ARBITRATION AWARD

Panellist/s: **Joseph Mphaphuli**
Case No.: **PSHS60-10/11**
Date of Award: **7-Aug-2011**

In the ARBITRATION between:

PSA obo Smit, M.E
(Union / Applicant)

and

Department of Health – Western Cape
(Respondent)

Union/Applicant's representative: Mr. May
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DETAILS OF HEARING AND REPRESENTATIONS

This is an award in terms of Section 138(7) (a) of the Labour Relations Act 66/1995 ("The Act") as amended. The arbitration hearing was conducted in terms of Section 191 of the Act.

The proceedings were conducted at the Respondent's premises in Cape Town on 21 April 2011 and 14 July 2011.

Mr. Rodrigues an official in the Respondent's services appeared on behalf of the Respondent. Mr. May an Attorney appeared on behalf of the Applicant.
Parties agreed to file their closing arguments by 28 July 2011

The proceedings were mechanically recorded.

ISSUE IN DISPUTE

Whether there was a dismissal or not, if so, whether the dismissal was effected for a fair reason and in accordance with a fair procedure and the appropriate remedy, if any.

BACKGROUND TO THE DISPUTE

The Applicant was appointed on 01 August 2003. The Applicant served in the capacity of professional nurse. The Applicant was remunerated at R 17 000.00 per month. Her alleged dismissal took place on 30 November 2009.

Both the substantive and procedural fairness of the dismissal were contested.

The Applicant Party favoured reinstatement in the event of a successful application.

SURVEY OF EVIDENCE AND ARGUMENT

Dr Richard George Du Toit a practicing medical doctor testified in the Applicant's case. He was in private practice but also rendered medical service at the provincial hospital in Hermanus. His qualifications read: He qualified as a medical doctor in 1987. He was qualified as an orthopedic surgeon and has practiced in the discipline for twenty years. He did a variety of orthopedic work. He had a keen interest in sports injuries and had in his practice extensive exposure to hip and knee injuries.

He had first known the Applicant as a professional nurse at the provincial hospital. The Applicant had consulted him as a referred patient. The patient complained of a knee injury on 12 December 2008. He suspected cartilage injury. He put her on crutches and prescribed treatment. The patient's condition did not improve.

The Applicant was subjected to further treatment in January 2010. The pain did not however subside. His subsequent diagnosis was that the Applicant had severe injury in her knee.

He completed the medical certificate in the manner that he did on 27 October 2009 in that he could not put a definite date as to when she could return to duty. The Applicant's injury was such that it would have been aggrevated if the Applicant returned to work at the time.

He recommended a knee replacement which was subsequently done on 15 February 2010.

He was confident that the Applicant's medical certificate was forwarded to the Applicant's place of employment on 11 November 2009 in respect of the sick leave he authorised for the Applicant from 27 October 2009.

It was his view that the Applicant had fully recovered following the three months rest period after the knee replacement operation. He had referred the patient for a knee replacement operation.

The Applicant testified in her case. She was previously employed as a senior professional nurse, a position she held for 6½ years. She was remunerated at ± R 17 000.00 per month at the date of her dismissal.

She sustained an injury following an accident in 2008. The injury was sustained on duty and was registered as such. She consulted the doctor at the hospital. The consulting doctor referred her to Dr Du Toit at a private institution namely, Hermanus Medi Clinic.

Dr Du Toit ordered her to rest so her swollen knee could subside prior to surgery. The doctor booked her off repeatedly while she continued with her treatment.

She took it upon herself to present the Respondent with medical certificates after every event of treatment, consultation or surgery. The Respondent was at all times knowledgeable about her circumstances.

She had been in and out of work for further treatment and consultation due to excruciating pain in her knee. She consulted specialist medical practitioners at various stages of her ailment.

She received a telephone call from the Respondent on 30 October 2009. The message was that she would be dismissed if she did not return to work. In the mean time she was booked off for surgery in November 2009. Following numerous postponements and cancellations of appointments the surgery was finally done on 26 November 2009.

The final medical certificate was forwarded to the Respondent on 03 December 2009. The medical certificate did not serve any purpose as her services were already terminated at the time.
The Applicant Party closed its case.

Dr Franken testified in the Respondent case. He was a qualified medical practitioner. He obtained qualification in 1976. He qualified as an orthopedic surgeon in 1985 and has practiced orthopedic since 1985.

He recalled being given an opinion on the condition of the Applicant in September 2009. He examined the Applicant on 01 September 2009 following an accident and subsequent injury in December 2008.

His diagnosis was that the Applicant's knee was not at all affected but that the pain originated from a vascular condition which he thought could be competently treated by a vascular surgeon. It was his view that the Applicant had no medical justification to stay away from work for two months after he saw her. The Applicant was ready for light duty following the consultation she had with him.

Mrs. Bouwer a nursing manager at Hermanus Provincial Hospital also testified. The Applicant was her subordinate and reported directly to her. The Applicant absented herself from work for the period 26 October 2009 to the date of termination of her employment.

She had no contact with the Applicant for the stated period. She heard however, that the Applicant telephoned to report sick on 26 October 2009. The Applicant did not contact her directly.

The Applicant had a poor attendance record. Resulting from the Applicant's poor attendance record she had given the Applicant strict instructions to contact her directly in the event of her inability to report for duty.

She had also convened a meeting with the Applicant and a union representative whereby she impressed upon the Applicant that she will be the person to be contacted when the Applicant was unable to report for duty.

For inexplicable reasons the Applicant did not carry out the instruction.

It was her recollection that the Applicant approached her on 27 October 2009 following a medical consultation. The Applicant did not present any medical certificate or a certificate of incapacity.

She insisted that the Applicant must hand in a certificate of incapacity failing which she would be deemed to be absent without authorisation. The consequences hereof being that the Applicant's services could be terminated.

She further telephoned the Applicant urging the Applicant to report for duty or submit proof of incapacity. The Applicant failed to respond in any way whatsoever.

She eventually forwarded a letter to the Applicant dated 30 November 2009 to register the fact that her services were being terminated forthwith. The Applicant acknowledged receipt of the letter on 30 November 2009.

She had not given the Applicant permission of absence or received proof of incapacity for the period under investigation at the date of termination of employment.

According to the consulting doctor namely, Dr Du Toit a medical certificate would be issued retrospectively for the period in question. Dr Du Toit ultimately handed the certificate as described.

She subsequently received a medical certificate on 03 December 2009 and after the fact of termination of the Applicant's services.

ANALYSIS OF EVIDENCE AND ARGUMENT

There was no dispute about the termination of the Applicant's services. In dispute was whether termination of employment was at the instance of the Respondent or not.

The gist of the Respondent's argument was that the Respondent simply confirmed the Applicant's apparent unwillingness to continue to serve by registering the termination in a correspondence addressed to the Applicant.

The Applicant Party profoundly argued against any wrong doing on the part of the Applicant that could have justified the Respondent's act to terminate the Applicant services.

It was common cause that apart from the Labour Relations Act 66/1995, the relationship between the parties was also regulated in terms of the Public Service Act.

Section 186 of the Labour Relations Act specifically and expressly addresses the question of dismissal. In terms hereof any form of termination of employment at the behest of an employer constitute a dismissal irrespective of the reason thereof.

Where there is a dispute about the existence of a dismissal as in the case of constructive dismissal or abscontion, the provision of Section 192 (1) finds application.

The implication hereof is that the employee who claims that he or she has been dismissed must lead evidence to prove the existence of a dismissal.

The position is supplemented by the provisions of the Basic Conditions of Employment Act 75/1997 as amended. In terms hereof an employee whose absence from duty is due to incapacity may submit proof of incapacity to escape dismissal due to unauthorised absenteeism. The Basic Conditions of Employment Act makes no reference to the length of time for which an employee is protected from dismissal on account of illness. At most the requirement is that evidence of incapacity must be presented to the Respondent prior to resuming duties.

Where an employee's absence is not accounted for an employer may be justified to terminate an employee's services for desertion. Termination is generally provisional pending proof of justification for absenteeism.

The position in the public sector is somewhat different.

Section 17 (5)(a)(i) of the Public Service Act 1994 makes the following provision.
"An officer, other than a member of the services or an educator or a member of the Agency or the Service, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his place of duty".

Mrs. Bouwer's evidence was that the Applicant failed to attend at work for the period 25 October 2009 to 30 November 2009.The latter being the date on which her employment was terminated, for

failure to account for her absence. In the event the Respondent was entitled to invoke the provisions of the Public Service Act herein above referred to.

There was no evidence presented by the Applicant Party to prove the contrary. That the Applicant had consulted medically and was incapacitated and further that her incapacity prevented her from undertaking duties was well documented.

The argument about whether the Applicant was incapacitated or not for the duration of her absence however, misses the point.

The point was whether the Applicant had permission of absence or not, or whether the absence due to reasons of incapacity were supported by proof of incapacity of which the Respondent had knowledge of at the time when the provisions of the Public Service Act were invoked.

The answer was a resounding no as embodied in the testimony of Mrs. Bouwer.

As it where the Respondent's act in terminating the Applicant's services met with the requirements of the enabling Act.

The responsibility to account for absence from duty rest with an affected employee and failure to do so may give rise to repudiation of an employment contract at the instance of the employee.

AWARD

1. There was no unfair dismissal.
2. Termination of employment was for a lawful cause.

Joseph Mphaphuli
Signed
PHSDSBC Panelist
05 August 2011