



ARBITRATION AWARD

Panelist: F. N. Bantwini
Case Number: PSHS472-11/12
Date of Award: 16 July 2012

IN THE ARBITRATION BETWEEN

NEHAWU obo Ngqeza T

APPLICANT/EMPLOYEE

AND

Department Of Health-EC

:

RESPONDENT/EMPLOYER

Union/Applicant's Representative

:

Mr M. Gobana

Union / Applicant's Address

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DETAILS OF HEARING AND REPRESENTATION

1. This matter was part heard on 19 April 2012 and was finalized on 14 June 2012 at the offices of the respondent in Port Elizabeth. It came before the PHSDSBC in terms of Section 191 (5) (a) of the Labour Relations Act no.66 of 1995 (the LRA) for arbitration of the applicant's dismissal dispute. Mr. P. Qwayiza appeared for the respondent, the Department of Health while Mr. M. Gobana, an official from NEHAWU appeared for the applicant, Mr. T. NGqeza who was also in attendance. Parties agreed to submit written closing arguments on 20 June 2012. The last set of arguments was received on 25 June 2012.

ISSUE TO BE DECIDED

2. I have to decide as to whether the applicant's dismissal was procedural and substantively fair and if not, what the appropriate remedy would be.

BACKGROUND TO THE DISPUTE

3. The applicant started working for the respondent on 16 March 2006 as a Porter. The applicant's services were terminated on 08 March 2012. He challenged the dismissal by referring the dispute to the PHSDSBC through his union. The applicant was charged and dismissed for alleged misconduct which emanated from assaulting a fellow employee.

SURVEY AND ANALYSIS OF EVIDENCE AND ARGUMENT

4. In terms of section 192(2) of the LRA the onus is on the respondent to prove the fairness of the dismissal of the applicant.

5. According to Mr Qwayiza's opening statement the applicant was charged with assault. His dismissal was both procedural and substantively fair.

6. **Ms. Kutala Nobanda**, the first witness for the respondent testified as follows

7. She works for the respondent at Livingstone Hospital as a Nurse. On 07 February 2010 she was on duty. While she was in the consulting room she was given a file of a patient who was to be given an injection by Sister Goliath. Both Mr Madiba and the applicant were standing next to the doorway. Mr Madiba left while the applicant remained. When she requested the applicant to move, he refused. The applicant started shouting and threatened to kick her. She thought the applicant was joking.

8. The applicant hit her with the fist on the face while she was on her (the witness) way to the cubicle where she was going to inject the patient. The witness was referred to a statement that appears on page 104. The incident happened in front of the Doctor and the patient. The witness further testified that she was never forced to write the statement. The supervisor took her to the doctor for examination after the incident. She was given some pills by the Doctor. The applicant assaulted her and her relationship with the applicant is that of a colleague. The witness was also referred to her sick certificate which appears on page 130. The diagnosis, according to the sick note is assault with facial injuries and is dated 07 February 2010.

9. Under cross-examination by Mr Gobana, the witness testified as follows:

10. Mr. Madiba and the applicant were standing by the door. Mr. Madiba left and the applicant remained. When she requested him to move, he threatened to kick her and he eventually assaulted her. The applicant followed her while she was on her way to the cubicle where she was to inject the patient. She forgot that the applicant and herself were at some stage teasing each other. The statement was written long time ago hence she has forgotten some of the facts. The applicants' representative stated that the applicant will testify that the applicant and the witness quarreled. The applicant recalled the quarrel but could not figure out as to what it was all about.

11. The witness further testified that she was booked off sick until 16 February 2010 and there was visible swelling on the right eye. The Doctor called the police after the incident. The applicant had already left when the police arrived. She was interviewed by the police and did not know whether the applicant was also interviewed and does not know why the applicant was not arrested. A case number was sent by police via her cellular phone. The applicant insulted her while she was busy with the patient.

The applicant was angry when he assaulted her. She could not recall the argument between her and the applicant before she was assaulted by the applicant.

12. Under re-examination, the applicant stated that she was examined by the doctor after the assault and a sick certificate was issued by the Doctor. The diagnosis is assault with facial injuries and it was issued on 07 February 2010. The Police were called by the Doctor so that she can report the incident. She left the premises of the hospital at 16h00 and she was supposed to knock off at 19h00. The applicant said he will meet her by the gate at 19h00.

13. The second witness, **Mr. Zahid Brown** testified as follows:

14. He works for the respondent at PE Hospital Complex and he presided over the disciplinary hearing which led to the dismissal of the applicant. He was appointed by the CEO to be a chairperson of the disciplinary hearing. The applicant did not plead guilty during the hearing. He recommended dismissal because assault is a serious offence in terms of the disciplinary code. The disciplinary hearing was held on 19 April 2010.

15. Under cross-examination, the witness testified as follows;

16. During the disciplinary hearing a sick certificate as well as other documents was submitted but he could not recall some of the documents as the incident occurred 2 years ago. The applicant did not plead guilty. The report was prepared and signed by him (the witness). Whatever he wrote is what transpired at the disciplinary hearing. The applicant did not dispute the assault and that played a role in finding the applicant guilty. Mitigating circumstances as well as the respondent's policy as a guideline assisted him in making a decision. The applicant apologized to Ms. Nobanda who testified that she sustained swollen eye as a result of the assault.

17. In closing, **Mr Qwayiza** argued as follows:

18. Ms. Nobanda disputed that she provoked the applicant except for asking him to pave the way for her while she was performing her duties. The applicant could not even justify that if ever he was provoked, such provocation warranted physical assault. Assault according to the disciplinary code of the respondent is regarded as a serious and a dismissible offence (Resolution 3 of 2003)

19. Mr Qwayiza referred me to authorities whereby assault is regarded a serious offence and dismissing an employee for assault was found to be an appropriate sanction. According to Ms. Nobanda's evidence, the applicant assaulted her (Ms. Nobanda)

20. Finally the respondent's representative stated that the applicant's dismissal was both procedural and substantively fair and that his (the applicant) application must be dismissed.

Applicant's version

21. There was no basis for the respondent to dismiss the applicant according to Mr. Gobana's opening statement. He was charged for assaulting a fellow employee and the union maintains that this was a false allegation.

22. The applicant, **Mr. Tandolwethu Ngqeza** testified as follows:
23. He knows Ms Nobanda as a colleague since 2009. On 07 February 2010 he was joking with Nobanda by saying “we are back Ms. Dakuville” He was from X-Ray together with Madiba to transport a patient when Ms. Nobanda told him that there is a patient that needs to be taken. On coming back from the theater, Ms.Nobanda started shouting at him. He ignored the shouting and told her that he took lunch and he was still calling her Dakuville.
24. He also became angry and shouted back at M. Nobanda who was saying she does not like to be called names. Mr. Madiba came between them and there were patients in the trolleys. Madiba told him (the applicant) to leave him alone and go to the porters’ room. Ms Nobanda did not ask him to move from the door way as he was not standing at the doorway. They were both in the passage facing each other.
25. Ms.Nobanda went to the nurses’ room and the Sister- in charge phoned the supervisor, Mr Blaauw. He went back to the Porter’s room. At about 15h25 he saw police who went to the Security Guard asking for the nurse room. They wet back while he was with other porters and he knocked off at 19h00. He never hit nor threaten Ms. Nobanda.
26. Under cross- examination, the applicant testified as follows;
27. He was on duty on 07 February 2010 and it is the same date which Ms. Nobanda alleged that he assaulted her. He knocked off at 19h00 and he was notified of the disciplinary hearing and signed the notice on 12 April 2010. Mr. Madiba could not testify at the disciplinary hearing because he arrived late. He told his representative and he was not aware that he was supposed to raise the issue of Madiba with the chairperson. He was dismissed for assault according to the chairperson’s report which appears on page 55 of the bundle. He appealed after the receipt of the letter which was dismissing him. The verdict of appeal is on page 48.
28. The applicant denied that he assaulted Nobanda and does not know as to who called the police. The police asked for the nurses room from the Security Guards. Assault is a serious offence and it is fair for the respondent to dismiss an employee who assaults another employee. The grounds for the appeal that appear on page 64 were not written by Mr. Gobana.. He saw Mr Blaauw’s statement 2 days before the disciplinary hearing. He never absconded from work on 07 February 2010 and he did not hide from the police. Mr Blaauw’s statement which appears on page 109, the applicant absconded on the arrival of the police and came back at 17h00.

29. The first witness for the applicant **Mr Zolani Reginald Madiba** testified as follows:
30. He works for the respondent as a Porter since June 1987. He knows the applicant even before he was employed at Livingstone Hospital. On 07 February 2010 he was together with the applicant on lunch when they received a call to collect a patient to the theater. Ms Nobanda told the applicant that she has been calling him to collect the patient. The applicant advised Ms Nobanda that “it is the reason why we are here”
31. They (the applicant and the witness) took the patient to the theater. On coming back, they heard that Nurse Nobanda was crying. He never saw any quarrel between Nobanda and the applicant although the applicant used to joke with Nobanda. He wrote the statement on the day of the incident but Sister Mazondo told him to keep it. The applicant never assaulted Nobanda and he never noticed any swelling on Nobanda’s face and eye. Mr Blaauw called the applicant from the porter’s room after seeing that the Nurse Nobanda was crying.
32. In the afternoon of the incident he saw 2 police officers coming in while he was in the porter’s room with the applicant. The applicant was never called by the police, instead he saw the police leaving the hospital premises with Ms.Nobanda.
33. Under cross-examination, the witness testified that he knows the applicant from the location. On 07 February 2010 he was escorting a patient which was stabbed, together with the applicant when Ms. Nobanda shouted at the applicant on their way back from the theater. He was never invited to attend the disciplinary hearing. During the second sitting, he attended the disciplinary hearing but he arrived late. The witness could not respond when it was put to him that Mr. Rens did not call him as a witness.
34. The witness further testified that he was ordered to write a statement and Mr Blaauw told him to keep it. He saw the police who left the hospital with Nurse Nobanda. Mr Blaauw came in when he was called by Mrs Mazondo. The applicant never assaulted Nobanda. The witness could not dispute the sick certificate issued by the doctor, indicating that Ms. Nobanda sustained facial injury.
35. Under re-examination, the witness stated that he has been to the Doctor before and the Doctor would write what he/she is being told by the patient. He wrote the statement on the day of the incident. The police never asked him anything.

36. In closing, **Mr Gobana** made the following submissions;
37. The evidence of the applicant and Madiba were not disputed by the respondent. The fact that the police did not arrest the applicant is that they could not see the need as there was no swelling on Nobanda's face. The police were only called for the protection of Nobanda as she suggested that she was scared as the applicant threatened to deal with her outside the gate of the hospital. If the nurse was assaulted, the applicant could have been questioned, arrested or summoned to attend an assault case.
38. In the light of the above questions, the only conclusion one could make is that no assault happened but there could have been mean threats that compelled Ms. Nobanda to require a police protection and therefore the police case opened was not that of an assault but a case of a threat in the part of Mr. Ngqeza.
39. The employer has failed to call the doctor that is alleged to have diagnosed the patient, it was very important in the case for the observation of the assault. The documentary evidence in the form of a sick note and the doctor's report should not have a weight. The respondent has failed to discharge the onus on balance of probabilities to prove that Ms. Nobanda was assaulted by the applicant. On the basis of the above facts, the dismissal of Mr. Ngqeza was substantively unfair.

ANALYSIS OF EVIDENCE AND ARGUMENT

40. Evidence before me indicates that the applicant was properly notified of the disciplinary hearing and he was afforded an opportunity to lead evidence and call witnesses. The applicant also testified that Mr. Madiba could not testify during the disciplinary hearing due to the fact that he arrived late at the disciplinary hearing venue.
41. The complainant, Ms Nobanda testified that the applicant assaulted her in front of the patient and the Doctor. The Doctor examined Ms. Nobanda and issued a sick certificate, booking her off sick from 07 February 2010 to 16 February 2010. The diagnosis according to the sick note is assault with facial injuries.
42. It is the applicant's case that the applicant did not assault Ms Nobanda although he heard that she was crying in the nurse's room. The applicant's representative in his closing arguments argued that the applicant did not assault Ms. Nobanda hence he was not even arrested by the police. He further argued

that the Doctor should have testified and the respondent could not have relied on the sick certificate alone.

43. Ms. Nobanda testified that the applicant had already left when the police arrived. This evidence was corroborated by Mr. Blaauw's statement which indicated that the applicant absconded when police arrived and he came back on duty at 17h00.

44. The evidence of both respondents' witnesses clearly established that the applicant assaulted Ms. Nobanda. Mr. Zahid Brown, for example testified that the applicant pleaded not guilty during the disciplinary hearing but did not dispute assaulting Ms. Nobanda, see page 94 of the bundle.

45. It must be noted that the authenticity of the Doctor's sick certificate that was issued for Ms. Nobanda was never questioned by the applicant's representative. The diagnosis is assault with facial injury.

46. Assaulting an employee is a serious offence and generally accepted as a valid ground for dismissal. This was conceded by the applicant. The applicant was aware of the respondent's disciplinary code and that assault is a dismissible offence. The rule is reasonable and the applicant should have avoided breaching it.

47. Based on the evidence before me, I am satisfied that the respondent has discharged its onus in terms of Section 192(2) of the LRA. I am also of the view that the sanction of dismissal was reasonable and fair considering also that the applicant committed a serious offence. There is in the circumstances no reason for me to interfere with the decision of the respondent to dismiss the applicant.

48. The conduct of the applicant justified dismissal and therefore his dismissal was both procedural and substantively fair.

AWARD

49. I therefore make the following award:

49.1 The dismissal of the applicant, **Mr. Thandolwethu Ngqeza** by the respondent, **the Department of Health-EC** is declared to be procedural and substantively fair.

49.2 The application is dismissed.

49.3 There is no order as to costs



Signature

Faith Ncumisa Bantwini

PHSDSBC PANELIST