



ARBITRATION AWARD

Case No: PSHS1146-18/19

Commissioner: Maureen de Beer

Date of award: 14 July 2020

In the matter between:

NEHAWU obo Adriaan Horak

(Union/ Applicant)

and

Department of Health- Western Cape

(Respondent)

Details of hearing and representation

1. The initial arbitration hearing of this matter took place on 14 June 2020. There were since several postponements of the case. The matter was postponed due to a change in representative by the applicant; illness of the applicant's representative and other issues. Evidence in this matter was finally concluded on 6 July 2020. The dispute relates to an alleged unfair labour practice in terms of section 186(2) of the Labour Relations Act 66 of 1995, as amended and concerns an alleged unfair demotion.
2. The applicant in this matter, Mr. Adriaan Horak, was represented his union representative, Mr. Daniel Swartz, who is a member of the National Education Health

and Allied Workers' Union (NEHAWU). The respondent was represented by Mr. Mvuzo Ngqame, who is appointed as legal representative with the Department of Health Western Cape (the Department).

3. The hearing was conducted in English and Afrikaans. A translator was available to the parties. Hearing was also manually and digitally recorded.

Issue to be determined

4. I am required to determine whether the respondent committed unfair labour practice towards the applicant. Should I find that the applicant had established that the respondent committed unfair labour practice against him, I must award appropriate relief in favour of the applicant. The applicant wishes to be placed back in his previous position (prior to the demotion) and further wants to be compensated for loss of earnings due to his demotion.

Background

5. The applicant, Mr. Adrain Horak, was appointed as assistant director: employee sourcing (within the human resources department). He was employed in that position for about five years and five months prior to his demotion. He earned a salary of R31 511.50 per month and also received a housing allowance of R900.00 and an additional Government Employees Housing Scheme allowance of R436.22. He was demoted on 12 March 2019 subsequent to a disciplinary hearing for misconduct. He was demoted to Senior Personnel Practitioner. His salary was also decreased to R26 299.25 per month. He still received the other allowances. The demotion was valid for a period of 12 months on condition that a similar position was available. Should such a position be available Horak was able to apply for the position. There was no guaranteed reinstatement to the position subsequent to 12 months. It was submitted by the respondent that currently a similar position does not exist. Horak initially started working for the respondent as of 1 January 1990.

6. Horak was found guilty of the following:

- (a) Gross Negligence committed on 3 October 2016 during a recruitment and selection process of a senior administrative officer. Horak allegedly failed to correct and proactively advise the interview panel about the deviation and contravention of the recruitment and selection policy by reconvening the interview process in the absence of the chairperson. Without the permission of the Delegated Authority the interview process was chaired by Mr. A Ernstzen on 3 October 2020.
- (b) Gross Dishonesty on 7 October 2016. Horak allegedly failed to advise the Delegated Authority that the interview of 3 October 2016 was without the presence of the Chairperson, Mr. Pye. Mr. Ernstzen acted as chairperson of the interview without authorisation from the Delegated Authority.
- (c) Negligence on 7 October 2016. Horak allegedly failed to inform human resources manager, Mr. Brandt, about the change of the benchmark from 70% to 80% in the senior administrative officer: human resources post process. He however signed the RS13 confirming correctness/ or support thereof.
- (d) Gross negligence as the latter conduct of Horak allegedly led to the Department of Health – Western Cape having to pay R95 216.00 as a settlement in respect of a dispute by Mr. R Hungana, when Mr. M Van Rooy was appointed in the post.
- (e) Negligence on 2 July 2018. Horak allegedly supported a recommendation for the appointment of Dr. SMR Gilbert without the required HPCSA registration which is a requirement to be appointed to the position of Medical Specialist.
- (f) Dishonesty on 2 July 2018 for allegedly misleading the Delegated Authority by advising that the RS13 document could be approved which recommended the appointment of Dr. SMR Gilbert, without the required proof of registration to HPCSA.
- (g) Gross negligence on 16 July 2018 for allegedly supporting the motivation for the filling of an administrative clerk: support nursing

position by failing to ensure that the experience, inherent requirements, competencies and duties of the job were in line with the advert.

(h) Gross negligence on 28 August 2018 for allegedly supporting the motivation for the filling of a porter contract post, at Eerste River Hospital without checking for discrepancies. His supervisor, F Brandt, found discrepancies on the motivation. Horak failed to rectify the errors and sent through the second draft motivation with the exact same errors.

7. Horak was issued with a final written warning and a demotion in respect of each of the charges. Horak denied guilt on all of the allegations. He indicated that he did not dispute the warning which was issued, as it already lapsed. He believed that his demotion was unfair and wanted to be reinstated in his previous position, which was at a level 9 rate of pay. He also requested payment of the difference in salary as a result of the demotion. Part of the sanction of Horak was that he needed to undergo further training, which already took place.

Submission of evidence

Evidence by the applicant

8. Mr. Horak testified in support of his case. It was his evidence that the bulk of his work was to manage and render a recruitment function. It included advertising, transfers, background checks, etc.

9. Horak felt that his hearing was procedurally and substantively unfair. There was insufficient evidence against him. He indicated that there was a two years and two months time delay in terms of when he was charged. Discipline should be dealt with promptly. One charge was even 5 years old. No progressive discipline was implemented. He was of the opinion that respondent's bundle of evidence was compiled in such a way to make him look guilty. He also complained about the period given for him to prepare and the fact that the chairperson was known to his manager

Brandt. He however confirmed that the hearing was postponed to a later date and a new chairperson was appointed.

10. He indicated that he received a fully effected bonus every year. This meant to him there were no issues with his work. He felt that this matter was an isolated case. He normally had good evaluations.
11. In respect of the first incident it was his evidence that the interview panel was short of one panel member and he was asked by KESS (Khayalitsha Eastern Sub Structure) to sit in as a panel member. Dr. Anwa Kawa approved his appointment. Mrs. Fatiema George, who was appointed as the scribe was supposed to inform the Delegated Authority of his appointment. An interview candidate fell sick. It was then decided to give her an alternative interview date, being 3 October 2016. Mr. Pye (who was the chairperson of the pane) was on his way to the interview. His wife had an emergency and he turned back to assist her. He never expected Pye not to be there. The interview proceeded. Mr. Abduragmaan Adamson made himself the chairperson and proceeded with the interview. He informed them not to proceed. Present was thus himself, Adamson, Fatiema George and Dandeleen Basson. Horak indicated that he wrote an email indicating what the right procedures were. In his later testimony a copy of the email was submitted into evidence. It was dated 30 September 2016. Horak indicated in the email that the exact same panel must be used for the last interview on 3 October 2016. Horak indicated that a unanimous decision was made and that the entire panel should be held accountable or guilty.
12. In respect of charge 3 it was alleged that the agreed benchmark for the post of 70% was changed to 80% and that Horak signed the RS13 in support thereof. According to Horak the RS13 is the actual submission for the filling of the post. It contains a checklist, which will indicate who is more suitable for the post. In charge 4 it was alleged that he failed to inform his direct manager, Mr. Brandt. According to Horak they were “conned” by KDH (Khayalitsha District Hospital). They submitted a benchmark of 70% but he received a second benchmark on his desk for 80%. He felt that the confusion came through KDH (which submitted 2 submissions for the filling of the same post. He was stationed at KESS (Khayalitsha Eastern Substructure

Office); KDH fall office them and they overee their wards. According to Horak the submission was signed when they were under huge pressure. It was approved by his manager. Horak said that he signed as recommendation supported and his manager signed as recommendation approved (in his capacity as acting director). His manager also signed the Employee Equity schedule, which is a separate form they add to appoint candidates who do not meet the employee equity requirements. Horak said that he verbally informed Mr. Brandt and he made a note on the checklist. He also made an affidavit to that effect. Horak admitted that if the corrections were made, Mr. Hungana would have been appointed in the post. Mr. Pye and Erstzen was both dismissed. Horak was subpoenaed by the respondent to testify at their arbitrations. He gave evidence in respect of recruitment and selection as a specialised witness, on the chairperson and benchmark. Daneline Basson was also charged. Horak indicated that she was also part of the decision making in respect of who should be appointed. A unanimous decision was made. If it was incorrect, they should all have been found guilty together.

13. In cross-examination it was put to Horak that his position required him to ensure compliance. Horak's response was that at that time he was a panel member and not required to fulfill those functions. He further stipulated that he informed Brandt about the shortcomings but that he insisted that he signs the recommendation. According to Horak the document was signed in good faith and with a combination of a innocent mistake. His signature was there due to the huge workload. It slipped through. He further said that the benchmark was changed subsequent to him sitting as a panel member. He was of the opinion that his manager should have advised him that he cannot be a checker and panel member.

14. In respect of the fifth and sixth charges relating to Horak recommending a doctor for appointment, he indicated that it is common knowledge that a doctor must be registered with the Health Professional Council and have a HPC certificate to be appointed as medical specialist. The certificate must be there before the actual appointment. The appointee brought the certificate before he was appointed. According to Horak an appointment can be done, pending verification.

15. In respect of the eighth charge Horak was then referred to two documents relating to the instruction given to him by Brandt, which was required to be rectified. According to Horak all that he can remember was that the change(s) which was required was something petty like the date which needed to be changed.
16. Horak did not understand why he was charged. When he was a witness, he was told what to say in his evidence by the respondent's representative, yet he was subsequently charged.

Evidence by the Respondent

17. Francois Brandt testified on behalf of the respondent. He was the senior human resources manager and Horak's direct manager. It was his evidence that Erstzen and Pye were investigated in respect of misconduct. He was of the opinion that Horak needed to engage the interview panel to ensure proper procedure was followed. Although he was a panel member there was no policy which prohibited him from fulfilling his primary duties. He had to intervene in the interview process in order for the correct process to be followed. He acknowledged that Horak sent an email that the interview panel cannot be changed but that the panel still sat and proceeded with the process. Brandt indicated that at the time Van Rooy was appointed, he was appointed as the delegated authority. He signed the documents as it was provided to him by Horak. It was Horak's responsibility to do the administration and quality checks. He only found out that things were not in order when Hungana submitted a grievance. The grievance was investigated and irregularities were found in respect of the interview process. Hungana referred his dispute to the Council. A settlement of about R95 000.00 was paid to him. He was of the opinion that Horak should have reported the irregularities but that he failed to do so. Pye and Erstzen was both dismissed. The Scribe, George, opted to resign. The entire panel was subjected to a disciplinary process. Horak was the last person to be investigated. The investigations took time, as well as the hearings, forensic investigations, etc.
18. In respect of the corrections he needed to make to the documentation of the porter appointment, Brandt indicated that Horak signed the date as August, whereas it was

September. He failed to rectify the mistakes which were pointed out to him. The procedure was however correctly followed. He addressed Horak's behaviour in his performance assessment.

19. In respect of the incident where Dr. Gilbert was concerned, Brandt testified that Horak failed to attach the necessary registration documents to the application. It was important documents. The offer of employment was not supposed to have been presented to Gilbert without the required documentation.

20. Brandt further testified that Horak never received SPMS (strategic performance management system) bonus because he always underperformed. He always had performance concerns and performed inconsistently. Brandt further indicated that Horak's conduct occurred in 2018 and that his hearing was conducted in the beginning of 2019. It was less than 8 months. According to Brandt there were issues in respect of the Hungana matter but with the Gilbert incident there was an increased issue of trust. Brandt confirmed that Pye and Erstzen were dismissed during March and July 2018. The Gilbert incident occurred in July 2018.

Analysis of arguments and finding

21. In light of the fact that the applicant only disputed his demotion, it was important that through his evidence he should have established in terms of section 186(2) that the respondent committed an unfair labour practice by way of any unfair conduct or omission that arose between an employer and an employee involving unfair conduct of the employer relating to the applicant's demotion. It must be noted that the demotion was applied as a sanction short of dismissal.

22. The applicant denied that he was guilty of the misconduct he was charged with. I have considered the evidence submitted by both parties. The first four charges relate to the same incident. The applicant claimed that since he was a panel member, there was no duty on him to ensure compliance of procedures. It must be noted that the applicant sent an email to the panel members to remind them about the procedures. The applicant allegedly told the panel in the interview process that they were not

allowed to proceed. The process however proceeded and the applicant supported the process. He has failed to submit any substantiating proof of the fact that he told the panel that they cannot proceed and further failed to notify his senior manager of what had happened. In respect of the same process the benchmark was set to a higher percentage which caused a particular candidate (Hungana) to fall short of qualifying for the post. The applicant attributed this to KESS giving him two submissions for the same post. His manager testified that he was not aware of the change in the benchmark and that he signed the documents based on the advice of Horak. Horak said that he signed it in good faith but also by mistake. Based on the evidence and the position Horak held, it was his duty to ensure that the interview process was correctly conducted. He further needed to inform his manager of the change of the benchmark, alternatively have discussed it with the panel members for it to remain the same. The applicant's conduct amounted to gross negligence.

23. In respect of the fifth charge it was Horak's submission that the offer of appointment for the doctor could have been executed whilst they were waiting on the outstanding documentation. Brandt said that this was incorrect. I am satisfied that due to the nature of the position, such an appointment cannot be made without the necessary qualifications being submitted. The applicant was thus negligent in the execution of his duties.

24. In respect of the last charge Brandt confirmed that the applicant failed to rectify a date on a document subsequent to him being directed to rectify it. He addressed this with the applicant in respect of his performance assessment.

25. Based on the latter I am satisfied that the applicant has been guilty of various acts of negligence, being:

- (a) Gross Negligence on 3 October 2016 during a recruitment and selection process of a senior administrative officer. Failing to correct and proactively advise the interview panel about the deviation and contravention of the recruitment and selection policy by reconvening the interview process in the absence of the chairperson. Without the permission of the Delegated Authority

the interview process was chaired by Mr. A Ernstzen on 3 October 2020.

- (b) Negligence on 7 October 2016. Failing to inform human resources manager, Mr. Brandt, about the change of the benchmark from 70% to 80% in the senior administrative officer: human resources post process; and signing the RS13 confirming correctness/ or support thereof.
- (c) Negligence on 2 July 2018. For supporting a recommendation for the appointment of Dr. SMR Gilbert without the required HPCSA registration which is a requirement to be appointed to the position of Medical Specialist.
- (d) Gross negligence on 28 August 2018 for allegedly supporting the motivation for the filling of a porter contract post, at Eerste River Hospital without checking for discrepancies. His supervisor, F Brandt, found discrepancies on the motivation. Horak failed to rectify the errors and sent through the second draft motivation with the exact same errors.

26. The applicant further disputed the time period the respondent took to take disciplinary action against him.

27. Disciplinary action must normally be taken within a reasonable time period from the date on which the alleged misconduct occurred or from the date from which the employer first became aware of it. Unreasonable delays could lead to an employee concluding that the employer has abandoned the anticipated disciplinary action and that the matter has ended. In *Stokwe v MEC: Dept of Education, Eastern Cape & Others* CCT 33/18 7 [2019] the Court said the delay itself does not constitute unfairness but the length of the delay must be considered in context. The Court also referred to a judgment by Justice Sachs in which he said “The delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irredeemably taint the overall substantive fairness of the trial if it were to commence.” The Court also found that

question whether a delay in finalisation of disciplinary proceedings is unacceptable, is a matter that should be determined on a case-by-case basis. The Court outlined the factors in *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38 (CC) to determine what constituted an unreasonable and unfair delay in the context of disciplinary proceedings as follows –

- (a) The delay has to be unreasonable. In this context, firstly the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.
- (b) The explanation for the delay must be considered. In this respect the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.
- (c) It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words it would be a factor for consideration if the employee himself or herself stood by and did nothing.
- (d) Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.
- (e) The nature of the alleged offense must be taken into account. The offense may be such that there is a particular imperative to have a decision on the merits. This requirement however does not mean that a very serious offense (such as a dishonesty) must be dealt with, no matter what, just because it is so serious.
- (f) All the above considerations must be applied, not individually, but holistically.

28. In respect of the first incident Horak was charged in 2019 for misconduct which occurred in 2016. According to Brandt the delay was due to the fact that other two employees were investigated, disciplined and dismissed (Pye and Erstzen). Horak pointed out that they were all part of the same panel and should thus have been found guilty together. The respondent has given insufficient evidence to substantiate why the applicant could

not have been disciplined with Pye and Erstzen. He was subpoenaed to testify in their arbitrations. There was no evidence to suggest that the respondent informed the applicant during 2016 to 2019 that he will be disciplined at a later stage. The other offenses occurred in July 2018 and August 2018, yet the applicant was only charged in 2019. The explanation by Brandt was that it was only about eight months after the incident. The respondent failed to sufficiently substantiate the reason for the delays and further failed to prove that the time delays in charging the applicant was reasonable.

29. The disciplinary action against the applicant eventually led to his demotion. Brandt indicated that he addressed Horak's on the last charge in respect of performance management. His conduct was addressed but yet it was added to his disciplinary hearing notice. Brandt constantly referred to Horak's poor performance. I acknowledge that in respect of the first incident(s), the applicant's conduct was serious. It however took the respondent about three (3) years to address the issue. The applicant was allowed to remain in his position for that period. The last charges were already addressed in terms of performance. It appears when the applicant's performance became worst or did not improve, he was issued with a notice to attend a hearing.

30. Collectively considering the evidence I find that respondent's conduct it was unfair when it demoted the applicant.

31. It is my determination that the applicant must be reinstated in the position as assistant director: employee sourcing. The applicant was already issued with a final written warning, thus there is no need for me to award an alternative sanction. The applicant committed misconduct although discipline was delayed and, in some instances, addressed informally. In light of the latter I will not award compensation for loss of earnings due to his demotion.

Award

32. The respondent, Department of Health- Western Cape, is ordered to reinstate the applicant, Adriaan Horak, in the position of assistant director: employee sourcing, with effect 1 August 2020.

33. No order for compensated for loss of earnings is made.



Commissioner Maureen de Beer