henry Mduduzi Sibiyi

8. Mr. Sibiyi testified as follows:
9. He was employed as a Senior Systems Management Officer and he was supervising the applicant. The applicant fell sick during the year 2009. From June 2009 the applicant failed to submit medical certificates. On 18 June 2009 he was accompanied by BE Mkhwanazi to visit the applicant's homestead and they could not find her. However, he found the applicant's father, grandfather and her grandmother. The applicant's father told them that the applicant was staying at Eshowe. They went back to Eshowe; that is where they found the applicant's sister and they gave her a letter addressed to the applicant. Amongst others; the letter was informing the applicant that she has failed to report for duty for a long time. The document also advised the applicant to apply for a sick leave or temporary incapacity leave no later than 25 June 2009. Thereafter, the applicant came back and submitted a medical certificate. The applicant apologised for failing to submit her medical certificate. At that time the applicant had been booked off sick for the period of 3 months.
10. He later sought advice from Mrs. Desai at the head office regarding the applicant's absence and condition. Amongst others; Mrs. Desai advised that the applicant should make her transfer request in writing and he should assist the applicant.

11. The applicant was due back at work on 1 April 2010; however, she failed to report for duty on that day. He then called the applicant at about 10h00 and she did not answer her phone. He later spoke to Mrs. Sokhulu who informed him that the applicant had gone to work. However, it was not true that the applicant had gone to work.
12. Later that day he decided to hide his mobile phone number and called the applicant again. At that stage the applicant answered her phone. The applicant promised to report back for duty on the following day (2 April 2010). However, the applicant failed to report for duty as promised. The applicant did not apply for vacation leave or sick leave during April 2010.
13. He was aware of the applicant's health condition. He also met the applicant and suggested to her to take early retirement. At one stage the applicant had requested a transfer to another institution.

Second witness – Siyabonga Mfana Ndabandaba

14. Mr. Ndabandaba testified as follows:
15. He was a Senior Staff Relations Officer at Mbongolwane Hospital at the time of the incident. On 13 April 2010 he visited the applicant's place of residence after receiving a call from the applicant's supervisor that she was failing to report for duty. He found the applicant and he informed the applicant that her failure to report for duty would result in termination of her services. The applicant promised to report for duty on the following day. There was no leave form or sick note submitted by the applicant. He only received a sick note covering the period 1 April 2010 until 9 May 2010 from the applicant's trade union afterwards.
16. He had posted the letter terminating applicant's services and the applicant reported for duty on 10 May 2010. He advised the applicant when she reported for duty that her services have been terminated.
17. There were no complains received from the applicant. It was the applicant's responsibility to report her absence to her superiors. The applicant had absconded from work. If an employee absents herself/himself from work for more than 30 days she/he would be regarded as having absconded.

Applicant's case:

18. It was the applicant's case that that the respondent cannot and could not have invoked section 17(5)(a)(i) of the Public Service Act 103 of 1994 ("the PSA") on or about 10 May 2010. Furthermore, the

respondent could not have deemed the applicant to have been discharged from the Public Service on account of misconduct in terms of section 17(5)(a)(i) of the PSA. This argument was based on the Ruling issued on 8 March 2011. It was further contended that the applicant's dismissal was procedurally unfair since the respondent failed to follow procedures as set out in Resolution 1 of 2003 concluded at the Public Service Co-ordinating Bargaining Council ("the PSCBC"). It was on this basis that the applicant contended that her dismissal was both procedurally and substantively unfair.

The applicant testified on her own and did not call any witness.

19. She testified as follows:
20. The respondent was aware that she was sick. Mr. Sibiyi had phoned and she told him that she was sick. He then advised her to bring a sick note for her absence. Messrs. Ndabandaba and Mabanga paid her a visit and they did not give her a letter. Mr. Ndabandaba requested a sick note but she told him that Mr. Sibiyi wanted a sick note to be accompanied by sick leave forms. When she reported for duty on 10 May 2010 she received a letter terminating her services.
21. Messrs. Ndabandaba and Mabanga visited her on 13 April 2010. She had consulted Dr. Ntimbane on 1 April 2010. When Messrs. Ndabandaba and Mabanga visited her she had a sick note in her possession. It was a norm to submit a sick note when an employee was sick. She could not fax her sick note because she was alone and sick. She was admitted to the hospital in January 2010 until April 2010. She was referred to a specialist by Dr. Ntimbane.
22. She did not report for duty on 1 April 2010, instead she went to consult Dr. Ntimbane.

Analysis of evidence and arguments:

23. In terms of section 188 (1) of the LRA a dismissal is not unfair if the employer proves that the reason for dismissal was for a fair reason based on the employee's conduct (and that the dismissal was in accordance with a fair procedure). For the purposes of determining the substantive fairness of the applicant's dismissal, it is important to look at the reasons that triggered her dismissal.

Allegation that the applicant was absent without leave or permission between 1 April 2010 and 4 May 2010

24. It was common cause that the applicant did not report for duty between 1 April 2010 and 4 May 2010 and there was no sick leave or leave of absence approved by the respondent or granted for this period. On 13 April 2010 Ndabandaba paid her visit and directed to report for duty on 15 April 2010 or to apply for sick leave within 5 working days. It was further common cause that she was advised of her discharge on 10 May 2010 through a letter received from the respondent on the said date.
25. However, the applicant's case was that the respondent cannot and could not have invoked section 17(5)(a)(i) of the PSA in terminating her services on or about 10 May 2010. Furthermore, the respondent could not have deemed her to have been discharged from the Public Service on account of misconduct in terms of section 17(5)(a)(i) of the PSA. This argument was based on the Ruling issued by myself on 8 March 2011. In support of this contention the applicant also argued that she had reported her absence to the respondent and it was aware of her medical condition.
26. The relevant parts of section 17 of the PSA read as follows: "An officer, other than a member of the services or an educator or of the Agency or Service who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month shall be deemed to have been dismissed from the public service on account of misconduct with effect from a date immediately succeeding his or her last day of attendance at his or her place of duty. (a) If such an officer assumes other employment he or she shall be deemed to have been dismissed as aforesaid irrespective of whether the said period has expired or not. (b) If an officer who is deemed to have been so discharged, reports for duty at anytime after the expiry of the period referred to in paragraph (a), the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that officer in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absent on vacation leave without pay or leave on such other conditions as the said authority may determine."

Applicability of the provisions of section 17 of the PSA

27. Having carefully considered evidence led and documents produced during the arbitration hearing I am of the view that the provisions of section 17 (5) of the PSA are applicable in this case. This was established

through the evidence of both Messrs. Sibiya and Ndabandaba. They both testified indisputably that the applicant was advised to report for duty after her lengthy absence from work. In the year 2009 the applicant was warned and told not to repeat the same thing. On 1 April 2010 Sibiya also advised the applicant over the phone to apply for leave of absence within 5 working days. The applicant failed to report for duty or to apply for leave of absence. Eventually, on 13 April 2010 Ndabandaba went to the applicant's place of resident armed with an ultimatum. The ultimatum made it very clear that the applicant was required to report for duty on 15 April 2010 failing which she will be terminated from the Peral system. The ultimatum also gave the applicant an opportunity to apply for sick leave within 5 working days. However, there was no positive response whatsoever, on the part of the applicant. Although the applicant disputed that she received the ultimatum; but her denial was not convincing; she gave a lame excuse that Ndabandaba had promised to bring her leave application form at home. This version was denied by Ndabandaba.

28. Therefore, I find these two respondent's witnesses to be accurate and credible. What impressed me was that they both reacted impressively to an exacting cross-examination by Govender. The pressure placed upon them elicited no damaging inconsistencies. Therefore, in my view they had no motive against the applicant; as such they had no reason to fabricate their testimony. By contrast, the evidence of the applicant was unimpressive. Although the applicant was an assertive and emphatic witness; her version lacked internal logic why she did not give or show Ndabandaba her medical certificate if she had it on 13 April 2010. Accordingly I reject the applicant's evidence.
29. Without any shred of a doubt it was correct to conclude that by implication the employee had indicated her intention not to return to work by failing to return to work or apply for sick leave within 5 days as commanded by the respondent in the ultimatum letter. At least; the applicant should have shown Ndabandaba her medical certificate if there was one as she was claiming. There was absolutely nothing wrong on 4 May 2010 when the respondent concluded that the applicant had no intention to return to work and invoked the provisions of section 17 of the PSA. This is why I fully agree with the respondent's representative that the applicant absconded and her services were then terminated by operation of the law.
30. The provisions of section 17(5) of the PSA have received attention in a number of decisions of the courts. In **Phenithi v Minister of Education & others (2006) 27 ILJ 477 (SCA)** the court dealt with the provisions of section 14(1)(a) of the Employment of Educators Act 76 of 1998 ("the EEA"), which has similar provisions as those of section 17(5) of the PSA. The court held that when an employee is dismissed in terms of the deeming provision the employer does not commit an act or take a decision

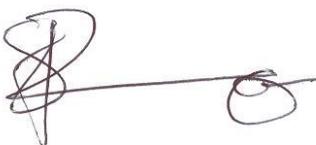
because the discharge is by operation of the law. At paragraph 19 the court specifically said: "As to the ground that s 14(1)(a), read with s 14(2), violates the appellant's fundamental right to fair labour practices in terms of s 23(1) of the Constitution, it is not clear what 'act' of the employer is alleged to be allowed by the section 'without considering the substantive and procedural aspects of the case'. It would not be out of place to interpret the word 'act' to mean 'to decide to terminate or discharge', to which the answer again is that the employer takes no decision to terminate an educator's services under s 14(1)(a) of the Act. The discharge is by operation of law. In my view, the provisions create an essential and reasonable mechanism for the employer to infer 'desertion' when the statutory prerequisites are fulfilled. In such a case there can be unfairness, for the educator's absence is taken by the statute to amount to a 'desertion'. Only the very clearest cases are covered. Where this is in fact not the case, the statute provides ample means to rectify or reverse the outcome."

31. If I were to apply the same principle established in the above judgment I must find that there was no dismissal as anticipated in section 186 of the LRA. Accordingly, I find that the applicant was not dismissed within the meaning of section 186 of the LRA, instead, she absconded and the deeming provisions of section 17 of the PSA were invoked.
32. Accordingly, in my view the applicant's termination of her contract of employment does not fall within the scope of section 186 of the LRA. As such, the applicant is excluded from the remedies provided for in section 193 and 194 of the LRA.
33. In the circumstances I make the following award:

Award:

34. Miss. Zandile Thandeka Manqele was not dismissed by the Department of Health; instead her services were terminated by the operation of the law; as such there was no unfairness to be determined.
35. Accordingly, the applicants' application is dismissed.
36. No order as to costs is made.
37. This file should be closed.

DONE AND SIGNED IN JOHANNESBURG ON THIS 15TH DAY OF SEPTEMBER 2011.



Arbitrator: Bhekinhlanhla Stanley Mthethwa