



ARBITRATION AWARD

Panellist/s: Martin Sambo
Case No.: PSHS123-11/12
Date of Award: 9-Dec-2011

In the ARBITRATION between:

PSA obo MODUKANELE T.A

APPLICANT

AND

DEPATMENT OF HEALTH-NORTH WEST

RESPONDENT

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

This matters was scheduled for Arbitration on the 08th October 2011, at 10h00am at the offices of the Department of Health, Albert Luthuli Drive in Mafikeng.

The employee party, Mr T.A Modukanele, (hereinafter referred to as the Applicant), was represented by his union representative from the PSA. The employer party, Department of Health-North West (hereinafter referred to as the Respondent), was represented by its Officer Mr M.S Malane.

The proceedings were electronically recorded.

BACKGROUND TO THE ISSUES

The Applicant Mr Modukanele has been employed by the Respondent since 01 August 2007. The Respondent is the Department of Health in North West.

The Applicant is alleging that the Respondent has in terms of Section 186 (2)(b) committed an unfair conduct relating to demotion and suspension. It is common cause that the Applicant was suspended for 3 months without pay and demoted to a lower rank i.e from Assistant Director , Level 9 to Level 8 after the Respondent found him guilty on charges of misconduct on 10 May 2010. The Applicant does not dispute the substantive fairness of the disciplinary hearing.

The Applicant had referred this matter to Council for conciliation. The matter could not be resolved through conciliation and was referred to Council for arbitration. At the commencement of the hearing the parties insisted that since the Applicant is only challenging the harshness of the sanction there is no need for oral submissions and the parties will make written submissions.

ISSUE TO BE DECIDED

Whether, in the circumstances detailed hereunder, the first Respondent has committed an unfair labour practice as set out in section 186(2) (b) of the Labour relations Act 66 of 1995 ('the LRA') by suspending the Applicant for 3 months without pay and demoting him to a lower rank

SUMMARY OF EVIDENCE AND ARGUMENT

The Applicant's submissions

The Applicant's financial commitments were disregarded. The sanction imposed by the Respondent is harsh and does not fit the offence committed by the Applicant. The Applicant has shown remorse by writing a letter admitting guilt.

The Respondent's submissions

The charges preferred against the Applicant are as follows; Count 1: *On the 30th March 2010 he absented himself from his official duties between 14h00 and 15h00 without reporting his whereabouts to your supervisor;* Count 2: *On the 30th March 2010 you presented yourself been under the influence of liquor as there were sufficient evidence to proof your health condition;* Count 3: *Your conduct on the day in question brought the Department into disrepute since you displayed unethical behaviour in the presence of officials from the Department at large;* Count 4: *Your conduct on the day set a bad precedent to your subordinates including other employees in the surroundings.*

The Applicant is disputing the procedural fairness. Procedural fairness relate to the following key factors; an employer must inform the employee of allegations in a manner that the employee can understand; the employee should be allowed reasonable time to prepare a response to the allegations; the employee should be advised of his rights and must be given an opportunity to state his or her case during the proceedings and to call witness to rebut allegations made against him; an employee has the right to be assisted by a shop steward or another employee during the proceedings, or under certain circumstances even be represented by legal practitioners (attorneys and/or advocates); the employer must inform the employee of a decision regarding a disciplinary sanction, preferably in writing in a manner that the employee can understand; the employer must give clear reasons for the verdict and sanctions pronounced in disciplinary hearings. All this was complied within this matter verbally and or in writing as indicated in attached

Annexure A.

The Disciplinary Code for the Public Service set the following consideration when deciding on cases of serious misconduct: the actual or potential impact of the alleged misconduct on the work of the public service, the employee's component and colleagues, and the public; the nature of the employee's work and responsibilities; the circumstances in which the offence took place. All this was also taken into account.

The aggravating circumstances which wer presented in the disciplinary hearing carry enough weight to justify the decision of the Presiding Officer. In his appeal, the Applicant requested that the 3 months suspension without pay be converted to a suspended sanction. This is frivolous, in the sense that no such a sanction exist in the Disciplinary Code for the Public Service. Furthermore his appeal has been dealt with extensively. The outcome was supported by appropriate legal authorities.

The most disturbing point of concern, is that the Applicant is untrustworthy and has remained as such, at every available opportunity. Firstly he wrote a letter and admitted guilt. In the same letter he made false allegations about the Labour Relations Officer. During the disciplinary hearing he challenges his own letter and argues that he was under duress to write the letter. Now that he was found guilty at the hearing and lost his appeal, it is very strange that in the pre-arbitration minute, he seek to rely on the same letter that he has placed in dispute, as evidence that he was remorseful, wrote the letter voluntarily and therefore deserves a lenient sanction. Trust borders on the heart of the employment relationship and this principle cannot be compromised. In conclusion, the Respondent stresses that the Applicant has failed to discharge the onus of providing any wrongdoing on the part of the Respondent or prove that the sanctions were shockingly inappropriate. There is absolutely no reason, to interfere with the sanctions. In fact the offences justifies dismissal even at first instance.

The Applicant should have known that his conduct is disciplinable and this could have some implications to his income. He is the author of his own demise. The State President is on record that the performance of Public Servants should be based on excellence and achievement. It is for this reasons, that the Respondent prays for dismissal of this application without hesitation.

ANALYSIS OF EVIDENCE AND ARGUMENTS

I am required to determine whether, in the circumstances detailed hereunder, the Respondent has committed an unfair labour practice as set out in section 186(2) (b) of the Labour relations Act 66 of 1995 ('the LRA') by suspending the Applicant for 3 months without pay and demoting him to a lower rank.

The onus to prove the facts on which an allegation of such an unfair labour practice falls on the Applicant. In this case the Applicant merely made allegations in the minutes of the parties' pre-arbitration minutes that his financial commitments were disregarded. Further that the sanction imposed by the Respondent is harsh and does not fit the offence committed by the Applicant and that the Applicant has shown remorse by writing a letter admitting guilt. On the other hand the Respondent not only disputed the allegations by the Applicant but also provided proof to indicate that the Applicant's mitigation were taken into account when coming to the sanction. Further argued that the sanction is less harsher than the possible sanction of dismissal in such offences especially where the Applicant has admitted guilt.

It is my finding that the Applicant has not only failed to discharged the onus of proof but has also failed to convince me that the Respondent has committed an unfair labour practice by suspending him for 3 months and demoting him to a lower rank.

Therefore from the circumstances detailed above, I find that the Respondent has not committed an unfair labour practice as set out in section 186(2) (b) of the Labour relations Act 66 of 1995 ('the LRA').

AWARD

1. Application is dismissed
2. I make no order as to costs



Martin Sambo

MARTIN SAMBO

PANELLIST: 04 December 2011