



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **JOSEPH MPHAPHULI**

Case No: **PSHS119-16/17**

Date of award: **02 October 2018**

In the matter between:

PSA obo Masindwa AA

(Union/ Applicant)

and

Department of Health- Gauteng

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The hearing was conducted at the Respondent's premises situated in Tshwane. The hearing was conducted on 03 July 2018, 07 August 2018, 13 and 14 September 2018 and in terms of Section 191 of the Labour Relations Act 66/1995.
2. Mrs Makhubela, employee in the service of the Respondent appeared for the Respondent.
3. The Applicant was represented by Mr Joseph Mashego, PSA official. Parties filed closing arguments on 21 September 2018.
4. The proceedings were digitally recorded.

ISSUE IN DISPUTE

5. I had to determine whether the Applicant's dismissal was fair or not and the appropriate remedy, if any.

BACKGROUND TO THE DISPUTE

6. The Applicant was recruited on 01 September 2011. He served in the capacity of training officer at R16 851.25 per month. The Applicant's services were terminated on 26 October 2015.
7. The Applicant filed for retrospective reinstatement.

SURVEY OF EVIDENCE

RESPONDENT'S CASE

8. Dr Soe, Chief Executive Officer, Tshwane District Hospital, gave evidence. The Applicant presented him with the appointment letters of two experiential students on 04 July 2014. He signed the appointments on the strength of the Applicant's representations. He later established that the students were not assigned to the Hospital by the affected College.
9. He felt that the Applicant's conduct in making false representations has damaged the trust relationship. To this end he could no longer count on the Applicant to serve the interest of the hospital.
10. In the circumstances he felt that the Applicant was not suitable for continued employment.
11. Mr. Phillip Matjika, employee, gave evidence. He served in the capacity of Labour Relations Officer. He became aware that the Applicant had appointed two experiential learners and that the appointments were illegitimate.
12. He took cognizance of the grievance raised by NEHAWU on the subject and accordingly met with the Applicant to halt the progress pending the investigations relating to the legitimacy of the appointments.
13. He had established that the learners were not issued with any documents related to the appointment of learners.

14. Not even did the provincial office, which office was solely responsible for the placement of learners knew about the appointments.
15. A circular dated 28 November 2013 was the point in reference. In terms hereof one Ms. Marinda Van Niekerk was responsible for placement of learners, be it interns or experiential learners.
16. The Applicant flouted his caution and went ahead with the appointment effective 01 April 2014.
17. Hospital management placed the appointments on hold and eventually terminated the appointments.
18. Mrs. Winnie Matube, Human Resource Manager gave evidence. She has been in the Respondent's service for nine years. She was responsible for Human Resource Management, training, administration and labour relations.
19. The Applicant was her direct subordinate.
20. The Applicant's role was to facilitate training, performance management and development systems amongst others.
21. Central office was responsible for the placement of interns. Placements of interns were initiated by the central office for accommodation at institutions such as hospitals, Tshwane District Hospital in the current matter.
22. Institutions of learning may also request the institutions to place students for practical or learner ship for completion of studies.
23. The procedure is that the institution or central office must communicate with her after which she then proceeded to approach the CEO for approval following which she would approach the affected unit if the interns can be accommodated.
24. Only if the head of the affected unit has confirmed the request would she instruct the Applicant to complete the placement.
25. The Applicant placed two students outside the laid down procedure.

26. The Applicant was fully conversant with the procedure. The Applicant has previously placed learners in the context of the stated procedure.

27. The Respondent closed its case.

APPLICANT'S CASE

28. The procedure that the Applicant followed has been in place for all the years that he has been in the service of the Respondent. The appointments that gave rise to charges leading to his dismissal was no different from the other appointments effected by him in the past.

29. Walk in learners were common place at the institution. The Applicant would place walk ins depending on vacancies on offer.

30. In the absence of vacancies, the Applicant would retain *curriculum vitae* on a spreadsheet for appointment when vacancies arise.

31. The affected appointees came at a time when the institution required the services of financial clerks. Mrs Dolo was the head of department of the affected department. Mrs Dolo had requested for the students and had accordingly received the students.

32. The request for the students was discussed in a meeting which he chaired. Mrs Matube attended the meeting.

33. He learned that there were consternations following the appointments. Resulting from the consternation the Labour Relations Officer, Mr Matjika met with the Applicant to discuss the appointments.

34. Mr. Matjika did not seem to have a comprehension of the method of operation where it concerned the placement of experiential learners as opposed to interns as contemplated by circular 90/ 2013.

35. He could not concede to Mr Matjika's view that the placements/ appointments were made outside the circular.

36. He did not at all con Dr Soe to approve the appointments. The appointments were done above board.

37. The dismissal has caused the Applicant untold financial hardships. His employment was his only source of income. The Applicant was extremely prejudiced due to the loss of income for the duration of his unemployment. To date the Applicant had not secured alternative employment.
38. Mr. Bongile Bhangase an employee at Tshwane District Hospital gave evidence. He was employed as a porter. He was recruited in June 2015. He approached the Applicant to submit his *curriculum vitae* for purposes of experiential training. He had completed an H.R Diploma at a College in Durban.
39. He left after handing his *curriculum vitae* to wait for a call from the Applicant. He received a call from the Applicant in July 2015.
40. The Applicant requested him to report at the office on 02 August 2015. He reported at the office as arranged. The Applicant issued him with a letter of appointment as an H.R intern for experiential training.
41. A post for a porter arose in November 2017. He applied for the post and was appointed on an indefinite basis.
42. Mr. Latani Mapukata, Skills Development facilitator was based at the central department of Health in Gauteng.
43. Part of his responsibilities was to see to it that institutions in the Department of Health in Gauteng were sufficiently staffed with skills necessary to execute the functions of the institutions.
44. He issued circular 90 of 2013. The circular serves to address skills development with particular reference to learners, interns and experiential students. The circular was specifically for a project on hand at the time.
45. In the ordinary course of events the Respondent make use of a policy geared to assist in skilling students, graduates and experiential learners and those who have just completed matric.
46. Experiential learners would walk in with proof of registration as a student for placement directly by the institutions and through the office of the Human Resource Management.

The policy trumps the circular, meaning that anything done under the policy would not be deemed irregular for the reason that it was in conflict with the circular.

47. It was his experience that the Applicant had placed experiential learners who were walk in candidates.

ANALYSIS OF EVIDENCE AND ARGUMENT

18. The charges leading to the dismissal of the Applicant read:

CHARGE 1

It is alleged that you committed an act of gross negligence in that you appointed two students of Tshwane North College i.e. Ms. Tshego Matoko and Ms. Precious Muroa into an experiential training programme without following the protocol required and despite being advised by your local Labour Relations Officer in a meeting held on the 03rd April 2014 to halt the process.

ALTERNATIVE TO CHARGE 1

It is alleged that you committed an act of misconduct as listed in Annexure A to the Code, which reads as follows: **While on duty, conducts herself or himself in an improper, disgraceful and unacceptable manner**, in that you appointed two students of Tshwane North College i.e. Ms. Tshego Matoko and Ms. Precious Muroa into an experiential training programme without following the protocol required and despite being advised by your local Labour Relations Officer in a meeting held on the 03rd April 2014 to halt the process.

CHARGE 3

It is alleged that you committed an act of dishonesty in that you, under false pretenses, obtained the signature of the Chief Executive Officer on the appointment letters of Ms. Tshego Motoko and Ms. Precious Muroa.

19. The essence of the charges was to the effect that the Applicant made himself guilty of gross negligence and misrepresentation of facts.

20. The sequence of events giving rise to the charges were as follows:

21. The Applicant in his position as a training coordinator was approached in his office by two students. The two students sought to be exposed to the working environment for experiential purposes. The two students presented the Applicant with their credentials.
22. The students complied with all the requirements for placement. At the time a need for financial orientated learners was already identified.
23. The Applicant was requested to seek for students to be placed in the finance department of the institution in a training committee meeting chaired by the Applicant. The head of department Mrs Dolo had made the request.
24. The Applicant sought the approval of the CEO to finalise the placement. The CEO's approval was secured and the placements were accordingly effected.
25. The Respondent's case was that the Applicant's conduct as illustrated herein above was in violation of circular 90/2013 and the standing practice of the placement of learners. Further that the Applicant secured the approval of the CEO under the impression that the placements were above board when in fact this was not the case.
26. In addition the Respondent argued that the Applicant unreasonably failed or refused to heed Mr Matjika's advice to halt the appointments.
27. The Applicant's case was that he was by virtue of office authorised to process applications for learner placements where the need was identified as was the case in the matter.
28. The Applicant had placed learners in similar fashion on previous occasions without any consequences.
29. The Applicant's case was bolstered by the evidence of Mr Latani Mapukuta, a high ranking official in the central office of the Respondent and a learner who was presented as testimony of the reality of walk in placements.
30. Mr. Mapukata's testimony dealt a deadly blow to the Respondent's case. Mr Mapukuta was the author of the circular on which the Respondent's case was anchored. The circular did not address the question of walk ins and was a once off major which should be read in conjunction with the learner placement policy according to Mr. Maputuka.

31. According to Mr. Mapukuta, the policy was the primary document and unlike the placements referred to in the circular, was of a permanent nature.
32. The policy which resides in his office allowed for walk in candidates/ learners Mr. Mapukuta's experience was that the Applicant had placed numerous learners through the walk-in method in the past without anyone raising an eye brow.
33. Mr. Mapukuta could speak from a position of authority to confirm that there was nothing untoward about the Applicant's conduct.
34. Mr. Bhangose's testimony gave full support to the Applicant's case and was consistent with Mr. Mapukuta's testimony.
35. Both Mr. Mapukuta and Mr. Bhangose's testimony was intact and untainted at the close of their testimony.
36. Read against the Applicant's version, the Respondent's version failed to impress to the extent of falling short of meeting the test of proof in terms of Section 192 (2) of the Act.
37. As a consequence, it is my finding that the Applicant's dismissal had no basis in law or fact and was bound to be set aside.
38. The cost order applied for by the Applicant following a postponement on a previous occasion was not in the circumstances appropriate in that the postponement on 08 August 2018 was not occasioned by the Respondent's fault. The Respondent's witness was indisposed on the day.

RELIEF

39. The Applicant is entitled to the relief sought.

AWARD

40. The Applicant's dismissal was substantively unfair.

41. I order the Respondent, Department of Health- Gauteng to retrospectively reinstate the Applicant, A A Masindwa, by no later than 15 October 2018.

42. Reinstatement must be with arrear salary from 26 October 2015 to the date of this award calculated at the applicant's rate of remuneration of R16 851.25.

43. The arrear salary must be paid to the applicant on or before 31 October 2018.

44. Mr. AA Masindwa must report for duty at the normal workplace at the normal knock on time by no later than 15 October 2018.

45. There is no order of costs.



Joseph Mphaphuli