



ARBITRATION AWARD

Panellist/s: Joseph Mphaphuli
Case No.: PSHS91-10/11
Date of Award: 25-Feb-2011

In the MATTER between:

HOSPERSA obo V.D Westhuizen G
(Union / Applicant)

and

Department of Health – Western Cape
(Respondent)

Union/Applicant's representative: Ms M.P Rademeyer

Union/Applicant's address: _____

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Respondent's representative: Mr. Collop

Respondent's address: Private Bag x 24

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DETAILS OF HEARING AND REPRESENTATION

The award follows an arbitration hearing held in terms of Section 191 of the Labour Relations Act 66/1995 as amended.

The hearing took place at the Respondent's premises in Beaufort West on 21 February 2011.

Present were Mr. Collop an assistant director Labour Relations in the service of the Respondent and on behalf of the Respondent. Mr. MP Rademeyer a union official appeared on behalf of the Applicant.

The proceedings were mechanically recorded.

ISSUE IN DISPUTE

Whether the dismissal was for a fair reason as contemplated by Section 188 and Schedule 8 of the Act, if not, what remedy was appropriate.

BACKGROUND TO THE DISPUTE

The Applicant was appointed on 21 December 1989. The Applicant served in the capacity of shift leader. The Applicant was remunerated at R 132 000.00 per annum. His dismissal took place on 28 April 2010. His dismissal was for a reason related to conduct.

Only the substantive fairness of the dismissal was contested.

The Applicant Party favoured re-employment in the event of a successful application.

Factors of common cause were that: the misconduct did take place. The misconduct took place on 13 March 2010.

The misconduct related to:

- Unauthorised removal of private or personal property from an accident scene, namely, spices and two boxes of clothing.

The Applicant had an unblemished disciplinary record.

SURVEY OF EVIDENCE AND ARGUMENT

Mr. Nankoo district manager in the service of the Respondent gave evidence. He was the investigating officer who conducted the investigations resulting in the charges against the Applicant. He had following his investigations suspended the Applicant due to the severity of the suspected misconduct.

He had previously chaired a disciplinary enquiry in respect of unauthorised possession of property. There were two employees charged. One employee was found guilty and was dismissed.

The Applicant testified in his case. He had given the Department outstanding service as a rescue officer and administrator. He was on call for twenty four hours for the better part of his tenure as an employee in the Department.

He like members of the public present at the scene of the incident took into his possession items for his personal use.

He regretted his action and if given an opportunity he would prove that the incident was a mere oversight on his part. He vowed never to do anything similar in future.

ANALYSIS OF EVIDENCE AND ARGUMENT

Schedule 8 of the Act, Code of Good Practice on dismissals directs that dismissals should be reserved for serious misconduct or repeated misconduct.

Serious misconduct relates to misconduct which is gross and which by its nature has the effect of damaging an employment relationship beyond repair. Where this is the case a normal working relationship is not conceivable to the extent that the remedy at the disposal of the innocent party is a dismissal. On the contrary a single incident of a minor or less serious misconduct does not justify dismissal. For dismissal to be justifiable as a penalty the affected employee must be a repeat offender who has shown himself to be incapable of reform. Only in this instance is progressive discipline recommended.

The representations made by the Applicant Party were that the Applicant was an exemplary employee and had served the Respondent over a long period of time. According to the Applicant Party these factors which served as convincing mitigating factors should be weighed in the Applicant's favour and serve as a reason for a lenient penalty.

It is my conclusion that the misconduct was gross and the attempt by the Applicant Party to trivialize the misconduct was lamentable. The Applicant Party sought to justify the conduct by arguing that in fact the items under investigations were offered to the Applicant by the driver of a tow truck

The tow driver not being the owner of the goods had no right to give the goods away. The Applicant should have known this. The right as to how the goods should be disposed vested with the owner and no one else.

The Applicant's appropriation of the goods to himself was unauthorised, period. Unauthorised possession is a form of grave misconduct which is generally penalised with dismissal.

I find that the fact that the Applicant occupied a managerial position in the institution constitutes an aggravating factor of some magnitude. The image of the department was tarnished as a result of the publicity given to the matter by the print media.

The Applicant's exemplary record in respect of an unblemished disciplinary record, seniority of service and god performance was greatly overshadowed by the gravity of the misconduct.

Accordingly I find that the chairperson of the pre-dismissal enquiry was not over zealous in imposing the dismissal penalty as argued by the Applicant Party.

The dismissal penalty was a match for the misconduct committed as continued employment could not under the circumstances, be tolerated.

AWARD

1. The dismissal was both substantively and procedurally fair.
2. I dismiss the application for an unfair dismissal.



Joseph Mphaphuli
PHSDSBC Panelist
25 February 2011