



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS1084-16/17**

Commissioner: **Samuel Baron**

Date of award: **10 July 2017**

In the matter between:

NEHAWU OBO MBASA, VIWE

(Union/Applicant)

and

DEPARTMENT OF HEALTH- EASTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter came before me as an arbitration referred to the Public Health and Social Development Sectoral Bargaining Council ('the Council') in terms of Section 186 (2) (b) of the Labour Relations Act 66 of 1995, as amended. It concerns an alleged unfair labour practice on the ground that the Respondent unfairly "disciplined" the Applicant with a deduction from his salary due to it not approving his sick leave.
2. The Applicant Mr. Viwe Mbasas, was present and was represented by Mr. Thabiso Damoyi, an official from the trade union NEHAWU, of which the Applicant is also a member.
3. The Respondent, the Eastern Cape Department of Health, was represented by Ms. Thembisa Jubase, its Deputy Director: Employee Relations.

4. The Applicant requested me to order that the deduction made from his salary *in lieu* of leave without pay be refunded to him.
5. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

6. I am required to determine whether the Respondent committed an unfair labour practice by deducting an amount of R1185.20 from the applicant's salary for purported unpaid leave.

BACKGROUND TO THE DISPUTE

7. The Applicant went on sick leave from 5 September 2016 to 7 September 2016 and submitted a medical certificate. He was paid the period of this three day leave, but later on, following an investigation into the "suspicious" medical certificate, his sick leave was not approved and the deduction mentioned above was then made from his salary.
8. The grievance lodged by the Applicant did not come to fruition and he approached the union to refer the matter to the Council on his behalf.

Applicant's case

9. The Applicant testified that he is currently working as an Admin Clerk Level 5 at the Pharmaceutical Depot in Mthatha. He currently earns a gross salary of R15 000.00.
10. He testified further that he was unfairly disciplined concerning his medical certificate dating from 5 September 2016 to 7 September 2016. His manager formed a view that his medical was not legitimate. They accused him of forging the medical certificate.
11. According to him the reason why they questioned the medical certificate was because he visited the doctor on the 5th of September 2016, but was not given a medical certificate on that day. He however went back to the doctor and was given the medical certificate which included the 5th. He was then told by his manager that his leave was not approved and that it would be regarded as leave without pay. The amount mentioned above was then deducted from his salary.

12. The Applicant mentioned further that he was not provided with any charges following the investigation, nor was he given an opportunity to state his side. The deduction was unfair because he in fact had a valid medical certificate.
13. Ms. Jubase chose not to cross-examination the Applicant and in fact did not dispute that his version was correct.

Respondent's case

14. Mrs Jubase testified that the Respondent conceded that the deduction from the Applicant's salary was made prematurely. The matter was probed and it was discovered that the medical certificate was in fact issued by the doctor and the Applicant was not at fault.
15. She stated further that once that fact has been established, it had to pass through the internal controls mechanism - regulations put in place by Treasury. So the matter served before the cost containment committee. It was a process done in an attempt to rectify the situation and looking at reimbursing the Applicant. It is thus expected that the Applicant will be paid back his R1185.20.

ANALYSIS OF EVIDENCE AND ARGUMENT

16. Section 186 (2) (b) of the Act prohibits any disciplinary action short of a dismissal in respect of an employee. It is regarded in terms of the Act as an unfair labour practice.
17. My first port of call would of course be to determine whether the deduction of the salary in question constitutes disciplinary action. Normally, an alleged unlawful deduction from an employee's salary would not resort under the unfair labour practice regime in the Act and the Council would lack the jurisdiction to entertain such matters. The deduction in question however does not fall within the prescripts of 34 of the Basic Condition of Employment Act 75 of 1997, as amended ("the BCEA"). It is not founded in any law or collective agreement, nor does it form the subject matter of a court order or an arbitration award.

18. To fall within the terms of the section 186 (2) (b) provision of the Act, the disciplinary action complained of must be disciplinary in nature and intent. In other words, the question to be asked is whether the Respondent intended to discipline the Applicant by effecting the deduction in question. There are several indications that it was.

19. The Respondent, before effecting the deduction, embarked on an investigation to verify the veracity of the medical certificate. It said this *inter alia* in an internal memorandum addressed to the Applicant:

2. "You reported sick on the 5th of September 2016, and on your arrival on the 8th, you submitted a sick note that is suspicious, and the manager conducted an investigation.

3. Following the investigation on your application of sick leave started from the 5th of September 2016 up to the 7th of September 2016, it is with great regret to inform you that it has not been approved because of the following reasons:

- Your submitted sick note indicates that you attended the institution on the 5th of September 2016, and you will be fit to resume duties on the 8th of September 2016, but the issued date of the sick note is the 6th of September 2016.
- Investigation revealed inconsistencies and lack of information regarding consultation.

4. In the view of the above explanation, you are notified that the Human Resources Section will implement unpaid leave against you".

20. It is clear from this memo that the Applicant was suspected of misconduct, namely obtaining and submitting a fraudulent medical certificate. It was decided due to the "irregularities" found in the medical certificate, unpaid leave will be implemented against the Applicant.

21. The Respondent did not argue that the deduction was informed by anything other than that fact. As I said, section 34 of the BCEA does not find application. The sole purpose

the Respondent effected the deduction was on suspicion that, as the Applicant alluded to, his medical certificate was not legitimate. It thus falls squarely within the section 186 (2) (b) provision of the Act.

22. It was conceded by the Respondent that the Applicant's medical certificate was not fraudulent. It confirmed with the doctor in question that it was in fact legitimate. The Applicant thus did not commit any offence as alleged and the deduction was thus unfair in the substantive sense.

23. It was not disputed that the Applicant was not given an opportunity to state his side, a basic tenet of fair disciplinary procedures. The disciplinary action was thus also procedurally unfair. All things considered therefore, I make the following award:

AWARD

24. The dispute referred by the Applicant, Mr. Viwe Mbasu, falls within the ambit of section 186 (2) (b) of the Act.

25. The Respondent, Department of Health- Eastern Cape, is hereby ordered to reimburse the Applicant, Mr. Viwe Mbasu, the amount of R1185.20, less statutory deductions, by no later than 31 August 2017.

Signature:  _____

Commissioner: ***Samuel Baron*** _____
Sector: ***Public Health*** _____