



ARBITRATION AWARD

Case No: PSHS1276-16/17

Commissioner: THABE PHALANE

Date of Award: 19 SEPTEMBER 2017

In the matter between:

NEHAWU obo Abrahams, J W

(Union/Applicant)

and

Department of Health- Northern Cape

(Respondent)

1. DETAILS OF THE HEARING REPRESENTATION

- 1.1 An Arbitration hearing was held on 28 August 2017 at the Kimberley Hospital, Kimberley Hospital Complex, Du Toitspan Road, Kimberley.
- 1.2 The Applicant attended and was represented by Mr S Nonyane, the Union Official, whilst the Respondent was represented by Mr J Tswaile, the Respondent's Official.
- 1.3 The parties submitted a bundle of documents marked Bundle "A" for the Applicant and Bundle "B" for the Respondent.
- 1.4 The Applicant testified and was cross examined. The Respondent also called a witness who testified and was also cross examined.
- 1.5 The parties then agreed to submit written arguments on or before 04 September 2017.

1.6 The Respondent submitted on 31 August 2017 and the Applicant submitted written arguments on 5 September 2017.

2. ISSUE TO BE DECIDED

2.1. I am determined to decide whether the Respondent committed an unfair labour practice against the Applicant by suspending him from his work because of his participation in an unprotected strike. If I find that the Respondent acted unfairly, I am further required to determine the appropriate remedy.

3. JURISDICTIONAL ISSUE

3.1. There was no jurisdictional point raised by the parties.

4. BACKGROUND TO THE ISSUE

4.1 The Applicant is employed from February 2012 at West End Hospital as a Switchboard Operator, earning a salary of R 10 601 per month. The Respondent suspended him on 27 January 2017 and the suspension was uplifted on 14 July 2017.

4.2 The Applicant was charged on 20 March 2017 and he attended before a hearing that was conducted on 27 March 2017.

4.4 The charges were cancelled by a letter dated 09 June 2017 as his role in the Industrial Action that took place during the month of October 2016 was not significant.

4.5 The Applicant resumed work on 17 July 2017 and he submitted that he was negatively affected and he wanted compensation as a remedy.

4.6 The Respondent on the other hand submitted that the suspension of the Applicant was precautionary in nature because the Applicant and other employees were engaged in an unprotected strike that was led by their Union NEHAWU.

4.7 The Applicant was however not fingered in the assault on the CEO of the West End Hospital, Mr Isaac Moyo, but was identified as one of the employees who misconducted himself by littering the Hospital.

- 4.8 The Applicant's suspension was on full pay whilst the Respondent was investigating the matter.
- 4.9 The Respondent wanted the matter to be dismissed.

5. SURVEY OF EVIDENCE AND ARGUMENTS

Herein follows a summary of the Applicants submissions and argument.

Mr Jacobus William Abrahams

- 5.1 The Applicant submitted that he is the Deputy Chairperson of NEHAWU at West End Branch. As an Officer, he was compelled to support the strike. He does not condone the wrong things as he understood that there would be repercussions that may lead to dismissals.
- 5.2 He did not intimidate people or vandalise the property and his role was supporting the strike by singing outside and opposite the premises.
- 5.3 During the period of the strike his son was stabbed and his cousin came to collect him whilst he was standing outside. The stabbing of his son affected him a lot and his participation in the strike was therefore minimal as he did not participate further from that day of the stabbing.
- 5.4 As the Deputy Chairperson of the Branch he was obliged to follow the decision of the majority. He received a letter of suspension of 27 January 2017 and was not called to testify. He was only called two months later and told that the Applicants would be called to testify individually and that was the last time he heard of the issue of the disciplinary charges against him.
- 5.5 He received the letter uplifting the suspension during July but he was first called at the beginning of July to return to work. He went and reported at his workstation but was frustrated again because whilst he was working Mr Moyo called him to the office and told him that he cannot allow the Applicant to work without a letter confirming that he must return to work.
- 5.6 He also found it strange that the Respondent did not suspend the Chairperson of the West End Branch along with other office bearers.

- 5.7 He is not fully conversant with Labour Relations legislation and he thought that the Respondent would serve a letter to the Regional Office but the employer came directly to him.
- 5.8 The Applicant wanted 3 months compensation.

Under cross examination

- 5.9 He conceded that the strike was illegal.
- 5.10 His participation was however minimal. His son was stabbed and he was attending to his wellbeing and that distracted him from any further participation.
- 5.11 He also conceded that there was an Ultimatum sent out to employees and his name appeared on the list of employees but never saw it as he was on leave from 17 to 28 October 2016. He agreed that there was a memorandum of agreement to end the strike as he was informed by the Secretary.
- 5.12 He was receiving a salary during the suspension but there were deductions made from his salary.
- 5.13 He was informed to attend the disciplinary hearing but he was not afforded an opportunity to say anything because it was concluded that the employees must appear individually and not collectively.
- 5.14 He admitted that the suspension was uplifted but he did not recall being told that he would not be called to answer as he was not a party to the assault on the CEO.
- 5.15 He also conceded that he was part of the consultation meeting with the Union about the misconduct of shop-stewards.

6. The Respondents submission and argument.

I have again summarised the Respondent's submission and argument which follows herein

Mr Chabanya Isaac Moyo

- 6.1 The witness was the acting CEO at West End Specialised Hospital.
- 6.2 On 11 October 2016 there was a group of people disrupting services. He was also removed from his office. The group consisted of the leadership of the Union.
- 6.3 The Applicant was also present and he was on duty on that day.

6.4 The Applicant was part of the group that caused disruptions and commotions because he was not at his workstation and did not perform his normal duties.

Under cross examination

6.5 The Applicant was part of a group that was singing and chanting. The leadership of the Union was leading this group.

6.6 There was another group of 4 which was causing trouble which was led by Mr Tong and Mr J. Oliphant who were at the forefront of the commotion and this second group forcefully removed him from his office.

6.7 The Applicant was not part of this group that is why the charges against the Applicant were dropped after he realised that the Applicant was not part of the second group.

6.8 The Applicant was suspended because he was part of the group that was chanting, disrupting services and was not at his place of work.

6.9 Services were disrupted because the outpatients could not be serviced and there was a blockade to access into the administration building.

7. ANALYSIS OF EVIDENCE AND ARGUMENT.

7.1 The Applicant has referred his matter in terms of section 186(2) (b) of the Labour Relations Act 66 of 1995 (the Act). He essentially submitted that his suspension was unfair because his participation in the industrial action was minimal.

7.2 The onus lies with the Applicant when there is a dispute about an unfair labour practice to establish that the Respondent committed an unfair labour practice. It is my finding that the Applicant has failed to discharge this onus.

7.3 The evidence presented here evidence leans in favour of the Respondent for the following reasons. It is common cause that the Applicant was engaged in an unprotected industrial action. This he conceded but tried to state that he was following the decision of the majority. He continues to submit that he was also attending to the wellbeing of his son who was stabbed during the duration of the Industrial action.

7.4 The Applicant loses sight of the fact that his Union entered into a Memorandum of agreement with the Respondent. The Agreement also states that those members

who engaged in the unprotected industrial action will be subjected to disciplinary action for misconduct in terms of the Public Service Disciplinary Codes and Procedures.

- 7.5 This is the reason he was charged and called to a disciplinary hearing. The fact that the disciplinary hearing did not sit is negated by the fact that all charges against the Applicant were withdrawn. The Applicant cannot be charged for actions that happened during the strike however it does not mean that the principle of no work no pay will not be applied to him.
- 7.6 Resolution 1 of 2003, which amends Resolution 2 of 1999-The Disciplinary Codes and procedures for the Public Service, provides that the principle of the Disciplinary Code is a corrective and not a punitive measure.
- 7.7 The Applicants challenge the fairness of the precautionary suspension issued to them. It is common cause that the suspension was uplifted on 9 June 2017.
- 7.8 Clause 7.2 regulates the precautionary suspension and provides that it must be on full pay. There was no allegation by the Applicant that he was not paid his salary.
- 7.9 It is for these reasons that I find that the Applicant has failed to discharge the onus that the Respondent committed an unfair labour practice by placing him on precautionary suspension.
- 7.10 In the premise the following award is in order:

8 AWARD

- 8.1 The Applicant has failed to show the existence of an unfair labour practice committed by the Respondent.
- 8.2 The referral made in terms of section 186 (2) (b) is accordingly dismissed.
- 8.3 There is no order as to costs.



Thabe Phalane (Panelist)