



ARBITRATION AWARD

Panellist/s: Paul Kirstein
Case No.: PSHS80-10/11
Date of Award: 2-Nov-2010

In the ARBITRATION between:

**IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL
BARGAINING COUNCIL (HELD AT MAFIKENG)**

CASE NO: PSHS80-10/11

In the matter between

PSA obo NHM PELLE

Applicant

and

DEPARTMENT OF HEALTH: NORTH WEST

Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1.

The matter was set down for arbitration on 28 October 2010 in Mafikeng, Northwest Province. The applicant was represented by attorney K Nemaname. The respondent was represented by M Adoons, an Employment Relations Officer in the employment of the respondent. The applicant submitted a bundle of documents marked bundle "A". The arbitration was mechanically recorded.

ISSUE IN DISPUTE

2.

The applicant referred an unfair labour practice dispute relating to disciplinary action short of dismissal.

SUMMARY OF EVIDENCE

3.

The applicant testified and indicated that she started her employment at the respondent on 3 June 2002 in the capacity as Assistant Director: Transport Management Services. The applicant referred to her responsibilities in the mentioned capacity. The applicant attended a disciplinary hearing on 27 August 2008. The applicant pleaded guilty to the three charges. The applicant indicated that she pleaded guilty because she did not want to waste the respondent's time and show remorse. The applicant indicated that the sanction of demotion is not appropriate. According to the applicant the sanction is too harsh taking into consideration the applicant's qualification, experience and capabilities. The applicant referred to her tertiary qualifications. The applicant compared her salary in the capacity as Assistant Director with the salary she received as a Senior Admin Clerk. The sanction of three month's suspension without pay and the demotion from Assistant Director to Senior Admin Clerk was implemented on 16 April 2010. The applicant indicated that there is no element of dishonesty involved in the

charges she pleaded guilty to. According to the applicant she attempted to protect the interest of the State. The indication is that there was no financial prejudice for the respondent. The applicant compared the sanction she received with a sanction received by a co-employee. In the matter referred to the applicant, the respondent suffered financial losses but the co-employee was not given a sanction of demotion. The applicant further referred to a fraud case and indicated that the respondent failed to take any disciplinary action against the culprit. The applicant referred to her dependants and the effect the three month's suspension without salary and the demotion had on her and the dependents.

4.

The respondent closed its case without calling a witness.

ANALYSIS

5.

The applicant referred an unfair labour practice dispute in terms of Section 186(2)(b) of the Labour Relations Act, Act 66 of 1995 ("LRA") and contends that the sanction of demotion issued at a disciplinary hearing conducted on 27 August 2008 constitutes unfair disciplinary action short of dismissal. The charges the applicant pleaded guilty to reads as follows:

"Count 1

Gross insubordination in that you on or around the 5th of December 2007 wrongfully and intentionally instructed AD: Conditions of service in a

letter dated 5 December 2007 to deduct an amount of R19 718.18 from Ms Maubane's pension funds; thereby refusing a lawful and reasonable instruction from the Head of your section communicated in the letter dated 2nd July 2007 to effect that any communication to other units should be done through his office while you knew or ought to have known that you don have the necessary authority to do so.

Count 2

Gross negligence in that you on or around the 18th of December 2006 failed and neglected to ensure that government/Departmental vehicle registration GDD 450 NW is properly inspected both prior its issue and when returned.

Count 3

Prejudiced the administration; effectiveness and discipline of the Department."

6.

At the disciplinary hearing the presiding officer issued the sanction of demotion, three month's suspension without pay and a final written warning. The applicant appealed against the sanction issued. On appeal the Appeal Officer stated in a report dated 10 December 2009 that the sanction of demotion to a lower rank and three month's suspension without salary stands. The indication is that the written warning as a sanction was not pursued. The applicant confirmed that she did not receive a written warning. Item 3 of Schedule 8 attached to the LRA deals with disciplinary measures short of dismissal. The general guidelines with regard to

disciplinary measures as stipulated in Item 3 has also been confirmed in a document referred to at the arbitration being a guide for managers regarding disciplinary procedures. It has been endorsed by courts that disciplinary action should be a progressive process unless the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. An arbitrator should not regularly interfere with a sanction imposed by an employer but must determine if the sanction that was imposed is reasonable in the circumstances. It was submitted on behalf of the applicant that the sanction of suspension without pay for three months was appropriate in the circumstances. It therefore needs to be determined if it was appropriate to issue in addition to the suspension without pay for three month's the sanction of demotion. Having regard to:

- the content of the charges the applicant has pleaded guilty to;
- the indication that the employee showed remorse;
- the clean disciplinary record of the applicant for an extended period of service;
- the adverse effect the sanction had on the applicant's employment career and her personal circumstances and those of her dependents.

It is determined that the sanction of demotion in addition to the three month's suspension without pay was inappropriate. Resolution 1 of 2003 in terms of which the disciplinary action was taken against the application makes provision for a demotion only if the employee consents to such sanction. There is no indication that the employee consented to the sanction of demotion. In the guideline to managers with regard to disciplinary procedures there is no indication that a demotion can be imposed as a disciplinary sanction. The sanction of demotion is therefore not only inappropriate but also not in compliance with prescripts. The applicant has shown that the respondent conducted an unfair labour practice in terms of Section 186(2)(b) of the LRA.

AWARD

7.
 1. The issuing of the disciplinary sanction of demotion to the applicant constitutes an unfair labour practice.
 2. The applicant must be reinstated retrospectively from 16 April 2010 in her position as Assistant Director without loss of any benefits. The outstanding remuneration caused by the demotion of the applicant must be paid to the applicant within 30 (thirty) days after the date of this award.
 3. No order as to costs.

SIGNED AT PRETORIA ON THIS THE DAY OF NOVEMBER 2010

PH Kirstein

PH KIRSTEIN

ARBITRATOR