



ARBITRATION AWARD

Case Number: PSHS497-11/12

Commissioner: Abraham Nthako

Date of Award: 05-December -2011

In the matter between

PSA on behalf of P. W. Van Biljon

(Union/Applicant)

and

Department of health – Free State

(Respondent)

Union/Applicant's representative: Mr. J. Greeff

Union/Applicant's address: C/o PSA

P O Box 7673

Bloemfontein

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Respondent's representative: Mr. J. B. Mncube

Respondent's address: Department of Health Free State

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DETAILS OF REPRESENTATION

1. This is an award in the arbitration between PSA on behalf of Me. P. W. Van Biljon, the Employee and Department of Health – Free State, the Employer.
2. The arbitration was held under the auspice of PHSDSBC in terms of the Collective Agreement.
3. The conciliation process was dealt with and the matter could not be resolved.
4. The Employee requested that the matter be resolved through arbitration process.
5. The matter was set down for arbitration on the 02nd of November 2011 and it was finalized.
6. The Employee appeared was represented by Mr. J. Greeff from PSA and the Employer, Department of Health was represented by Mr. J. B. Mncube.
7. The matter was mechanically recorded and the parties submitted a bundles of documents which were marked A and B.
8. The parties agreed that they will make submissions in writing and their arguments will be submitted to the Council, thereafter by the 23rd of November 2011 the Employee will reply to the Employer's arguments.
9. Employer raised a point of law, stating that the referral of the matter was wrong and it should be dismissed. From the referral it shows that the matter has been referred as constructive dismissal, as such the Employer's submission is incorrect and the point raised is dismissed.

ISSUE TO BE DECIDED

10. The issue to be decided on is whether the Employee was constructively dismissed and, if so what appropriate remedy to apply.

BACKGROUND TO THE ISSUE

11. Employee was appointed at the Employer's workplace from the 02nd of January 1997 and at the time of termination of service, she was an Assistant Nurse.
12. At the time of termination of her services, she was earning R7000.00 per month. It is alleged that the Employee resigned in November 2010 based on constructive dismissal.
13. She referred the matter to the Council and as it could not be resolved a certificate of non resolution was issued.
14. The matter was set down for arbitration at Bophelo House, Department of Health in Bloemfontein on the 02nd of November 2011 and it was finalized. Parties agreed that they will make written submissions of which I found that to be in order.
15. The matter relates to alleged constructive dismissal and it is the duty of the Employee to prove that she was constructively dismissed.

SURVEY OF EVIDENCE

EMPLOYEE'S SUBMISSIONS

16. The Employee made submissions without calling any witnesses.

EMPLOYEE

17. Me. P. W. Van Biljon made submissions through her representative as follows:
18. She had approximately 13 years service in the Public Service and at the time of resignation she was stationed at Virginia Hospital as Assistant Nurse. In 2001/2002 the Employee went for back operation and in 2005 the Employee was stationed at Winburg Hospital where she had to move beds as part of her duties. She injured her back. She then had to go for second operation in 2005. From 2005/2006 the Employee's specialist Dr. Hugo recommended that the Employee be changed to a lighter duty. Numerous letters were written to the supervisors and Employer from medical specialist and the Employee without success as per page 35 to 81, 91 to 105 and 111 to 115 of bundle A.
19. In 2007 the Employee had a fall back in terms of her back and she was treated for the problems and applied for temporary incapacity leave for the period of the 25th of September 2007 to 30th of April 2008. The leave was approved and the Health Risk Manager recommended that the Employee's job description and or job should change to light duty, pages 106 to 108 and 16 to 17 of bundle A. Various letters were written to Chief Executive Officer of Katleho Hospital, but the Employer refused to change the Employee's duties to light one. Her supervisor Mr. Thole made the situation very intolerable for her and he refused to change the Employee's duties.
20. He demanded that she continue to work as Assistant Nurse. In spite of numerous medical certificates and reports, Mr. Thole continued with his behaviour and victimized the Employee for many years. Human Resource Section wrote a letter at page 15 of bundle A to CEO of Katleho Hospital to recommend that the Employee be placed on a light duty position. In the mean time the Employee was struggling with the pain and discomfort. The Employee registered two grievances in terms of the injury on duty and light duty placement but the Employer did not give any proper response and or solution.
21. The Employee submitted that the issue in terms of her case has always being that the Employer partly complied with the recommendations of SOMA of light duty in that they constantly transferred the Employee on their request, but never reduced her duty to light duty due to her back injury. She submitted that a grievance was registered but still the Employer failed to reduce her duties to light ones. This damaged her back further and only when she could not continue with her duties as required by the Employer in spite of the SOMA recommendation she decided to resign as last resort. That was the Employee's submission in brief.

EMPLOYER'S SUBMISSION

22. Employer did not call any witnesses after submissions.
23. The Employer submitted as follows:
24. That the Employee was a Senior Nursing Assistant at Katleho Hospital Complex in Virginia and due to a back injury, the Employee had several back operations and approval was granted by the Health Risk Manager, SOMA, that the following periods be granted as temporary incapacity leave: 25th September 2007 to 30th October 2007, 03rd December 2007 to 31st December 2007 and 02nd January 2008 to 30th April 2008. On the 10th of February 2009 the Employee lodged a grievance in that she should do light duty as per document on page 1 of bundle B. The Employer failed to respond to her grievance within the prescribed 30 days and she lodged a dispute in this regard but the dispute was later withdrawn as the grievance was responded on.
25. The Employee's grievance was investigated and on the 17th of September 2009, the Employee was issued with the outcome of the grievance as per page 22 of bundle B. Management of Katleho

Hospital confirmed that the Employee should continue with nursing duties, but not to lift patients and that she be put on straight shifts. The Employer submitted that the Employee did not continue to part C of the grievance procedure, by referring the matter to the Executive Authority, if she was not satisfied with the response of the Department.

26. They submitted that a report dated the 19th of May 2010 was submitted by the Patient Care Manager, Me. Moletsane as per page 53 to 54 of bundle B on the Employee's progress and work satisfaction after transferring her to a light duty positions. The Employee was placed at male ward and continued to perform nursing duties, but should not lift patients. She was further put on straight shifts, meaning 8 hours per day not 12 hours. Employee was not satisfied. In November 2009 the Employee was transferred to casualty department after complaining about her workload and her shifts were reduced to six hours per day with three hours brakes.
27. In February 2011, the Employee was interviewed by Patient Care Manager, Me. Moletsane, to determine her satisfaction with regards to her placement. In terms of the report there were signs of total satisfaction and further the Employee thanked the Employer for her placement, stating that the strain on her back was much better because she does not work long hours. It was alleged that the Employee complained about her light work and requested additional duties, such as transferring patients and to work overtime.
28. The Employee was monitored and supported by the Occupational Health Officer and the Employer did it best to accommodate her. Employer submitted that on the 11th of August 2010 the Department of Health received an e-mail from PSA reminding the Department of the light duty placement and that the Employee requested the Employer to assist her in this regard but without success. In the e-mail it was indicated that the Employee was still lifting patients/transferring patients and been utilized at the Trauma Unit.
29. Department was again urged to transfer the Employee to a section where she could do light duty. Apart from the above report, Mr. Thole , Clinical Programme Coordinator, confirmed in his report that the Employee was placed in various positions to accommodate her medical condition, reference was made to page 19 of bundle B. The Employee was expected to do light duty such as "CSSD" secretarial and taking vital signs. The Employee developed a history of absenteeism due to her initial back injury.
30. The Employee was reported to have indicated that she is not satisfied with the duties at Casualties, even though she only preformed light duty such as taking the history and vital signs of patients. That was the Employer's submission in brief.

ANALYSIS OF EVIDENCE AND ARGUMENT

31. **Section 185 of The Labour Relations Act 66 of 1995 provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practice.**
32. **Section 192(2) of The Labour Relations Act 66 of 1995 casts the onus of proving that there was a dismissal on the employee, and the onus of proving that the dismissal was fair on the employer.**
33. Employee gave the Council her brief background about the operations that she went to and how the injury on her back affected her work. She submitted that the Health Risk Manager recommended that her job description and or job should change to light duty and reference was made to pages 106 to 108 and 16 to 17 of bundle A. She submitted that various letters were written to Chief Executive Officer of Katleho Hospital, but the Employer refused to change the Employee's duties to light one. Her supervisor Mr. Thole made the situation very intolerable for her and he refused to change her duties.
34. She submitted further that a grievance was registered but still the Employer failed to reduce her duties to light ones. This damaged her back further and only when she could not continue with her

duties as required by the Employer in spite of the SOMA recommendation she decided to resign as last resort.

35. **Section 186(1)(e) of Act 66 of 1995 provides that dismissal means that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.**
36. **Constructive dismissal consists in termination of the employment contract by reason of the employee's rather than the employer's own immediate act. Such an act of the employee is precipitated by earlier conduct on the part of the employer, which conduct may or may not be justified. See Amalgamated Beverages Industries (Pty) Ltd v Jonker 1993 14 ILJ 1232 (LAC).** It is important that we understand constructive dismissal before we could look at the submissions and the arguments of the parties. From the abovementioned it is clear that in the case of constructive dismissal an employee is the one that terminates the contract of employment due to the act or omission of the employer that makes continued employment intolerable.
37. **In the Labour Appeal Court case of Pretoria Society for the Care of the Retarded v Loots[1997] 6 BLLR 721(LAC), it was held that constructive dismissal was constituted by the employer rendering the work environment unbearable for employee.** Now looking at the arguments, evidence and submissions made, one has to align himself with the understanding of what constitutes constructive dismissal and whether the Employee herein has been constructively dismissed.
38. It is in deed so that the onus of proving constructive dismissal rest solely on the Employee. In this matter the Employee argued that the Employer refused to comply with the recommendations made for her to be placed on a light duty. She submitted that by granting temporary incapacity leave, it testimony that the Employer is in agreement that the Employee was booked of sick. Processing of the Employee's injury is testimony that Employer agrees that the Employee was injured and she had a medical condition.
39. She argued that the Employer had no intention to accommodate the conditions of the Employee and she was forced to continue with her normal duties after all the specialists that she consulted recommended that she be utilized in a light duty capacity as a nurse. The Employee had no other choice but to resign because her medical condition and or the Employer's attitude towards her made continued employment nearly impossible to continue.
40. On the other hand the Employer argued that the Employee was transferred to other Sections within Katlehong Hospital at least twice and her duties were reduced dramatically to support her back condition. The Employer kept the Employee under continued observation to ensure that she is satisfied with her working conditions and that she does not hurt herself again in line of duty. Employer submitted that it is not clear why the Employee did not continue with part C of the grievance procedure when she was obviously not satisfied with the response of the Employer.
41. The Employer submitted that the Employee did not exhaust internal grievance procedure, a tool which was readily accessible and only partly used by her. The Employer submitted that the Employee's resignation was totally voluntary. She was not forced to resign, she was accommodated in terms of SOMA recommendation and she was continuously monitored to ensure that she remains satisfied with her working conditions.
42. Employer submitted that the Employee failed to prove exactly how circumstances were made intolerable for her. The Employee submitted that Human Resource Section wrote a letter at page 15 of bundle A to CEO of Katleho Hospital to recommend that the Employee be placed on a light duty position. The letter that is referred to is dated the 01st of October 2010 and it refers to the Employee. The letter states that the Employee came to the office (Bophelo House) today, 30 September 2010; She came here to finalize her case regarding her placement where she would be able to render administrative work as well as sedentary type of duties; as mentioned by her doctor, Dr. D Hugo, she cannot do the duties of a Nursing Assistant and therefore must be alternatively placed; she is willing to

do any administrative work, whether it is at Katlehong Hospital or at any surrounding institution like Bongani Regional Hospital or Lejweleputswa District Office. Employer requested that she be assisted.

43. Before the abovementioned letter, there were numerous corresponds from the Employee and the Employer relating to her illness or injury. It is common cause that there were recommendations made with regard to the Employee's state of health and the work that she was doing. From the Employee's background it is clear that her complications started in 2001/2002 and in 2005 the Employee was stationed at Winburg Hospital where she had to move beds as part of her duties. She injured her back. She then had to go for second operation in 2005. From 2005/2006 the Employee's specialist Dr. Hugo recommended that the Employee be changed to a lighter duty. Numerous letters were written to the supervisors and Employer from medical specialist and the Employee without success as per page 35 to 81, 91 to 105 and 111 to 115 of bundle A.
44. The letters and corresponds on from page 35 to 81, 91 to 105 and 111 to 115 relate to 2002, 2005, 2006, 2007, 2008 and 2009. The Employer submitted that Employee's grievance was investigated and on the 17th of September 2009, the Employee was issued with the outcome of the grievance as per page 22 of bundle B. Management of Katleho Hospital confirmed that the Employee should continue with nursing duties, but not to lift patients and that she be put on straight shifts. On page 22 of bundle B is Mr. Moletsane's report on the Employee's problems. It indicated on action plan on light duty that the Employee be taken to male ward to continue with nursing duties but not lift up the patients; straight shifts were instituted and that the Employee should apply for the position of ward secretary should it be vacant.
45. On laziness it was indicated in the report that the unit manager is to stop remarks done by her subordinates with immediate effect and to give managerial support. The report was done in September 2009. The Employer submitted that a report dated the 19th of May 2010 was submitted by the Patient Care Manager, Me. Moletsane as per page 53 to 54 of bundle B on the Employee's progress and work satisfaction after transferring her to a light duty positions. The Employee was placed at male ward and continued to perform nursing duties, but should not lift patients. She was further put on straight shifts, meaning 8 hours per day not 12 hours. Employee was not satisfied. In November 2009 the Employee was transferred to casualty department after complaining about her workload and her shifts were reduced to six hours per day with three hours brakes.
46. The Employer submitted that in February 2011, the Employee was interviewed by Patient Care Manager, Me. Moletsane, to determine her satisfaction with regards to her placement. In terms of the report there were signs of total satisfaction and further the Employee thanked the Employer for her placement, stating that the strain on her back was much better because she does not work long hours. It was alleged that the Employee complained about her light work and requested additional duties, such as transferring patients and to work overtime.
47. The question that needs to be answered is how the Employer made the working conditions so intolerable that the Employee felt that continued employment is not possible. The Employee submitted that the issue in terms of her case has always being that the Employer partly complied with the recommendations of SOMA of light duty in that they constantly transferred the Employee on their request, but never reduced her duty to light duty due to her back injury. She submitted that a grievance was registered but still the Employer failed to reduce her duties to light ones. This damaged her back further and only when she could not continue with her duties as required by the Employer in spite of the SOMA recommendation she decided to resign as last resort.
48. What surprises in this matter is that the Employee submitted that she was not placed at a light duty but the Employer submitted that that was done. After the Employee was transfer to male ward and an instruction issued that she should not lift patients and after being put on a straight shift, she was not satisfied. What I do not understand is how an employee can work in an alleged intolerable situation for so many years because in my view she was not happy with the manner that the Employer is handling her case. In the cases of constructive dismissal, employees who have resigned must generally show

that they were subjected to coercion, duress or undue influence. Mere unhappiness at work is not enough.

49. The Employee alleged that the Employer refused to put her on light duty even when it was recommended by SOMA to do so however it appears from the submissions made by the Employee that it has always been her case that the Employer partly complied with the recommendations of SOMA of light duty in that they constantly transferred the Employee on their request, but never reduced her duty to light duty due to her back injury. From this evidence, an inference can be drawn that the Employer did something about the Employee's situation but the Employee was not happy in the way that it was handled.
50. What should be noted is that the Employee has been in constant communication with the Employer by herself, through her representative Union and doctors. This has been happening from 2005 as per documents referred to by the Employee at pages 35 to 81, 91 to 105 and 111 to 115, if not from 2002. The Employer submitted that the Employee lodged a grievance and due to the fact that the matter was not dealt with within the required time, she referred a dispute to the Council and the grievance was dealt with as per page 22 of bundle B. As a result thereof, the Employee withdrew her case at the Council. From all this evidence it cannot with certainty be said that the Employer folded his arms when the Employee complained.
51. The Employee referred to Mr. Thole in her submission but there is no evidence that she lodged a complaint against him. The test for whether the employer has rendered the prospects of continuation of the employment relationship intolerable is objective, that is, the existence of a constructive dismissal cannot be determined from the state of mind of the employee alone. **See: *Smithkline Beecham (Pty) Ltd v CCMA and Others (2000) 21 ILJ 988 (LC)***. It is my view that the Employer did not push or pressure the Employee into resignation but the Employee's health condition is the one that led her to resign as the Employer was showing determination to assist her and accommodate her health.
52. The onus of proving on a balance of probabilities that the Employee has been dismissed, lays with the Employee. There is no indication in submissions made as to when and how in November/December 2010 exactly did the Employee resign, nevertheless, it is my view that the Employee's resignation was premature as her case was attended to as per submissions made. What constituted light duty to the Employer did not do so to the Employee. It is my view that the question of light duty should have been explored and expanded by both parties to get a clear understanding of its meaning within the workplace, more so considering the Employee's back symptomatology and recommendations made. Resignation was not the last resort.
53. It is therefore my view that the Employee failed to prove on a balance of probabilities that she was constructively dismissed.

FINDING

54. Based on the above, it is my finding that the Employee failed to discharge the onus of proving that the Employer constructively dismissed her.
55. The Employee case should be dismissed.

AWARD

56. The Employee **Me. P. W. Van Biljon** was not constructively dismissed.
57. The Employee's case is dismissed.

58. I make no other as to costs.

Signature: _____

A handwritten signature in black ink, appearing to be 'Abraham Nthako', written over a horizontal line. The signature is stylized and cursive.

Commissioner: Abraham Nthako

Sector: Health