



ARBITRATION AWARD

Panelist/s: Leslie Martin
Case No.: PSHS45-11/12
Date of Award: 21-Nov-2011

In the ARBITRATION between:

N.E.H.A.W.U. on behalf of M. Cagwe

(Union / Applicant)

and

Department of Health- Western Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration was held at the offices of the Western Cape College of Nursing in Klipfontein Road, Athlone, Western Cape on 2 November 2011. The applicant, Mr. Makhaya Cagwe (Cagwe), was represented by Mr. Meniers, an official with NEHAWU. The respondent, the Department of Health, Western Cape (the respondent), was represented by Mr. R. Collop, an assistant director in labour relations and Mr. W. Breuninger an assistant director in labour relations for EMS.

ISSUE TO BE DECIDED

2. Was the dismissal of Cagwe fair?

BACKGROUND TO THE ISSUE

3. Cagwe worked for the respondent from January 2005 until 6 December 2010 when he was dismissed. At the time of his dismissal Cagwe was a general worker and earned R4,300.00 (four thousand three hundred rand) per month.

SURVEY OF EVIDENCE AND ARGUMENT

4. It was common cause that Cagwe had been dismissed for entering an office without authorization. It was also common cause that Cagwe had entered the office and had come out of the office.
5. Selica Rentia Overmeyer (Overmeyer), a clerk in supply chain management at EMS, Enrico Antonio Heuvel (Heuvel) the administrative officer at EMS and Jacobus Herklas Nel (Nel) an assistant director in supply chain management testified under oath for the respondent.

6. Cagwe testified under oath on his own behalf.

THE EVIDENCE FOR THE RESPONDENT:

7. Cagwe was seen coming out of the office shared by Overmeyer and Boshoff on 7 July 2010. At that time Overmeyer was not at work and Boshoff was on leave. All orders and procurement advices are printed and locked up in this office. Personnel and Logus system documents are also kept in her office. This office was to be kept locked at all times when Overmeyer or Boshoff were not there.
8. Otherwise Overmeyer had an open door policy prevailing in that office regarding Cagwe. When Overmeyer left work on 6 July 2010 she locked her office and took the key home with her. Boshoff had left his key with Heuvel. At that stage everything in Overmeyer's office was packed up and ready to move.
9. Nothing had been reported missing from that office on 7 July 2011.
10. On 7 July 2011 Heuvel returned from Tygerberg hospital with 3 ladies. After he had dropped them at the entrance and had parked the car he was told by these ladies that they had seen Cagwe emerge from the office.
11. Heuvel reported this to Nel, who asked him to write a report. Nel had also asked him to check with Overmeyer whether the office had been locked. Overmeyer confirmed that the office was locked.
12. Nel was later appointed as the investigating officer in this matter.
13. As the administrative officer Heuvel would also make sure that the office was locked.
14. He was also aware of the fact that Cagwe was a shop steward of NEHAWU. Where the office is situated is not the usual working environment of Cagwe, who would visit that floor as he worked with the cleaning staff.
15. There was an arrangement between Cagwe and Nel that Cagwe would obtain authorization from Nel to do trade union related business on that floor.
16. At the entrance to the building is a sign which reads that no unauthorized persons are allowed. Cagwe is an authorized person.
17. The office door had a latch which locks the door automatically when it is closed. That day the latch was in the unlocked position. The office could also be entered through a hatch or the window.
18. Nel was at Tygerberg hospital on 7 July 2011 and had not returned to Pinelands office that day. He could therefore not himself check whether the office was locked.
19. THE EVIDENCE FOR THE APPLICANT:
20. On 7 July 2011 Cagwe passed the office on his way to making some photocopies. He noticed the office door was open so on his way back from the photocopying facility he entered the office to speak to Overmeyer. He often did this and would chat to Overmeyer about trade union business or anything.
21. On 7 July 2011 he had entered the office to speak to Overmeyer regarding the bonus of Mlambo, a union member, who wanted to know if his bonus would still be paid as he was on suspension. He had spoken to Overmeyer previously about this. Overmeyer is Mlambo's supervisor.

ANALYSIS OF EVIDENCE AND ARGUMENT

22. It is clear from the evidence presented at this arbitration that Cagwe was accustomed to entering the office to interact with Overmeyer. The evidence also suggests that that this was encouraged hence the open door policy towards Cagwe.
23. While it is so from the evidence that Overmeyer had her key at home on 7 July 2011 the evidence in respect of the key of Boshoff is that he had given it to Heuvel. As there is no evidence pertaining to where that key was that day it would be reasonable to assume that Heuvel had it on his person. There is in fact no evidence of how Cagwe got that key if that were the case.
24. On a balance of probabilities therefore Cagwe had not opened the office door with either of the two keys.
25. There is furthermore no evidence that Cagwe had opened the office door using a key or any other tool.
26. While there is the testimony of Nel that entry to the office could be gained through the window or a hatch there is again no evidence of such entry having been made. The evidence of the office being located on the first floor leads me to conclude on a balance of probabilities that it was unlikely that Cagwe had so entered the office. There is also no evidence of his having gained entry to the office through the hatch.
27. On a balance of probabilities therefore Cagwe had entered the office through the door as testified to by him and when he had seen it ajar. He had done so on numerous occasions in the past and in accordance with the open door policy testified to by Overmeyer.
28. It must be borne in mind that the respondent was in the throws of relocating – a further factor which tilts the balance of probabilities further in Cagwe's favour in that it is indicative of unusual circumstances prevailing in the office at the time. Such circumstances would be of office doors being open and boxes packed and being carted out.
29. The evidence of Overmeyer was in fact of boxes having been packed in the office, ready to be moved.
30. It would not be surprising to have found the office open and with the latch in the locked position.
31. In the circumstances and having considered all the evidence presented at this arbitration I find that the dismissal of Cagwe was substantively unfair.
32. In the circumstances it would be appropriate to make an award in favour of Cagwe and to restore the status ante his dismissal.

AWARD

33. In making this award I have taken into account the provisions of the Labour Relations Act 66 of 1995 as amended in particular sections 193 and 194. I accordingly order the respondent, the Department of Health Western Cape, to reinstate Cagwe into the position he held prior to his dismissal

on 6 December 2010 and by no later than 6 December 2011. Even though the dismissal was almost a year ago there is no evidence to suggest that any delay in the resolution of this dispute was caused by Cagwe. The reinstatement will also be without loss of benefits and remuneration backdated to the date of dismissal on 6 December and in the amount of R51600,00 (fifty one thousand six hundred rand)(R4300,00 (monthly salary x 12 (months)). This amount is due and payable by no later than 15 December 2011 after which it will attract interest at the legal rate of interest.

Panellist/s: **Leslie Martin**
Sector: **Public Health & Social Development**