



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Arbitrator: **Mr. Anand Dorasamy**

Case No: **PSHS479-15/16**

Date of Award: **11 JULY 2017**

In the matter between:

P BAYENI

(Union / Applicant)

and

DEPARTMENT OF HEALTH-KWAZULU NATAL

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. Mr M P Nonyongo an attorney represented the applicant and Ms P M Mkhize represented the respondent. This dispute relates to an allegation of unfair dismissal. The arbitration proceedings commenced on the 4 July 2017 at the King Edward hospital board room (Doctor's Quarters) and after the evidence was tendered the parties agreed to submit written closing arguments on the 7 July 2017.

ISSUE TO BE DECIDED

2. The issue to be decided was whether the dismissal of the applicant was procedurally and substantively fair. Should I find in favour of the applicant I am to determine the appropriate relief.

BACKGROUND TO THE ISSUE

3. The respondent opposed the applicant being represented by a legal practitioner and after taking into account the submissions I ruled as follows: I have considered the submissions and determine that the applicant should be granted legal representation taking into account the comparative abilities of the parties. The respondent is also allowed to make an election as to whether it wants to be legally represented or not or continue with the matter. The respondent elected to continue with the matter.
4. The applicant challenges the procedural and substantive aspects of her dismissal and seeks retrospective re-instatement with back pay. The applicant was conditionally offered a post that was later withdrawn.
5. The respondent contends that the dismissal was procedurally and substantively fair and prays for the dismissal to be confirmed.

SURVEY OF EVIDENCE AND ARGUMENT

RESPONDENT'S OPENING STATEMENT

6. The applicant was not dismissed but the respondent withdrew the letter of appointment because she did not disclose that she was dismissed from the Public Service. The applicant was given a conditional letter of appointment based on her providing the correct information. Upon discovering that the applicant failed to provide the correct information the respondent withdrew the conditional letter of appointment.

APPLICANT'S OPENING STATEMENT

7. It is the applicant's case that her dismissal was both procedurally and substantively unfair. She is seeking retrospective re-instatement with back pay.

RESPONDENT'S EVIDENCE

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8. She is the assistant director at the Inkosi Albert Luthuli hospital since 2002 and is aware of the case because recruitment fall under her portfolio.
9. There was a problem with the applicant's appointment because there was a problem on persal. When they tried to appoint her a message reflected desertion or absconded her duties.
10. She saw her application for appointment and on the second page (p19-20) section F work experience , reason for leaving states resigned.
11. She could not be appointed on persal because it showed desertion and therefore the HRO's could not proceed with the appointment. They need a request to head office to unblock on persal so that an appointment can be made. Once the system is unblocked can appoint.
12. The applicant did not reflect in her application that she absconded but wrote resigned. After it was discovered that she was previously dismissed the relevant documents were sent to head office.
13. There was a vacant post and the applicant applied and was successful at the interview. She indicated that she would assume duty on the 1 April 2015 and reported for duty on that day. After she assumed duty the documents were given to the HRO to process the appointment on persal to pay her. At that point, the appointment could not be processed on persal.
14. Under cross examination he stated as follows:
15. The applicant was dismissed while working at Intibane clinic in the Eastern Cape. In May 2005 she was employed at the clinic and worked until 2007 and decided to resign and gave her letter to the sister and her colleague witnessed it and she gave her 30 days of service.

16. She had not seen the affidavits before today. According to her employer the applicant deserted her duty (BA p18). On page 30 of bundle B shows desertion. The letter from the Eastern Cape Department of Health shows that she absconded.

17. There was an attempt to request that her termination of service be amended at the KZN Department of Health. It was to remove the block so that an appointment could be done. It was done by the hospital to register her on the system.

18. The applicant was dismissed at the Intibane clinic and the employer was prepared to employ her.

APPLICANT'S CASE

PHINDIWE BAYENI

19. She was working in 2005 at the Intibane clinic in Umtata until 2007. The reason for leaving was that her father was ill and needed her to run the family business.

20. She ended up stopping at the Intibane clinic as she resigned in August 2007 and gave her letter to her supervisor and served her 30 days until August.

21. She deposed to an affidavit (BA p12) because she started at the clinic in 2005 and resigned in August 2007. The letter of resignation was witnessed by Ms Nomonde Keshwa (BA p 15). The affidavit was written in 2015.

22. She wants to return to work and be paid back pay from the date of dismissal.

23. Under cross examination she stated as follows:

24. At the time she asked the district manager and was told that she was on probation and she did not understand the term probation period. She did not claim her pension.

25. When she tried to contact her supervisor she could not get through.

26. She does not have proof that she resigned and the relationship with her manager was good. She does not know the reason they changed her resignation to abscondment.

27. She was not present when Ms Keshwa wrote her affidavit and she did not come to the hearing because it is very far and she could not give her money.

28. The employer contends that she absconded and that is the reason she was not appointed.

CLOSING ARGUMENTS

29. The parties agreed to submit written closing arguments on the 7 JULY 2017. The parties' submissions were considered when arriving at my decision.

ANALYSIS OF EVIDENCE AND ARGUMENT

30. This matter was cited as an unfair dismissal dispute in terms of Section 191 of the LRA and the issue to be decided was whether the dismissal of the applicant was procedurally and substantively fair.

31. The applicant was employed at the Intibane clinic in the Eastern Cape as a nursing assistant from 2005 until 2007. The Eastern Cape department is separate from the Kwa Zulu Natal department of health.

32. The applicant stated that she left her employment at the clinic to help her father.

33. Upon enquiry to the Eastern Cape Department of Health it was found that the applicant had deserted her post and desertion is reflected as the reason for leaving the employment. If an employee has desertion recorded as a reason for leaving employment then it is difficult for the employee with this adverse recording against her name to be captured on any public service department.

34. In the present case the adverse recording was made on the Eastern Cape persal system and it would cascade into all the provincial state departments in the country. It would not be possible an employee even if he/she was successful at an interview and

offered a position to be captured on the persal system because the person with the adverse recording is blocked on the system.

35. The only avenue left for the applicant is to approach the Eastern Cape Department of Health to rescind her adverse recording of desertion and if done she would be unblocked on the national persal system. If it was not the Kwazulu Natal Department of Health but the Gauteng Department of Health the same action would result as the applicant is blocked on the persal system.
36. Even if it was possible to make a finding in favour of the applicant her relief of retrospective re-instatement with back pay is not possible as she is still blocked on the persal system and the system would automatically reject her on the system.
37. In an event the applicant was conditionally appointed subject of the verification of any misrepresentation on her CV and other misdemeanours that could have led to the withdrawal of the offer of employment. The Kwazulu Natal Department of Health (the hospital) attempted to verify the applicant's status and was advised that she was dismissed at the Intibane clinic for desertion.
38. As a consequence of the above I do not believe that the employer had miss-conducted itself in respect of the procedural aspect of the withdrawal of the offer of employment. Therefore I determine that the procedural aspect of the dismissal to be fair.
39. Once the reason for leaving her previous employment was confirmed as that of desertion it was within the right of the respondent to withdraw the offer of employment. The adverse recording against the applicant's name prevented the respondent capturing her on the persal system and as such her employment could not be made on the persal system.
40. In this regard I have considered the judgment in *Bayat v Durban Institute of Technology* (2006) 27 ILJ 188 (CCMA) where it was held that "where the offer of employment is conditional upon the fulfilling of a future uncertain event, no employment relationship comes into being until the condition was fulfilled. That is also the case for terminative conditions."

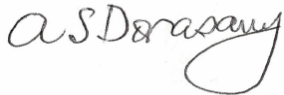
41. As a consequence of the above I determine that the withdrawal of the offer of employment was procedurally and substantively fair.

AWARD

42. I find that the withdrawal of the offer of employment was procedurally and substantively fair.

43. The application is dismissed.

44. This file should be closed.

A handwritten signature in cursive script, appearing to read 'a S Dorasamy', written in black ink.

Arbitrator: Anand Dorasamy