



ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy
Case No.: PSHS546-11/12
Date of Award: 22-Feb-2012

In the ARBITRATION between:

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NEHAWU O B O NDLELENI L AND 3 OTHERS

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative : MR T GABELA
Union/Applicant's address : P O BOX 1690
PIETERMARITZBURG
3200
Telephone : 033 395 8508
Telefax : 033 342 7406
Respondent's representative : MR T D NTSHANGASE
Respondent's address : P O BOX 133
RICHMOND
3780
Telephone : 033 212 2170
Telefax : 033 212 3450

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 10H00 on the 2 February 2012 at the Richmond Hospital Boardroom in Richmond. Mr T Gabela of NEHAWU represented the applicants and Mr T D Ntshangase represented the Respondent (employer).

The applicants present were Ms N J Makhaye, Mr T Sindane and Mr L Ndleleni. The application by the fourth applicant was dismissed.

APPLICANT'S OPENING STATEMENT

2. The applicants' case is that of unfair disciplinary action short of dismissal (s 186(2) (b).
3. The applicants challenge the procedural and substantive aspects of the employer's decision. In terms of procedure the applicants will prove that the employer did not follow the correct procedures in terms of the collective agreement 1/2003. It will also be proven that the evidence was not enough to prove the charges. The conduct of the chairperson was biased in favour of the employer.
4. The applicants submit that they were not given a fair hearing and the sanction was not fair and the commissioner should overturn the sanction. The applicants challenge the sanction of three months suspension without pay.
- 5.

RESPONDENT'S (EMPLOYER) OPENING STATEMENT

6. The employer contends that the case against the applicants was fair and the sanction was appropriate.
7. The respondent seeks that the decision of the presiding officer be upheld.

ISSUE TO BE DECIDED

7. I am required to determine whether the Respondent (employer) had perpetrated an act of unfair labour practice against the applicants in respect of their disciplinary finding and sanction. Should I find in favour of the applicants, I am to determine what relief should be granted to them.

BACKGROUND TO THE ISSUE

8. The applicants were charged with misconduct as follows:

It is alleged that-

On the 19 January 2011, at or near Richmond Hospital, you:-

1. While on duty you conducted yourself in an improper, disgraceful, unprofessional and unacceptable manner in that you intimidated and forcefully demanded that the CEO of Richmond Hospital vacates the institution with immediate effect.
2. You incited other personnel to participate in an un-procedural and unlawful conduct to forcefully remove the CEO of Richmond Hospital from the hospital premises.

3. You contravened the Code of Conduct of the Public Service, Section 4.3.1 “ An employee co-operates with other employees to advance the public interest” in that you deserted your post, failed to co-operate with the CEO of Richmond Hospital and refused to follow the appropriate channels of communications to air your grievances.

The applicants were found guilty and sanctioned on the 19 April 2011 with three months suspension without pay and issued with a Final Written Warning which is valid for a period of six months.

They seek the setting aside of the finding and sanction.

The respondent contends that the finding and sanction was fair and prays for the decision of the presiding officer to be upheld.

9. SURVEY OF EVIDENCE

APPLICANT'S CASE

The applicants elected to tender the evidence of one witness only.

NGILONDIWE MAKHAYE

The salient aspects of Ms Makhaye's evidence are recorded below:

10. She is working at the hospital since 2008 and became a shop steward in December 2010.
11. On the 19 January 2011 during a NEHAWU meeting there were complaints about the irregularities in the hospital. The members wanted answers to the letter written to the district manager. They wanted the CEO Mr Dladla to get the information they wanted. As shop stewards they said that they would go to Mr Dladla but the members wanted to go with them as they wanted the results of the investigation. The members were angry and they calmed them and told them that they would go to Mr Dladla and they (member) wanted to be there. The delegation agreed but advised them to be quiet and not be violent. They (members) walked quietly until they reached the door.
12. When they were in the corridor Mr Ndeleleni knocked and the CEO invited them in and offered them in action to sit down. After they sat down he continued on the telephone and after he finished, greeted them and asked them about their meeting. They said that they were bringing the worker's message for him to go to the District manager to get a response. He disagreed and telephoned his secretary and they heard the crowd singing. The secretary arrived and he asked her to get the message from the District manager. Then Mr Dladla stood up and said that they were joking and that there would be bad consequences and just left.
13. When Mr Dladla was addressing the crowd they were in his office and thereafter with the secretary they went outside. Then Mr Dladla told the members about the serious consequences of their actions. Nobody answered and all were quiet and she said to him “Sir can I talk to you”. Only then did he

switch off the cellphone as he was recording the incident. He told her to go to his office and he came in and closed the door. She told him that he could end the scene if he did as the workers requested.

14. He said he was in a bad situation but he could handle it and that he would not be going anywhere.

They left his office.

15. They did not intimidate him nor raise their voices. There was no stage that he was intimidated and he was recording the incident on his phone while moving up and down.

16. She heard the workers singing and when Mr Dladla went out they were quiet and listened to him and after the incident went back to their departments.

17. The sanction was unfair because they were the people talking to Mr Dladla and the District manager about corruption. She felt bad in not having a salary and as a single parent her daughter has suffered.

Under cross examination she stated:

18. A grievance about corruption was lodged with management (CEO) and the District manager but there was no response.

19. The workers were engaged in the action during their tea time.

20. As a shop steward she has learnt that she can be in a soup and be punished for the actions of other people. She was acting on behalf of the workers.

RESPONDENT'S CASE

PETROS NGWANE DLADLA

The salient aspects of Mr Dladla's evidence are recorded below:

21. On the 19 January 2011 he was in his office when he heard singing and shouting and after that the door of his office opened and the three applicants entered. He was shocked and put his phone down and asked them their problem. They said that they wanted to speak to him. He went out of his office to get the secretary and when he went to her desk, she was not there but saw a group of workers surrounding her desk.

22. He went out to find her and saw her on her way to the kitchen and he called her and asked her to go to his office to record the discussion. He asked the shop stewards about their problem and they told him that they were there with the workers to tell him to leave the hospital. He asked them the reason for him doing that and they told him that they had written to the District manager about some complaint and she had not responded.

23. He asked them to contact the District manager but they disagreed and said that they wanted him to leave. He asked them for the letter sent to the District manager so that he could look at it and ask her for the reason for not responding.

24. During that time he had given them permission to hold an election meeting and he wanted to know what happened to that meeting. They said that the meeting did not take place because the union

officials did not come. He asked them for a reason and they said that the officials had a car accident. At that point they stood up and said that they were not there to discuss the officials but to tell him to go immediately. He realised that the meeting was over.

25. He walked out and addressed the employees and tried to find out if they agreed with their leaders and one employee responded in the affirmative and then he tried to explain that what they were doing was illegal. He told them that he would not be going anywhere and asked them to go back to work and then he went back to his office. They followed him and lined the passage up to his door. Ms Makhanye asked him to be professional and leave. He asked her if she was professional but he disagreed and told her that he was not going anywhere and that she could leave. She left the office and then after some time all the workers left. He gave them permission to meet from 12h00 to 15h00 for the elections.
26. After the incident he spoke to the District manager and related the incident. The District manager formulated the charges.
27. He saw his secretary running away and asked her to come back. She said that she was intimidated. Everyone ran away because it was a frightening situation. The secretary was asked to write a statement but she refused because she was afraid. There were other people that witnessed the incident and wrote statements but they refused to attend the hearing because they were afraid because the Richmond area had endured violence and as local people they were afraid to participate.

Under cross examination he stated:

28. Prior to the incident his working relationship with the shop stewards was good. He did not call the police or security guards.

The parties agreed to submit written closing arguments on or before the 9 February 2012. The applicant was contacted to submit its closing arguments on the 13 February 2012.

29. APPLICANT' CLOSING ARGUMENTS

In the Applicant's closing argument, the Applicant wishes to place the following facts and circumstances:

1.

It is common course that the Applicant went to the office of the hospital, the CEO offered the applicants chairs to sit in his office.

2.

The members of the hospital reported the allegations of corruption via their Shopstewards to the CEO who allegedly did not take any actions, this was submitted through a letter, which is marked "annexure D".

3.

After a number of consultation with the CEO and not getting progressive responses, the members decided to write to the District Manager; MEC for health, and to the Premier. They continued to enquire with the CEO on whether he have received any feedback from the District Office, the CEO kept on saying no response he received from the District.

4.

It was out of this background where the members, in their general meeting on the 19 January 2011 decided to go to the office off the CEO, the mob of workers stood outside the building of the CEO offices. They sent the three shop-stewards to communicate their message, which was about receiving feedback for their letters was sent to the district. Mr Dladla, was approached as part of protocol. Please note that these members were coming from the union meeting which was held under Manager's authority and they were on time. These three were sent to the CEO to request him to go to the District. This was the 19th of January 2011.

5.

Under these circumstances that the Department of Health laid charges against the applicant as contained in Annexure C page 1, and Annexure A page 7 of the bundles. The employer alleged that the applicants committed three offences. The three applicants were then placed on precautionary suspension for more than prescribed period. They were then called for disciplinary hearing. Which, the outcome was not communicated to them within a prescribed time period.

6.

The employer did not prove his case on both the merits and on substance as well procedural omissions. The employer had brought one witness, called Mr S. Dladla

- He claimed that he was intimidated by the officer's charged, because when they were coming towards his office, they chanting revolutionary songs. The three officers' charged, by virtue of being Shopstewards came to his office and they told him to go to the District Office to demand their response for their letters they have had wrote to the District. He called this action as an intimidation. He further testified that when the Shopstewards entered his office, he called his secret in to meeting to record the conversation.

The common understanding on the definitions of the word intimation as it used was used as a frightening behaviour: "*from World English Dictionary*".

-vb

- To make timid or frightened; scare

- To discourage; restrain, or silence illegally or unscrupulously, as by the threats and blackmail
- To make timid; fill with fear.
- To overawe or cow, as through the force of personality or by superior display of wealth, talent, power, authority, etc.
- To force into or deter from some action by inducing fear.

None of the above definition was mentioned by the employer representative to prove the case. So the Officers' Charge did not intimidate the CEO of Richmond hospital

7.

We find MR Dladla as not telling the truth but instead fabricating his testimony under oath and failing to support his statement as well as not having an understanding the meaning of the charges.

- He could not bring the minutes or his secretary to support his statement.
- Mr Dladla alleged that he intimidated, but he did not call the internal security or the SAPS as he might understand that intimidation is also a criminal case.
- There no sticks and any kind objects carried by our member during this moment.
- According to Miss Makhaye, where she testified, she mentioned that there was no moment of intimidation, but instead there were utterance of intimidation from Mr Dladla when he was saying to the Shop stewards and members of the that he hope that they know the consequences of what they were doing, this was not disputed by the employer representative.
- It is also surprising and not believable that all worker, including switchboard who work in the same building were not in their offices due to intimidation, only him, because he could stand his grounds.

The charge that says officers charged forcefully demanded the CEO of Richmond Hospital that he must vacate the institution with immediate effect. It was a fabricated one, is not the truth and it does not hold any water and our members did not force the CEO of Richmond Hospital to vacate the institution with immediate effect.

8.

Furthermore, the employer failed to present any evidence in this charge. Mr Dladla just mentioned that he was intimidated, he did not mentioned that that he was force to vacate the institution with immediate effect. In this whole case in is clear that the employer is one who alleges thus the onus lies with the employer to prove the case on the balance of probabilities, by means of witness testimony or evidence, instead the employer chose not to lead evidence. This means that Officers' Charged were sanctioned on the basis of fabricated and unfounded allegations.

9.

On charge number three, the CEO of the hospital agree that the meeting of the workers was request

through its Regional Office and as a CEO, he approved the meeting from 12H00 to 15H00. Miss Makhaye testified that the workers were standing outside the building of the CEO at 15H00 when they were utilising their tea-times and they went back to workstation at 15H15. Mr Dladla whilst on employer's witness stand those workers at Richmond have morning and afternoon tea.

10.

Worker of Richmond Hospital were never inducted with Code of Conduct or the Public Service since they transferred from Private Hospital. Disciplinary rules-on the Workplace Law, eight edition, by John Grogan. State that: the codes provides that any (from paragraph-3-4-(which includes an arbitrator or the Labour Court) who is determining whether a dismissal is for misconduct is unfair should consider, amongst other things, whether the employee was aware, or could reasonably have been expected to be aware, of the rules or standards.

11.

When Miss Makhaye was testifying, she mentioned that Mr Sindane and Mr Ndleleni had went several times to Mr Dladla to discuss about the reply of their letter, but Mr Dladla could not give them any progress. The letter "ann D" was one way official to be used by the workers to air their dissatisfactions. It requested an investigation on the mismanagement of the patients' money. So the letter was sort of clarion call, because in its headings it was specific. So the issue of grievance form was irrelevant. The charge was fabricated and it should be dismissed as so.

12.

Procedural unfairness

All three Officers' Charged are the Union Representatives (Shop stewards). The Labour Relations Act provide for the employer to inform and consult the union before disciplining the Shop steward. The employer did not give reasonable time to make representation on the suspension union Shop stewards. The fax transmission reflected this letter was faxed on the 24th of January 2011 which was from Umgungundlovu Health. The Shop stewards were suspended on the 25th January 2011.

The Presiding Officer, C.M Ndaba failed to comply with the provisions of Resolution 1, of 2003, paragraph 7.3, sub-paragraph 0.

The Officers Charged were called for the hearing on the 15th of March 2011, but they received the outcome of their way far from the prescribed period in terms of resolution 1 of 2003. members received their outcome on the 04th of May 2011.

13.

Conclusion

It is our pray to the Commissioner to overturn the decision of three months suspension imposed by the respondent to the applicants, because the fact, evidence and circumstance did not prove the employer's case, but instead it contradicted the facts and fabricated thus we are convinced that the applicants were sanctioned on the basis of facts.

30. RESPONDENT'S CLOSING ARGUMENTS

1.

The applicant declared a dispute alleging unfair suspension or disciplinary action.

2.

The respondent called one witness to prove its case. The witness was Mr Dladla.

3.

The respondent's witness testified that on the 19 January 2011 at about 09h40 am he received a letter from NEHAWU requesting a permission to hold a meeting to elect new shop-stewards, the permission was granted and they were granted from 12h00 to 15h00. In terms of terms of references for Institutional Management Labour Committee (IMLC) when a Union requests to hold a meeting, they should send Agenda of issues to be discussed at that meeting and the CEO must singed to say they may carry on with the meeting, this was done to avoid a situation whereby employees will discuss issues that may be detrimental to the Hospital or issues that should be discussed at the IMLC.

4.

It is my submission that the applicants caused destruction in the institution and they ended up discussing issues that were never part of the Agenda and as a result they and their members participated in an un-procedural and unlawful conduct by forcefully removing the CEO of Richmond Hospital.

5.

The applicants have testified that as the office bearer from Pietermaritzburg did not pitch up for their meeting, Employees pressurized them to go to CEO's office and request a respond letter from the District Manager. She has also testified that they could not resist the employee's demands and the employees were singing as they were going to the office of the CEO.

6.

It is my submission that the applicants should have avoided the situation as they are the leaders to these employees; the applicants knew that they should have followed the correct procedure when you are not happy i.e. Institutional Management and Labour Committee but they dismally and purposely failed to do so.

7.

The Chief witness (Mr Dladla) testified that the three officers charged entered his office without prior arrangement or appointment. He greeted them and asked about the meeting. Mr Ndleleni told him that the resolution emanating from that meeting was to tell him to leave the institution immediately.

8

He then asked if their principals arrived at that meeting. Mr Sindane (officer charged) mentioned that they did not come to socialize or to talk about the meeting they ordered him to leave the institution immediately because the District Office is not responding to the letter which was sent to the District so he must report to the District office by tomorrow he must not come to Richmond Hospital.

9.

He also mentioned that he went out of his office and they followed him as he addressed the crowd which was singing outside his office, he then returned to his office and Ms Makhaye followed him to his office and asked him to be professional and leave the institution as the people were angry at him.

10.

It is my submission that the applicants knew exactly what they were doing was very wrong and it could lead to serious charges against them yet they did it.

11.

It is my submission that the applicant should have requested their response letter from the District Manager not their CEO because initially they had written to the District manager not to their CEO, moreover their letter had been intentioned to The District Manager, The Health MEC, The Senior HR Manager (Head Office) and The Premier of KZN. (***Annexure D of the bungle***)

12

It is my submission that the applicant's witness testified that they came inside the CEO's office and he welcomed them nicely but suddenly they were followed by charges. At the same time she agreed that they were being pushed and forced by the employees to go and demand answers from the CEO, while their members were singing outside during office hours and lied that it was tea time yet when you read the basic conditions of employment you will not see that time called tea time at 15h00. Nursing manager is also not aware of such a slot.

13.

The Applicants Chief witness testified that when they went out from the CEO's office there were + - 30 people singing outside his office and the question asked about the relationship between him (Mr Dladla) and the staff after that incident. She testified that the relationship is normal. This proved on balance of probabilities that these people were incited to participate in an un-procedural and unlawful conduct. There is peace in the Institution since these three officers were suspended.

14

The 3rd witness Ms Makhaye was asked “What was the intention of bringing the staff in front of Mr Dladla’s (CEO) Office. She answered that they wanted to prove to Mr Dladla that it is not only them who are saying he must leave they wanted to show him that the entire hospital who wanted him to leave the institution.

This also proved that these people that were singing were incited intentionally to fulfil their own interest.

15.

It is my submission that the respondent’s witness Mr Dladla also mentioned that there are bilateral meetings and IMLC forums within the institution which they engaged with the Unions in addressing the grievances and issues that affects employees and other Unions use those forums and there are procedures in addressing the grievances.

16.

It is my submission that respondent had prepared 4 witnesses but had to withdrawn them as they were receiving threats from their colleagues, knowing the history of Richmond.

17

It is respondent’s prayer that the applicant’s case be dismissed accordingly as it lack muscles and suffer from the truth.

ANALYSIS OF EVIDENCE AND ARGUMENTS

31. This matter was cited as an unfair labour practice dispute in terms of Section 186 (2)(b) of the LRA.

The issues to be decided was whether the respondent (employer) perpetrated an act of unfair labour practice against the applicant in respect of the findings and sanction meted out to the applicant and I my finding be in the affirmative , what would the appropriate relief be to him

I have taken cognizance of the decision in Sweeney/ Transcash [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitutes a rehearing *de novo* on the merits. The award must accordingly be based on evidence led at the arbitration.

32. At the arbitration the respondent tendered a bundle and the representatives referred to portions in their arguments. As such the material was properly before me and neither party had objected to it. In *University of the North v Nobrega & Another* (1999) 20 ILJ 2117 (C) it was held that if any party had had any objections to the material being admitted, it should have raised and dealt with it in the hearing. As there were no objections to the tendered documents, I am entitled to rely on it.

33. The issues in dispute in this matter are fairly straightforward.

The applicants were union shop-stewards and were representing their members. They were disciplined and received a sanction of three months suspension without pay and a final written warning that is valid for six months. They challenge the finding and the sanction imposed.

34. In order not to protract my determination I will deal with the finding and then the sanction imposed.

35. The applicants elected to use only one witness to present their version. The respondent also used one

witness, Mr Dladla the CEO and the person who was approached on the day in question.

36. In respect of the finding of guilt there was no evidence before me on what basis the chairperson arrived at his finding and the reasons thereof. What evidence was led contradicted what purportedly happened on the day. The following recordings are of importance:

i. The charges preferred against the applicants were:

On the 19 January 2011, at or near Richmond Hospital, you:-

1. While on duty you conducted yourself in an improper, disgraceful, unprofessional and unacceptable manner in that you intimidated and forcefully demanded that the CEO of Richmond Hospital vacates the institution with immediate effect.
 2. You incited other personnel to participate in an un-procedural and unlawful conduct to forcefully remove the CEO of Richmond Hospital from the hospital premises.
 3. You contravened the Code of Conduct of the Public Service, Section 4.3.1 “ An employee co-operates with other employees to advance the public interest” in that you deserted your post, failed to co-operate with the CEO of Richmond Hospital and refused to follow the appropriate channels of communications to air your grievances.
- ii. The applicants and their members were permitted by the CEO to hold an election meeting (12h0015h00) that did not take place because the unions officials did not attend.
- iii. They were requested to go to the CEO to get a response to their complaint lodged with the District manager about corruption at the hospital. When they approached the CEO he was on the telephone and thereafter asked them about the reason for coming to him. The applicants explained their requests from their membership. There is opposing submissions as to what had occurred in the CEO’s office. He stated that the applicants asked him to leave the hospital immediately whilst the applicants stated that they requested that he contact/ or go to the District manager to get her response to the complaint.
- At some point during the discussions the CEO (Mr Dladla) left the room, addressed the workers while recording them. The applicants together with the secretary remained in the CEO’s room and after some time went outside and thereafter they returned to the CEO’s office. Mr Dladla said that he was not going anywhere and I am unsure of whether he meant that he would not accede to their alleged demands for him to leave immediately or to approach the District manager to obtain a response to their complaint.
- iv. Mr Dladla contended that both he and the secretary felt intimidated during the incident.
- v. The employer elected not to call the presiding officer despite being aware that the finding and sanction was challenged.
- vi. I took note that the respondent called one witness whilst the applicants were in agreement on the testimony of Ms Mahkaye.

37. In respect of the findings against the applicants and as previously recorded there evidence on the reasons for the finding of guilt. My concern is that had the CEO complied with the applicant's request then the incident would not have spiralled out of control. In any event he did contact the District manager after the incident and had he done so at the time of the requested the matter may have been resolved. Further the claim of intimidation must be treated with caution as the CEO did display any signs of being intimidated because firstly he left the delegation sitting in his office and not only approached the workers outside but also recorded them on his cell-phone. This does not portray a person being intimidated. Further he was able to end the discussion, not accede to the request, left the room to call his secretary who duly complied with his request to join the meeting in his office.

The secretary remained in his office after he left the room. The mere fact that the applicants and the workers had dispersed when requested to do so shows that there was no areas of concern lending the perception that any intimidation had taken place. In any event the CEO if he was so intimidated had the opportunity to call the security or SAPS which he failed to do.

38. As there are mutually destructive versions before me I tend to lean in favour of the applicants' version as more probable of what happened on the day. In arriving at my finding I am of the view that the findings against the applicants were unfair.

39. The next question is the appropriateness of the sanction. The question of the Final Written Warning valid for a period of six months has lapsed. In arriving at a finding that the reasons for the finding being unfair it flows that the Final Written Warning should be expunged from the applicants record.

The next question is whether the sanction of three months suspension without pay was appropriate. I determine that such a sanction was inappropriate and had the presiding officer applied his mind to the totality of the facts before him he ought to have reached another sanction than the one that he meted out. Therefore I determine that the applicants ought not to have been sanctioned at all and therefore must be reimbursed with the non-payment for the three months.

40. As a consequence of the above I find the Respondent (employer) had perpetrated an act of unfair labour practice against the applicants in respect of his disciplinary finding and sanction.

AWARD

41. The respondent perpetrated an act of unfair labour practice against the applicants.

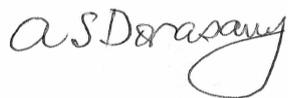
42. The sanction of a Final Written Warning is to be expunged from the applicant's employment record.

43. The applicants must be paid their three months pay within fourteen days of receipt of this award.

44. There is no order as to costs.

45. This file may be closed.

DONE AND SIGNED IN DURBAN ON THIS 22 DAY OF FEBRUARY 2012.

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

Arbitrator: Anand Dorasamy