



ARBITRATION AWARD

Case Number: PSHS200-11/12 (PSHS431-11/12)
Commissioner: Abraham Nthako
Date of Award: 14-June -2012

In the matter between

Kramer Wiehmann & Joubert obo Mokgothu & Mofokeng

(Union/Applicant)

and

Department of health – Free State

(Respondent)

Union/Applicant's representative: Mr. J.Nortje

Union/Applicant's address: C/o Kramer Weihmann & Joubert

P O Box 12322

Bloemfontein

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Respondent's representative: Mr. J. J. Gous

Respondent's address: C/o Gous Vertue & Associates

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DETAILS OF REPRESENTATION

1. This is an award in the arbitration between Mr. Thebe Benjamin Mokgotho, Mr. Mpuse Mofokeng, Employees and Department of Health – Free State, the Employer.
2. The arbitration was held under the auspice of PHSDSBC in terms of the Collective Agreement.
3. The conciliation process was dealt with and the matter could not be resolved.
4. The Employee requested that the matter be resolved through arbitration process.
5. The matter was set down for arbitration on a number of occasions but on the 30th May 2012 it was finalized.
6. Employees appeared and they were represented by Mr. J. Nortje from Kramer Weihmann & Joubert and the Employer, Department of Health was represented by Mr. J. J. Gous from Gous Vertue & Associates.
7. The matter was mechanically recorded and the parties submitted a bundles of documents which were marked A and B.
8. A ruling for consolidation of PSHS431-11/12 with PSHS200-11/12 was made after hearing the submissions by the parties' representatives.
9. The matter proceeded under case number PSHS200-11/12 on the 29th of May 2012 and then it was adjourned to the 30th of May 2012.
10. The parties agreed that they will make submissions in writing and their arguments will be submitted on the 13th of June 2012.
11. Parties agreed on the leave credit due to Employees and performance evaluation, details of the agreement will be dealt with under the background.

ISSUE TO BE DECIDED

12. The issue to be decided on is whether the Employer's decision to suspend the Employees was a fair one or not and, if so what appropriate remedy to apply.

BACKGROUND TO THE ISSUE

13. Employees work for the Employer and they held different positions they were suspended on different dates.
14. Mr. Mofokeng was suspended on the 23rd of November 2010 and his suspension was uplifted on the 05th of November 2011.
15. Mr. Mokgothu was suspended on the 17th of November 2010 and his suspension was uplifted on the 05th of November 2011.
16. Employees were suspended on full remuneration and benefits.
17. They referred the matter to the Council and as it could not be resolved a certificate of non resolution was issued.
18. The matter was set down for arbitration at Bophelo House, Department of Health in Bloemfontein for the 29th and 30th of May 2012 and it was finalized.
19. Parties agreed that they will make written submissions of which I found that to be in order.

20. The matter relates to unfair labour practice in terms of Section 186(2) as such Employees had a duty to prove on a balance of probabilities that they were unfairly treated.
21. Parties agreed as follows on other aspects of the dispute, that the Employer the leave credit due to Employees as follows;
22. That the leave credit due to Employees will be paid by the Employer as follows; Mr. Mofokeng's 20(twenty) leave days will be paid by the 15th of June 2012 and Mr. Mokhothu's 4(four) leave days will be paid by the 15th of June 2012 as well.
23. There will be a salary adjustment for the period of 2010 and 2011 and it will be corrected by the 15th of June 2012. The adjustment for the period 2011 to 2012 will run normally in the cause of the Employer's business.

SURVEY OF EVIDENCE

EMPLOYEE'S SUBMISSIONS

24. The Employees made submissions without calling any witnesses.

EMPLOYEE

25. Employees made submissions through their representative as follows:
26. The representative gave the background around the disciplinary hearing until the charges were withdrawn by the Employer and suspension uplifted. After the withdrawal of the charges on the 03rd of February 2012 the Employer placed the Employees at different positions than those that they have been appointed for. Employees submitted that they were unfairly treated by the Employer by suspending them from November 2010 to February 2012 and thereafter, he withdrew the charges against them without placing them at their positions.
27. They submitted that they have proven their case on a balance of probabilities as they were not treated fairly when it came to the procedure that the Employer followed in the proceedings and suspension. That was the Employee's submission in brief.

EMPLOYER'S SUBMISSION

28. Employer did not call any witnesses after submissions.
29. The Employer submitted through its representative as follows:
30. That the Employees were only suspended but not dismissed, pending the disciplinary hearing. The charges against the Employees were withdrawn but the case is still pending and it has not been finalized. He submitted that the Employees did not suffer any prejudice and or monetary loss. He submitted that their salary was paid in full, including leave and assessment bonus. The Employer submitted that Employees were paid for over a period of 11 months for basically doing nothing and the charges that they faced were complex in nature as they had to go through 20 000 thousand pages and complicated forensic report.
31. As a result it was impossible to work within the boundaries of the normal time for disciplinary hearing as per collective agreement. He submitted that the postponement came from both parties due to the fact that sometimes it was difficult to arrange date legal representatives and the chairperson. Due to the complexity of the matter the Employer had to up lift the suspension against the Employees. After

the up-liftment of the suspension the Employees were redeployed within the Department due to reshuffling and not to prejudice the Employees.

32. The Employer submitted that Employees were not prejudiced but the Department is the one that was prejudice. He went further to say that Section 186(2) was not meant to enrich Employees. The intention of the section was brought into action to distract the employer from unfairly treating employees in finalizing the disciplinary hearing. He submitted that the Employees are not entitled to compensation. That was the Employer's submission in brief.

ANALYSIS OF EVIDENCE AND ARGUMENT

33. **Section 185 of The Labour Relations Act 66 of 1995 provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practice.**
34. **This dispute has been referred to the Council in terms of Section 191(1) of Act 66 of 1995. In Nawa v Department of Trade & Industry [1998] 7 BLLR 701 (LC) the Labour Court stated that the LRA does not provide for general unfair labour practice definition and concluded that an employee who alleges an unfair labour practice must show that it falls within the residual unfair labour practice.**
35. 2002 amendments inserted the definition of an unfair labour practice into section 186(2) of Act 66 of 1995. The definition reads as follows: 186(2) Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving- (a) unfair conduct by the employer relating the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee; (b) the unfair suspension of the employee or any other unfair disciplinary action short of dismissal in respect of the an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosure Act 2000 (Act No 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.
36. The Employees alleged that the Employer suspended them unfair. They submitted that they were unfairly treated by the Employer by suspending them from November 2010 to February 2012. From the background given by the Employees' representative it appears that there was a postponement of the hearing on a number of occasions. Mostly it was because the Employer was not ready to proceed with the hearing as some of the documents were not there.
37. Some of the postponements were agreed upon by the parties but still the matter could not be finalized and or started with. On the other hand the Employer submitted that the charges that the Employees were faced with were complex in nature as they had to go through 20 000 thousand pages and complicated forensic report. The Employer went further to say that it was impossible to work within the boundaries of the normal time for disciplinary hearing as per collective agreement.
38. He submitted that the postponement came from both parties due to the fact that sometimes it was difficult to arrange date with legal representatives and the chairperson. The question that needs to be answered is whether it fair to suspend the Employee for such a long period. The Employer suspended the Employees but later decided that he is not going to continue with the hearing but to withdraw the charges. **In Sajid v Mohamed NO & others (2000) 21 ILJ 1204 (LC)**, it was held that suspension of an employee pending a disciplinary inquiry was unfair because the Employer later decided not to hold an inquiry.
39. It has also been held that suspension becomes unfair if it is imposed for an unreasonable period, particularly if the period of suspension is limited by a disciplinary code. **See: Ngwenya v Premier of KwaZulu-Natal (2001) 22 ILJ 1667 and Ned v Department of Social Services & Population development (2001) 22 ILJ 1039.** The Employer indicated that it was impossible to work within the boundaries of the normal time for disciplinary hearing as per collective agreement. It is clear from the submissions made that Employees were on suspension for a very long time before the charges could be withdrawn against them.

40. I am of the view that the Employer should have given the Employees alternative job while the matter was continuing to avoid indefinite suspension or suspension for a period of almost a year and a quarter. The Employer continued to charge and set the disciplinary hearing on a number of days without complete investigations. I am of the view that the Employer should have suspended the Employees and thereafter give them alternative work if they believed that the Employees will interfere with the investigation at the unit or department that they were operating from. The suspension could have been reasonable. In this case it is clear as indicated by the Employer that the suspension went beyond the boundaries of normal time as per collective agreement.
41. The Employees were suspended and there after the charges were withdrawn against them. After the withdrawal of the charges, Employees were not taken back to their respective positions as per contract of employment but they were given other positions that are not part of their employment contract. The Employer indicated that the case is still pending and very soon the Employees will be charged again. This shows that the Employer has not finished the investigations in this matter. As a result, the only inference that could be drawn is that the Employees are actually still on suspensions when it comes to their positions.
42. From November 2010 to February 2012, Employees were paid in full and as already indicated above, some of the outstanding moneys were paid and agreed upon. However, a person who has been unfairly suspended as in the case of the Employees can be awarded compensation but such award should arrived at inconsideration of all relevant factors surrounding the matter. In this case, the Employer is the one who suffered a great loss because he had to remunerate Employees for the services that they did not render as they were on suspension. Therefore, it will not be just to award maximum compensation in this matter.
43. I am of the view that the Employer should compensate Employees for two months each.

FINDING

44. Based on the above, it is my finding that the Employees were unfair suspended by the Employer and they have proven that on a balance of probabilities.
45. The Employees are entitled to compensation.

AWARD

46. The Employees, **Mr. Thebe Benjamin Mokgotho and Mr. Mpuse Mofokeng's** suspension was unfair.
47. The Employer, Department of Health Free State is ordered to compensate Employees for two months each calculated at their normal monthly salary.
48. The Employer is to pay the said amounts on or before the 15th of August 2012.
49. The Employer must note that interest will accrue on the amount payable from 15th of August 2012 in accordance with Section 143(2) of the Labour Relations Act 66 of 1995.
50. I make no order as to costs.

Signature: _____



Commissioner: Abraham Nthako

Sector: Health