



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: PSHS50-17/18

Commissioner: THABE PHALANE

Date of Award: 24 JULY 2017

In the matter between:

S. Lekoma

(Union/Applicant)

and

Department of Health- North West

(Respondent)

1. DETAILS OF THE HEARING REPRESENTATION

- 1.1 An Arbitration hearing was held on 03 July 2017 at the Department of Health offices, situated at, 4th floor cnr West end and Leask Street, Pretoria.
- 1.2 The Applicants attended and were represented by Mr O.B Brandt, an Attorney, whilst the Respondent was represented by Mr J Dlamini, the Respondent's Official.
- 1.3 The Applicants submitted a bundle of documents marked bundle "A" and the Respondent submitted a bundle of documents marked bundle "B".
- 1.5 The matter proceeded to arbitration and the Applicant testified and was cross examined, and the Respondent also called a witness who testified and was cross examined.

1.5 Mr J Raholang provided interpretation services.

1.4 The parties also submitted oral arguments at the conclusion of the hearing.

2. ISSUE TO BE DECIDED

2.1 I am determined to decide whether the Respondent committed an unfair Labour Practice against the Applicants by issuing a warning and deducting a months' salary for gross insubordination. In the event that I find that the Respondent acted unfairly, I am further required to determine the appropriate remedy.

3. JURISDICTIONAL ISSUE

3.1 There was no jurisdictional point raised by the parties.

4. BCKGROUND TO THE ISSUE

4.1 The Applicant was charged with two charges, theft and insubordination. She was found guilty and a sanction of three months suspension was imposed. The Respondent appealed the sanction and the appeals authority reduced the verdict and the sanction, and only the insubordination conviction was left remaining.

4.2 The remaining suspension is one month without pay. This is the issue in dispute and the Applicant wants the verdict of the disciplinary hearing chairperson to be overturned and submits that in the event that the verdict is upheld, the appropriate sanction would be a final written warning.

4.3 The Applicant submitted that she had a legitimate reason to refuse the instruction.

4.3 The Respondent on the other hand submitted that the Applicant is guilty of gross insubordination. The Respondent submitted that the Applicant should have actually been dismissed, hence the appeal.

- 4.4 A wrong message will be sent if she remains without a sanction for the misconduct she committed. The lesser sanction itself justifies the submission that there was insubordination by the Applicant.

5. SURVEY OF EVIDENCE AND ARGUMENTS

Applicants evidence and argument, Ms S Lekoma.

- 5.1 The Applicant is a cleaner in the Library at Excelsius Nursing College. She has been working for 27 years at the instruction.
- 5.2 On 03 May 2016 she was called by Mrs Mmolai, the Administration Director, to attend a meeting at 12. She told her that she must go and work at the Kitchen.
- 5.3 The Applicant asked who will work at her place because she had a written instruction that she must not work at the kitchen. There was a conflict and Mr Mkhize, the then College Principal, moved her from the kitchen to the Library.
- 5.4 Mrs Mmolai replied that if a Manager has spoken she has spoken, it is final. She did not give her a chance to explain why she was moved from the kitchen to the Library.
- 5.5 She was only asked on 03 May to go and work in the kitchen. She also produced the letter at the disciplinary hearing.
- 5.6 She denied that she was told several times to go and work at the kitchen. She has a clean disciplinary record and did not receive any written instruction contrary to the letter from Mr Mkhize.
- 5.7 The letter was clear that if she disobeyed the instruction she will be subjected to disciplinary action.

Under cross examination

- 5.8 The Applicant submitted that when she asked about her position at the library there was no response. By asking it did not mean that she was refusing to go to the kitchen.
- 5.9 The problem was also the fact that Mrs Mmolai did not talk to her nicely. There was not even a request made to her Supervisor because she was not even aware of the request to move her to the kitchen.
- 5.10 The conflict between her and her colleagues ended in 2009.
- 5.11 Mrs Mmolai should have been aware of the letter but she was always speaking harshly towards her.

6. The Respondents submission and argument.

1st witness, Mr Mzamo Adoons

- 6.1 The Respondent is the Assistant Director, Labour Relations at Klerksdorp Hospital.
- 6.2 He compiled the investigation report into allegations of misconduct against the Applicant. There were allegations relating to theft and insubordination against the Applicant.
- 6.3 He was told that the Applicant was told on several occasions that she must clean the kitchen because she was working at a small section and would thereafter rest the whole day. The Applicant allegedly refused to clean the kitchen.
- 6.4 He does not remember if the Applicant was the only one requested to clean at the kitchen, but she was the only one who refused that instruction.

6.5 He met the Applicant and she refused to give a statement. He does not remember if the Applicant gave him the transfer letter and could not tell its impact if it was given to him.

Under cross examination.

6.6 The witness submitted that he did not include the refusal by the Applicant to give a statement because he included issues that were relevant to his investigation.

6.7 He was told that the Applicant was given the letter to move to the kitchen.

6.8 He denied that it was convenient to include a charge of insubordination after almost five months because of the theft charges against the Applicant.

6.6 He was told that the Applicant was earlier moved to the library but they decided it was the correct time to move her back to the kitchen and this instruction was issued several times to the Applicant.

7. ANALYSIS OF EVIDENCE AND ARGUMENT

7.1 The Applicants have referred their matter in terms of section 186(2) (b) of the Labour Relations Act 66 of 1995 (the Act). Section 192 requires the Applicant to show that he was dismissed and the Respondent will then have to prove that the dismissal was fair.

7.2 The onus equally applies when there is a dispute about an unfair labour practice in that the Applicant has to establish that the Respondent committed an unfair labour practice and the Respondent has to then prove that the conduct was fair.

7.3 The issue in dispute is whether the refusal to go to the kitchen amounted to gross insubordination. The evidence presented here evidence leans in favour of the Respondent for the following reasons. It is common cause that the Applicant did not follow the lawful instruction to clean again at the kitchen as requested.

- 7.4 The Applicants reasoned that she had a written instruction to move from the kitchen to the library. It would have been appropriate to issue another written instruction revoking what she had in her possession. This view is biased because it ignores the fact that the conflict that prevailed did not exist.
- 7.5 There was thus no reasonable impediment to her moving back. I find that the reason given by the Applicant not to move back to the kitchen as instructed to be insubordinate. I however disagree with the Respondent that it amounted to gross insubordination.
- 7.6 It is my finding therefore that the sanction imposed on the Applicant after her appeal was an appropriate sanction.
- 7.7 I am therefore not convinced that the Applicant has succeeded in showing that the Respondent has committed an unfair suspension or disciplinary action against her.
- 7.8 In the premises the following award is in order

8 AWARD

- 8.1 The Applicant failed to show the existence of an unfair conduct committed by the Respondent.
- 8.2 The referral made in terms of section 186 (2) (b) is accordingly dismissed.
- 8.3 There is no order as to costs.

Commissioner: THABE PHALANE



Thabe Phalane (Panelist)