PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **Pieter Venter**

Case No: **PSHS1005-18/19**

Date of award: **13 May 2019**

In the matter between:

Dr YAK VAHED Applicant

and

DEPARTMENT OF HEALTH- FREE STATE Respondent

DETAILS OF HEARING

1. This is the arbitration award in the matter that was scheduled for arbitration on **30 April 2019** in Welkom. The Applicant had to file written arguments on **6 May 2019** and the Respondent had to file opposing written arguments by **13 May 2019.**

2. The Applicant was represented by Mr. Kruger, an attorney, whilst the Respondent was represented by its Labour Relations Officer, Mr. Maqina.

3. The matter was mechanically recorded although no evidence was led and no Interpreter was required. The parties entered into a **written stated case** which should be read in conjunction with this award.

BACKGROUND TO THE MATTER

4. The matter was referred to the Bargaining Council in terms of Section 188 read with section 191 of the Labour Relations Act, 96 of 1995 (hereinafter referred to as "the LRA").

5. The Applicant was employed as a Clinical Manager with effect from 1 August 2006 until his employment was terminated; with effect from 1 July 2018.

6. The Applicant suffers from Parkinson disease and his illness ultimately led to the termination of his employment.

7. The parties entered into a stated case in terms of which the material facts were common cause. Parties were allowed to address the legal issues in writing.

8. The Respondent raised a jurisdictional point and argued that the Applicant was not dismissed within the ambit of the LRA and that the termination of his employment was in fact employee-initiated or per agreement. The onus was therefore on the Applicant to demonstrate that he was in fact dismissed.

ISSUE TO BE DETERMINED

9. I am called upon to decide whether the Applicant was in fact dismissed within the ambit of the LRA and whether the Bargaining Council lacked jurisdiction to determine the dispute.

SURVEY OF ARGUMENTS

10. In terms of the stated case the following material facts were common cause between the parties:

- The Applicant was employed with effect from 1 August 2006. He earned R 139 699-00 per month and his services were terminated with effect from 1 July 2018.

- Respondent's Bundle (R) contained his application for ill-health (temporary incapacity). The Applicant completed this on 6 July 2017 (see R, page 16).
- The Applicant indicated that his illness is serious and that it was permanent. He also indicated that the disease was progressive and incurable and that he relied on his wife to take care of him.
- His application was completed by Dr Wolpe on 28 June 2017. The latter's report (R, page 32) indicated that his condition was permanent and that he could not perform any duties. It was also indicated that he was not suitable for employment.
- The Health Risk Manager for the Respondent issued their own report on 10 November 2017 (R, page 50). It was agreed that the incapacity caused by the diagnosed condition was total and permanent. It was also foreseen that the Applicant would not be able to return to his duties.
- The Health Risk Manager also recommended that the Applicant complete the necessary documentation to retire on medial grounds and that the forms be submitted to the Government Employees Pension Fund to expedite his application.
- The Applicant completed the Annexure F form that was used to apply for ill-health retirement on 6 February 2018 (R, page 58).
- The Applicant's employment was terminated in writing per letter dated 20 February 2018 (R, page 65, received in May 2018).
- A certain Dr Page also issued a report during March 2018.
- The Applicant was not performing any duties.

11. **Mr. Kruger** (on behalf of the Applicant) submitted written arguments that were as follows:

Section 186 of the LRA states that:

"Meaning of dismissal and unfair labour practice

(1) "Dismissal" means that-

(a) an employer has terminated a contract of employment with or without notice;

(2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving –

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act."

12. Section 188 of the LRA states that:

Other unfair dismissals

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for dismissal is a fair reason-

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

13. Schedule 8: Code of Good Practice Dismissal; in terms of the Act:

“10. Incapacity: Ill health or injury

(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

*(2) **In the process of the investigation referred to in subsection (1) the employee I should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.***

(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

11. Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider-

(a) whether or not the employee is capable of performing the work; and
(b) if the employee is not capable-

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work."

14. From the aforesaid it is clear that the termination of the Applicant's employment was initiated by the Respondent (on its own documentation it is also so noted).

15. From the Respondent's own documents, it is also evident that the termination due to ill-health was *advised* (sic) by the Respondent's Health Risk Manager on 7 November 2017, stemming from a prolonged period of absence due to ill-health, long before annexure "F" was completed.

16. The decision to terminate, dated 20 February 2018, was also evidently based on the aforesaid Health Risk Manager's findings and advises – and not on the annexure "F" completed by the Applicant – in fact the notices of termination mention nothing related to annexure "F" nor that the termination was occasioned by the Applicant, but rather by the Respondent.

17. If the termination was initiated by the Respondent – which the Respondent continually confirms – it entails that the processes envisaged in section 188 and the Code of Good Practice in terms of the Act, needed to be followed by the Respondent in evaluating the termination. This in itself entailed that the report of Dr. Page, dated March 2018, should have been considered by the Respondent.

18. It also then flows that after the Applicant was medically declared fit for his duties by Dr. Page, and conveying the same to his employer (the Respondent), the Respondent instead relied on the facts it had in November 2017, issued by its Health Risk Manager, and only conveyed this decision to terminate long after the report by Dr. Page had been issued.

19. Quite obviously, the Applicant's termination entailed a process invoked by the Respondent of its own volition, in the absence of Dr. Page's report, and contravention of the relevant legal prescripts. The whole process entailed a discretion that had been exercised by the Respondent in terminating the Applicant's employment

20. **Mr. Maqina** submitted written arguments that were as follows:

The report in question was made after a decision was arrived at to discharge the Applicant on account of ill health. Further that the Report further advises the Applicant to consult his Neurologist on the findings made therein. It is respectfully submitted that Dr Page given his speciality was in no position to conclusively decide that the Applicant was fit to work in the absence of a properly qualified Neurologist to support such a finding, Lastly the Applicant did not up to date submit a report from Dr Wolpe (his Neurologist) supporting Dr Page's findings. It shall then follow that the medical report from Dr Wolpe still stand supported by the medical certificate attached to the application from Dr Moola *Annexure R page 50* that the Applicant has advanced Parkinson disease.

The letter in question is a culmination of a process that was initiated by the Applicant by means of his Doctors reports that he is having advanced Parkisons disease and that it is progressive and degenerative, further that no alternative employment is possible as he is entirely dependent of his wife. Having considered all evidence presented by the Applicant and the assessment of the Health Risk Manager the Respondent was left with no option but to terminate his service on account of ill health. It is respectfully submitted that much as the letter indicates that the termination of service is employer initiated the undisputed facts contained in the application for Temporary Incapacity Leave points to the fact that the Applicant had no means to return to work as his condition was permanent and as such he should be boarded.

It is disputed that the termination of the Applicant's service was initiated by the employer, a decision to terminate service of an employee on account of ill health is preceded by an application and or an investigation from the employer, in this case the Applicant is the one who initiated the termination of his service on account of ill health by means of his application for temporary incapacity leave in which avers that he is permanently incapacitated.

The Health Risk Manager made a recommendation to terminate the Applicants service on account of ill-health, the recommendation was as a result of the Applicant's report Annexure R page 21 at paragraph 5.1[1] in which the Applicant indicated that he

is having a problem to do his core function which is to do Forensic Dissection, writing and examination of patients. The Applicant also indicated on Annexure R page 25 paragraph 7.4 that he will not be able to return to his present job. Further that he did not perform any alternative work since his disablement (Annexure R Page 25 at par 7.5). It is also indicated at Annexure R page 26 at par 7.6 that he will not be able to do any other alternative work.

The Health Risk Manager relied on the medical reports from the Applicant's treating Doctors to arrive at a recommendation to advise that his service should be terminated on account of ill health. The question that arise from him completing Annexure F remains that if the Applicant held a view that he was not ill and or incapacitated why did he complete the form in question. In answering this question, it is our submission he did so because he knew that he was indeed ill and would not be able to perform his duties and or to do any other alternative work.

It is submitted that on the basis that the application for ill health was initiated by the Applicant it was not necessary to exhaust the provisions of section 188 to the letter. It is further reiterated that the report from Dr Page was submitted long after the decision to terminate the Applicant's service was made, secondly Dr Page is not a Neurologist and as such he cannot conclude that the Applicant is fit to work when such a finding is not supported by a qualified Neurologist.

ANALYSIS OF ARGUMENTS

21. The issue that needs determination is whether the Applicant was dismissed within the ambit of the LRA. If he was dismissed the Respondent would need to explain the reasons and process that was followed. If the Applicant was not dismissed the Bargaining Council would simply lack jurisdiction to determine the dispute.

22. In terms of section 192 of the LRA the Applicant must establish the existence of a dismissal. The relevant part of section 186 of the LRA reads that a dismissal will occur **if an employer has terminated** a contract of employment with or without notice.

23. The core issue to be determined is therefore whether the Respondent terminated the Applicant's employment.

24. The Applicant argues that various documentations indicate that the termination was a dismissal as the relevant forms and documentation mention that the Respondent initiated the termination. Examples are the submission on R, page 63 and the termination letter on R, page 65. It is therefore argued that termination was a decision taken by the Respondent and that a dismissal occurred within the ambit of the LRA.

25. It is also argued that Dr Page declared the Applicant fit for duty and that this was never considered. The Applicant also argued that he was not subjected to due processes.

26. In **Stocks Civil Engineering (Pty) Ltd v Rip NO & another (2002) 23 ILJ 358 (LAC) 2002 ILJ** it was held that one should note whether an employer acted unilaterally. In **Khuzwayo and Somta Tools (Pty) Ltd (2005) 26 ILJ 947 (BCA) 2005 ILJ** the Respondent employer boarded the Applicant employee for medical reasons. The employee took part in the boarding process but maintained that he did not do so willingly, but feared that he would be disciplined if he refused. He claimed to have been unfairly dismissed on grounds of incapacity, and further claimed that the employer had conducted itself unfairly in relation to the provision of various benefits to him, and in the payment of his salary whilst he was on disability leave.At arbitration the employer argued that the Applicant's employment was terminated by mutual consent, and that the alleged unfair labour practices were disputes of interest, not of rights, and that the bargaining council lacked jurisdiction to arbitrate them. After considering the evidence and arguments the arbitrator was satisfied that the employee was a voluntary participant in his medical boarding, and had consented to the termination of his employment. Having regard to decided cases on the issue, the arbitrator found that medical boarding cannot constitute a form of dismissal unless it is unilaterally imposed by the employer. In the present case the employee had consented to his boarding and so had failed to discharge the onus of proving that he had been dismissed.

27. In my view the Applicant took part in the boarding process and he even initiated the process. The Applicant suffers from a serious disease and applied for temporary incapacity leave. His own application has various references to the seriousness of his illness and the effect thereof. He indicated that he is unable to work and that he depends on his wife to take care of him.

28. The application that was forwarded to the Health Risk Manager was therefore not a unilateral decision or action. It was in fact initiated by the Applicant.

29. After the Health Risk Manager indicated that the Applicant was permanently disabled he had to complete a specific form in applying for ill-health retirement (R, page 58). In my view this form is crucial as it is the designed form that initiates ill-health retirement. The form mentions that "*this application must only be used in the event where the HOD, following a full assessment of an employee for purposes of long term incapacity leave, decides that such an employee should be retired on grounds of ill-health….*"

30. The form (application for ill-health retirement) was signed by the Applicant on 6 February 2018. He also confirmed (R, page 61) that the information is correct and that no information has been withheld. The Applicant therefore applied to be boarded, which application was successful.

31. The Applicant presented no reason why he applied for medical boarding (as per the prescribed Annexure F) and he decided not to lead any evidence or to present any arguments in this regard. In my view this is a crucial aspect and he failed to tender any reasonable explanation. I can therefore only infer that he did so willingly and with the full knowledge of the fact that he applied for medical boarding.

32. The Applicant furthermore relies on a medical report from Dr Page, which report was completed somewhere in March 2018. My concern about this report is firstly that it was completed after the Applicant's services were terminated. It was furthermore completed after the Applicant completed his application for medical boarding.

33. The report from Dr Page is presented as the reason why he is, according to him, fit to perform duties. I have studied the report and beg to differ. Dr Page specifically made the following recommendation: "Dr Vahed should discuss these findings with his neurologist". The report is in my view in any event not conclusive as it was not accompanied by a report from a neurologist.

34. The Public Service Regulations of 2016 furthermore stipulate in Regulation 69(5) that an employee may withdraw any resignation with the written consent of the Executing Authority and before the last day of employment. The Applicant failed to comply with the specific regulation.

35. The Applicant initiated the termination of employment process and also took part in it when he completed the final form that ultimately led to his medical boarding. I am therefore not satisfied that the Applicant has established a dismissal within the ambit of the LRA.

AWARD

36. The Applicant **was not dismissed** within the ambit of the LRA and the Bargaining Council lacks jurisdiction to determine the dispute between the parties.

37. The application is dismissed.

Signature: 

PM Venter