



ARBITRATION AWARD

Panellist/s: Asha Sewpersad
Case No.: PSHS111-11/12
Date of Award: 8-Sep-2011

In the ARBITRATION between:

PSA obo MDEPHA N.F

(Applicant)

and

DEPT OF HEALTH:KZN

(Respondent)

Union/Applicant's representative: PSA
Union/Applicant's address: P.O. Box 4011
Durban
4000
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Respondent's representative: Mr S.B. Msane
Respondent's address: Private Bag X5706
Port Shepstone
4240
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1.Details of hearing and representation

- [1.1] The arbitration was held at the Port Shepstone Hospital, Bazley Street, Port Shepstone.
- [1.2] The Applicant was represented by Mr E. Geldenhuys, an Attorney on the instructions of PSA and the Respondent was represented by Mr. S.B. Msane, the Assistant Manager, Staff Relations.
- [1.3] The Respondent submitted a bundle of documents which were marked Annexure "A" and admitted into evidence.

2.Issues to be decided

- [2.1] Whether the Applicant's dismissal was substantively unfair?

3.Background to the issue

- [3.1] The Applicant was employed by the Department of Health as a registered nurse since 1997.
- [3.2] On the 7 July 2009, the Applicant was charged as follows:-
 - 1. It is alleged that:
During the months, January, February, March and May 2009, you fraudulently claimed moonlighting overtime which you did not work.
 - 1.1. On the basis of the above allegations you are therefore charged in terms of the Disciplinary Code and Procedure for breaching Code of Conduct for the Public Service as follows:-
 - 1.1.1. You have committed fraud-financial with intent to deprive the department, administration or patient (incl S & T, abuse of vehicle and fuel).
 - 1.1.2. You have failed to be honest and accountable in dealing with the public funds and use the public services property and other resources effectively, efficiently and only for authorized official purposes(4.4.8)

- 1.1.3. You have failed , in the course of your official duties, to report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest.(4.4.10)
- 1.1.4. You have engaged in a transaction or action that is in conflict with or infringes on the execution of your official duties.(4.4.5)

[3.3] At a disciplinary hearing held on 14 January 2011 the Applicant was found guilty of the Following misconduct:-

- You have committed fraud-financial with intent to deprive the department, administration or patient.
- You have failed to be honest and accountable in dealing with the public funds and use of the public service property and other resources effectively, efficiently and only for authorized official purposes.(4.4.8)
- You have failed, in the course of your official duties, to report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence or which is prejudicial to the public interest.(4.4.10)
- You have engaged in a transaction or action that is in conflict with or infringes on the execution of your official duties.(4.4.5)

[3.4] The Applicant lodged an appeal against the decision and the sanction of dismissal was confirmed and the Applicant thereafter lodged a dispute for an unfair dismissal with the Council.

4. Common Cause Facts

The following evidence was common cause:-

[4.1] The Applicant was dismissed on 27 January 2011.

[4.2] The Applicant was employed as a registered nurse for the past 14 years and was not dismissed prior to this.

[4.3] The Applicant was dismissed on four charges which can be found on page 5 of Bundle A.

[4.4] The Applicant received overtime for the months of February and March 2009. The Applicant however did not work overtime during February or March 2009.

[4.5] The overtime received by the Applicant in March 2009 was due to a fraudulent overtime claim put through in February 2009. The overtime paid into the Applicant's bank account amounted to R2277-20.

[4.6.] The overtime received by the Applicant in April 2009 was due to a fraudulent overtime claim put through in March 2009. The overtime paid into the Applicant's bank account amounted to R2252-71.

[4.7] A Supervisor, Matron Mdletshe was dismissed in July 2009. Matron Mdletshe pleaded guilty to charges of fraud.

5. Survey of evidence and argument

Respondent's Evidence

The Respondent led the evidence of Matron Thandeka Victoria Mkuzo and Matron Mary Alma Ndileka Mzizi.

5.1. Mkuzo testified as follows:-

[a.] The Applicant did not work under her supervision.

[b] The Matron in the office recorded the details of all persons who worked in the communication book.

[c] She was not aware of whether Matron Mzizi was studying or whether she was friends with the Applicant.

Under cross examination she testified as follows:-

[d] The overtime forms are kept with the Matron on night duty in her office. The list of all persons working overtime is recorded in a small book. The overtime forms are handed out by the Matron on duty and thereafter taken to Human Resources for payment.

[e] A nurse working under her supervision was also disciplined but she did not know Sister Nzama or Sister Bhengu.

5.2.Mzizi testified as follows:-

- [a] She was the Assistant Nursing Manager since 2004 and was not aware of any back pay that was due to be received by nurses.
- [b] A list of all persons who worked overtime would be recorded in the communication book. The staff member signs the claim form as the small book.
- [c] She could recognize the Applicant's signature as the Applicant worked under her supervision in 2009. The claim form for February 2009 was signed by the Applicant, however the claim form for March 2009 was not.-

Under cross examination she testified as follows:-

- [d] She had been the Applicant's Supervisor since 2005 and experienced no problems with the Applicant who had a clean disciplinary record.
- [e] Sister Mdletshe as Night Control Nurse was signing claim forms with her staff but was not aware of whether she was dismissed.
- [f] She was not an expert on signatures but had copies of the Applicant's signature.

6. Applicant's evidence

The Applicant testified as follows:-

- [6.1] Matron Mdletshe who was a friend to her , had approached and told her that as she was working overtime, there was a new rate of payment per hour, which she was going to calculate .
- [6.2] The Applicant signed the blank claim for February 2009 once only.
- [6.3] When she received payment in March 2009, Matron Mdletshe called her and enquired whether she had received the money and requested a loan for R1000-00 which she advanced to her.

- [6.4] In March 2009 she had also received monies in her bank account and had immediately contacted Mdletshe who told her that she had not finished calculating her hours and that she would receive further payment.
- [6.5] When she was completing her Management Course in 2007 she had borrowed books from Mdletshe who had told her that she must pay R1000-00 for the books, so when she received the monies for March 2009 she gave Mdletshe R1000-00.
- [6.6] She believed that she was being paid the difference between the old and new rates.
- [6.7] She was subpoenaed as a witness for Mdletshe's disciplinary hearing where Mdletshe had pleaded guilty to charges of fraud and was dismissed.
- [6.8] She had no intention to defraud the Respondent and would have paid back the money to the Respondent if they had explained to her that it was paid to her unlawfully.
- [6.9] She was aware of Sister Ndzobongo, Sister Makhaye, Sister Bengu, Sister Nzama and Staff nurse Msane who in similar circumstances were not dismissed and still in the employ of the Respondent.

Under cross examination she testified as follows:-

- [6.10] She did not disclose the reason nor did she see it fit to disclose in her affidavit the reason as to why she had lent the money to Mdletshe.
- [6.11] Although Mdletshe had told her about the new rate of pay for overtime, she had not seen any circular to that effect nor had she requested the circular from the staff office. She had understood what the purpose of the claim form was when she had signed the blank claim form.
- [6.12] She did not declare the amounts she had received to the Department because Mdletshe had explained to her what the money was for.
- [6.13] She was not aware of the merits of the case relating to the other staff nurses who were not dismissed.

[6.14] During re-examination she testified that her home language was Xhosa and that English was not her first language and that she had written her affidavit.

7. Analysis of evidence and argument

My analysis and findings below take into account all the evidence presented above and shall therefore not be repeated. I shall mention only the salient aspects.

[7.1] In determining whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Generally it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and if such a gravity that it makes a continued employment relationship intolerable.

[7.2] The Applicant in this case was dismissed for breaching the Code of Conduct for the Public Service, (4.4.8; 4.4.10; 4.4.5) According to this code an employee's conduct may warrant disciplinary action as listed in Annexure A to the code.

[7.3] The Applicant in an affidavit which was written by her under oath stated as follows:-

"I was approached by Matron Mdletshe and gave me a blank form to sign. Sometime in February 2009 certain amount +- R2100-00 was deposited on my account. I have got in contact. In March I received this amount. She called me and told me to take 50% of it and to give 50% to her. Half of that amount was given to her. In March I did not fill any form but in April I received another amount of +-R2100-00 and half of it also given to her. That is all I can say."

She failed to mention that she had lent money to Mdletshe and also paid her on the second occasion for text books which she had loaned from her during her study in 2007. If this was indeed the case it would have been included in the affidavit which was written by her on 1 October 2009 as she was charged with this misconduct in July 2009. There is a distinct difference between "lending" as she claimed during the arbitration and "giving" in her affidavit. The Applicant's evidence during the arbitration appeared to be an afterthought. I reject the Applicant's evidence in that regard and find her version highly improbable in that regard.

- [7.4] The Applicant had been in the employ of the Respondent for the past 14 years and was clearly aware of the Code of Conduct in the Public Service and the misconduct for which she was charged is in my opinion a serious one. For her to claim that she believed Mdletshe when she told her to sign the blank overtime form as she was going to calculate the new hourly rate is improbable as if that was the case a circular to that effect would have been issued and she made no attempt to obtain the circular nor could she produce a circular to that effect. I reject the Applicant's version in that regard.
- [7.5] With regards to the Applicant's claims of inconsistency she conceded during cross examination that she was not aware of the merits of those cases .I have no evidence before me to suggest that the circumstances relating to those cases are identical to the Applicant's case, hence I find no merit in the Applicant's claim of inconsistency.
- [7.6] The Applicant has been dismissed for a serious offence which has become very prevalent and which is plaguing our society of recent. It is not sufficient for the Applicant to offer to repay the amounts paid to her fraudulently. It is clear that she was a party to Sister Mdlethse's fraudulent activities. Her evidence during the arbitration showed her to be a very dishonest witness. This act of dishonesty has completely broken down the trust relationship between the Applicant and the Respondent. It is an offence for which the Code of Conduct for Public Servants recommends dismissal and I find to reason to deviate from that.
- [7.7] In view of all the evidence and on a balance of probabilities I find that the Applicant's dismissal was substantively fair.

8.Award

- [8.1] This application is dismissed.

DONE AND SIGNED AT DURBAN ON THIS 6th DAY OF SEPTEMBER 2011.



ASHA SEWPERSAD

PANELIST