



ARBITRATION AWARD

IN THE PUBLIC CO-ORDINATING BARGAINING COUNCIL

PSHS192-11/12

In the matter between

MR. S M. MTSWENI

APPLICANT

And

DEPARTMENT OF HEALTH –MPUMALANGA

RESPONDENT

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION

- 1.1 The arbitration hearing was held on two different dates. It commenced on the 22nd November 2011 and was concluded on the 10th February 2012.
- 1.2 The applicant Mr. S.M Mtsweni appeared and was represented by Mr. S Masilela an official of NEHAWU, a trade union. The respondent the Department of Health-Mpumalanga was represented by Mr. S. Malinga its employee.

2. ISSUE TO BE DETERMINED

- 2.1 Whether the dismissal of the applicant was procedurally and substantively unfair.

3. BACKGROUND TO THE ISSUE

- 3.1 The applicant was employed by the respondent on the 15th March 1994. At the time of his dismissal his position was that of a Chief Environmental Officer earning a salary of R166 079-00 per annum. The applicant was dismissed on the 30th January 2011. Subsequently referred the dispute of unfair dismissal to the Public Health Social Development Sectoral Bargaining Council (“PHSDSBC”) for resolution.
- 3.2 The conciliation process was not able to resolve the dispute and the applicant requested that it be resolved through arbitration.
- 3.3 The parties held a pre-arbitration meeting on the 21st November 2011 and recorded the following as their agreement.

3.3.1 COMMON CAUSE ISSUES

The applicant was dismissed for misconduct and that the chairperson of the disciplinary enquiry was Mr. J.G Mnisi, and his outcome report was issued and confirmed by both parties.

Documents submitted were what they purported to be, and charges against the applicant was recorded therein. The witness Sister T.B Nkosi was called by the presiding officer mero muto.

3.3.2 ISSUES IN DISPUTE

Whether the presiding officer had powers to call Nkosi as a witness. Whether the applicant was in breach of any standard or law applicable in the workplace. Also whether the evidence presented proved the allegations.

4. SUMMARY OF EVIDENCE AND ARGUMENT

- 4.1 On behalf of the respondent two witnesses testified Ms. Poppy Tause and Ms. Thoko Nkosi. The essence of their testimony was that the applicant made a fraudulent claim of R17 085-84 for travel costs which he could not justify by documentation, or that he was grossly negligent in failing to support his claim with proper documentation.
- 4.2 Further that he was grossly insubordinate by refusing to submit monthly reports and itinerary when instructed by his supervisor Ms. P Tause to do so.
- 4.3 A further charge was that he was in dereliction of his duties when he failed to monitor domestic water at Verena which was his area of operation.
- 4.4 The evidence of Ms Tause was that the applicant was her subordinate from the period 1997 until 2006. In 2005 a Typhoid outbreak was experienced in the area of Delmas. The applicant was then assigned to the area to help combat the outbreak, as a result of this assignment he was given a travel allowance. He worked independently in the area but was required to submit monthly reports and itineraries by certain dates. He failed to comply.
- 4.5 She (Tause) refused to sign his log sheets for payment of the travel allowance precisely because he was not accounting for his travel. He (applicant) took his log sheets to Sister Nkosi as the senior to sign. In 2007 there was another outbreak in Verena and he was assigned to work there. He also did not submit the required reports and itineraries.
- 4.6 Subsequently, a meeting was held between herself, the applicant and Sister Nkosi to discuss the problem. The meeting occurred around 2008, and at this stage he (applicant) was submitting reports albeit not weekly on Monday. He was instructed at this meeting to submit reports weekly and he still failed. In December 2008 he did not submit any report and from January 2009 until May 2009 he submitted them without the authorised signature.
- 4.7 A decision was taken around April 2009 that he will not be paid for travel allowance until he complied with the instruction to submit proper reports. He referred a dispute of unfair

Labour Practice to the PHSDSBC and the award was in favour of the respondent. On the 6th April 2010 further correspondence went to the applicant advising him that it was a final instruction to submit the said reports. He eventually submitted log sheets and his activities did not correspond with the work plan and therefore the objectives to be met.

- 4.8 She referred to page 14 of the bundle of documents exhibited marked 'B'. The said document related to a programme of sampling water for bacteria. The programme is part of bacteria. The programme is part of the operational plan and the applicant has failed to carry out the task as stated. He completed only a small part of the plan. Further that the sampling of water is an important part of his functions because of the health risks inherent in the water.
- 4.9 He further reported that he condemned the food of business in Sun City. He however failed to submit a detailed report with the certificate of condemnation. The applicant failed to submit reports of systematic inspection which should show where he had been and when, what facilities he found, what food he condemned and why. Such report also need to be signed by the owner or Manager of the business which he condemned.
- 4.10 She further referred to minutes of a meeting which was held on the 12th March 2007, whose purpose was to resolve problems between the applicant, Tause and Nkosi. The resolution of the meeting was inter alia, that the applicant will submit his itineraries and log sheets to her (Tause) for signature. He (applicant) agreed in that meeting that he will ensure that there is a correlation between his itineraries log sheet and monthly reports. He however failed to comply with the resolutions.
- 4.11 The applicant failed to perform the function of water sampling which is a requirement and is part of his functions. Due to the fact that he had failed or refused to submit itineraries to her (Tause) it was difficult for her to account for any activity performed by the applicant.
- 4.12 Under cross examination she conceded that she has not supervised the applicant since 2009. The applicant was reporting to sister Nkosi. She (Tause) was still responsible to account for the applicant's activities and to submit a consolidated report of all activities. Sister Nkosi has always informed her that the applicant was not submitting any reports. She further conceded that the applicant's claim for the amount of R17 098-94 was signed by Sister Nkosi. She however stated that the applicant was manipulating Sister Nkosi knowing very well that she was not familiar with activities which the applicant was supposed to perform.
- 4.13 She further conceded that in 2009 she was no longer giving instructions to the applicant. She however pointed out that the applicant was reporting to Sister Nkosi, but was not submitting any reports to her.
- 4.14 The next witness Mrs Thoko Nkosi testified that she is employed by the respondent as a Director Primary Health Care. She also supervises Community health Centres which are open for 24 hrs in a day. She further testified that on the 29th of April 2010, a meeting was with the applicant represented by NEHAWU regarding the same issue of failure by the applicant to submit reports. The applicant was requested in the said meeting to submit reports for the year 2009, in order that his grievance could be looked into.

- 4.15 She conceded to signing the applicant's travel claim in 2009. She stated that she signed them because she is the person responsible for transport regulation in her section. Further that she was manipulated by the applicant, who begged and stated that if she did not sign he would not be paid. She further admitted that she had no knowledge of the activities stated in the itinerary submitted by the applicant. She could not tell whether they were completed or not. She further stated that the monthly reports which formed part of the applicant's bundle were never submitted to her.
- 4.16 The applicant also testified and stated that he was dismissed on the 30th March 2011. He stated that regarding charge 1, he was entitled to claim for travel in terms of the approved scheme. The claims are authorised by the supervisor, and submitted to the Transport Officer who will process and submit them to the Director at the District Office. He dully submitted the claims to Sister Nkosi with the itineraries. The claims were approved by Sister Nkosi.
- 4.17 He further stated that he was paid about R11 000-00 and not R17 000-00 as alleged by the respondent. He was however entitled to every cent which he claimed. He further denied that in 2009 he had received instructions from MS Tans. He stated that he was being supervised by Mrs Nkosi. He admitted that he did not submit any reports to Mrs Nkosi because she said he should keep them. He conceded that he did not carry out the instruction issued to him in April 2010 because he had filed a grievance regarding the same issue.
- 4.18 Mr. Mohlahle Boshielo also testified for the applicant. He explained the process which needs to be followed for transport claims to be paid. He conceded that even though supporting documents are attached to the claim forms, he was not able to verify whether the work was done. Only the supervisor of the person concerned would be able to verify.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

- 5.1 The applicant was dismissed for misconduct. The Labour Relations Act 66 of 1995 gives guidelines in schedule 8 on how matters of dismissal for misconduct should be handled. **Schedule 8 Code of Good Practice: Dismissal item 7** deals with cases of dismissal for misconduct and it provides as follows:
- "Any person who is determining whether a dismissal for misconduct is unfair should consider-
- (a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace; and
 - (b) If a rule or standard was contravened, whether or not-
 - (i) the rule was a valid or reasonable rule or standard
 - (ii) the employee was aware or could reasonably be expected to have been aware, of the rule or standard
 - (iii) the rule or standard has been consistently applied by the employer; and

(iv) Dismissal was an appropriate sanction for the contravention of the rule or standard.

- 5.2 The applicant is charged with three counts of misconduct, fraud gross insubordination or failure to carry a lawful instruction and dereliction of duty. The evidence of the respondent should therefore show that the applicant contravened a rule or standard of the workplace.
- 5.3 The gist of the evidence presented on behalf of the respondent was that the applicant was aware that he had to show by means of log sheets, itineraries and reports that he had gone to the places he claimed for. It is common cause that it was a requirement of the job to submit monthly reports. The said reports would account for the work done. The applicant argued however that it was not necessary for him to submit reports in order that he be reimbursed for travelling.
- 5.4 Evidence from Tause was that there should be a correlation between the plan (itinerary) the log sheets and the report. The applicant conceded that he did not submit any reports. He stated that he was instructed by Sister Nkosi not to submit the reports; this version was not put to Sister Nkosi. I therefore reject it as an afterthought on the applicant's part.
- 5.5 The duty is placed on the applicant to justify that he was claiming because he had done the work. It is evident from Sister Nkosi's evidence that she merely signed the claims without checking and she could not in any event verify because she would not know what to look for in the reports. She signed the claims based on emotions. She was feeling sorry for the applicant she said.
- 5.6 The question still remains whether it can be said that the applicant misrepresented himself when he submitted claims which were not supported by any reports. The answer would be in the affirmative especially in that he was given numerous opportunities to submit. It would not be unreasonable to conclude that such reports did not exist, and that he did not attend at the places for which he had claimed travelling allowance. He therefore claimed money in circumstances where he could not prove that he travelled and that is misrepresentation or fraud.
- 5.7 Regarding the charge of gross insubordination, evidence was led that the applicant was given instructions to submit reports. Further that several meetings were held where he was informed to submit reports and he refused. Even at the stage where he was informed of the consequences of failure to comply, and was given an ultimatum, he still refused or failed to comply.
- 5.8 It would not matter in this instance that the instruction came from Nkosi or Tause. They both had authority to instruct the applicant. His refusal was therefore insubordination.
- 5.9 Regarding dereliction of duty, the applicant conceded that he did not attached a certificate to prove that he had condemned the food at one of the businesses. He also conceded that he did not sample the water and have it tested for bacteria. He was in the circumstances in dereliction of his duties.
- 5.10 A further question is whether the above acts of misconduct warranted dismissal, and further whether a fair procedure allowed the chairperson to meru motu call a witness.
- 5.11 In **SAPA obo VORSTER v SA POSTKANTOOR [1997] 11 BLLR 1524 (CCMA)** the dismissal of an employee who claimed overtime for a period in which he was not

performing duties was held to be fair, on the basis that he was aware of the rule and that the rule was reasonable.

- 5.12 In **JOHANNES v POLYOAK (PTY)LTD [1998] 1 BLLR 18 (LAC)** the dismissal of an employee who persistently refused to obey instructions until certain grievances were met, was held to be fair no matter how well had worked in the past.
- 5.13 In **ESKOM v MOKOENA [1997]8 BLLR 965(LAC)** it was held that an Employer is entitled to set its own standard of performance and account will not interfere unless such standards are grossly unreasonable.
- 5.14 In casu the applicant was aware of the standard of performance required of him. He knew that he had to conduct tests on the water. He further knew that failure to do so may have disastrous consequences for the community.
- 5.15 Given all the afore- going his dismissal was not substantively unfair.
- 5.16 Regarding the procedure the applicant argued that at the disciplinary hearing, the chairperson called a witness who had not been called by either party. I have been referred to the collective agreement and it is silent on the aspect raised. I therefore have to be guided by the Labour Relations Act 66 of 1995. In Section 138 the arbitrator is given powers to deal with the arbitration in any manner that he/she deems fit but should determine the dispute quickly and fairly with minimum formalities.
- 5.17 A disciplinary hearing is an informal process, but the standard is fairness. A disciplinary enquiry chairman is therefore entitled to call any person whom he believes will assist him and the process to come to a fair decision. Such process is therefore not unfair.
- 5.18 In the premise I find the dismissal of the applicant to both procedurally and substantively fair.

6. AWARD

- 6.1 The application for unfair dismissal is hereby dismissed.
- 6.2 No cost order is made

NOMSA MBILENI

ARBITRATOR