ARBITRATION AWARD

Panellist/s: **Leslie Martin**
Case No.: **PSHS234-10/11**
Date of Award: **30-Nov-2011**

In the arbitration between:

J.I. Beaurain
(Union / Applicant)

and

Department of Health- Western Cape
(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration took place at the offices of the Department of Health, 4 Dorp Street Cape Town on 26 April 2011, 24 May 2011, 7 July 2011 and at the Nursing College in Klipfontein Road, Athlone on 24 October 2011. On 24 May 2011 the respondent was unable to proceed with the matter on account of its representative's being off for reasons of ill health. The respondent representative on that day, Mr. X. Ngenase, undertook to submit a medical certificate in support of the reason for postponement of the matter.

2. The applicant, Johannes Izak Beaurain (the applicant), was represented by Ms. C. Kgosana(Kgosana), a fellow employee.
3. The respondent, the Department of Health Western Cape (the respondent) was represented by Mr. F. Rodriguez, its Deputy Director, Labour Relations.

4. At the conclusion of proceedings on 24 October 2011 the applicant submitted his closing argument orally and in writing. The respondent submitted its closing argument verbally and requested an opportunity to do so in writing as well. The respondent was instructed to submit its written closing arguments within 7 days on

31 October 2011. The applicant was afforded an opportunity to submit replying argument in writing within 7 days on 7 November 2011. The respondent failed to submit its written argument by 31 October 2011. I received the respondent's closing arguments on 11 November 2011. I received the applicant's replying papers on 16 November 2011. The date for the issuing of the award is thus 30 November 2011. The applicant has objected to the respondent's late filing of its written argument and has demanded that the decision in this matter be taken with only the applicant's argument submitted on 24 October 2011 taken into account. I have read all arguments submitted in writing and do not think it appropriate to exclude any of them as that would be fair in order to arrive at a proper conclusion of this dispute and to get to the truth of the matter and also because the applicant does not appear prima facie to have made any argument in respect of a dismissal for misconduct in his initial argument, the dispute that the applicant has referred. The applicant has accordingly been afforded an opportunity to remedy any shortcomings in his replying papers and thereby to cure any prejudice he may or may not have suffered. My decision will in any event be taken on an assessment of the facts presented at this arbitration.

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ISSUE TO BE DECIDED

5.Was the dismissal of the applicant fair?

BACKGROUND TO THE ISSUE

6.The applicant worked for the respondent as an electrician in the engineering department from June 2006 until 20 May 2010 when he was dismissed.

7. In terms of Section 138(7) of the Act, I am required to provide brief reasons with my award. Accordingly, I shall only refer to the evidence I consider relevant to determining the dispute between the parties.

SURVEY OF EVIDENCE AND ARGUMENT

8.Each party handed a bundle of documents into evidence. The parties agreed that objections to documents will be dealt with as and when those issues arise.

9.It was common cause that the applicant was dismissed for insubordination after he had drafted information regarding the filthy state of toilets at Groote Schuur Hospital (GSH) on Facebook.

10. It was also common cause that the applicant received 2 letters (12 June and 6 August 2009) instructing him to stop posting such information on Facebook.

11. He continued to do these postings after he had received the letters.

12. Mvuzo Ngqame(Ngqame), the labour relations officer/assistant director at GSH, Harold Leslie Scott (Scott) testified under oath for the respondent.

13. The applicant testified under oath for himself. Dr. Helgart Francina Louisa Antonissen (Antonissen), a medical doctor caring for patients and part of occupational health and safety, and Albertus Johannes de Vries (de Vries), an inspector from the Department of Labour, testified under oath for the applicant.

THE EVIDENCE FOR THE RESPONDENT:

14. After the photographs on Facebook came to the attention of the management at GSH they held a meeting at which it was decided that they take advice from head office on the matter and investigate the allegations of the applicant.

15. The labour relations department at head office advised that the letters be issued to the applicant.

16. The applicant had also posted on Facebook allegations of Murder and fraud against the Management at GSH.

17. The information published on Facebook by the applicant is to be found at page 42R.

18. The information regarding the toilets is not true as toilets were supplied with paper and soap and not often locked. Ngqame had become aware of these issues through the complaints only of the applicant and no one else.

19. If the issue pertained to safety the complainant could go to the safety officer or his immediate superior to lodge his complaint.

20. While the applicant had posted these things on Facebook Ngqame received a collective grievance from the engineering staff regarding engineering issues.

21. Management at meetings had resolved to deal with the applicant's issues. This pertained to the toilets in the inter-floors which were not used by the public.

22. Ngqame became aware of the postings as the secretary of the CEO had seen it on Facebook. There was already information on this around the office.

23. The applicant had published internal communications with Antonissen on Facebook.

24. Ngqame was also aware of a petition by the applicant but could not remember whether there were signatures on it.

25. The cleaning function had long ago been outsourced to a cleaning company, Pronto, and this function was monitored by health and safety officers.

26. For the maintenance of the functional toilets the respondent employed a plumber, a foreman and 4 handymen.

27. It was unusual to declare a dispute openly on the internet.

28. The applicant's issues pertained to the lack of fresh air supply; filters that needed to be replaced more regularly; toilets that were not flushing on the inter-floors (a service floor between floors).

29. There are toilets that are not situated on the inter-floor that are locked and decommissioned.

30. As part of his general duty the applicant would have access to these toilets. However, as they are locked he should not have access to them.

31. There is no need for the applicant to use these toilets as there are clean, usable toilets elsewhere in the hospital. There are also toilets for employees in the engineering workshop.

32. The quality of water and the kitchen are not part of the applicant's Key Performance Areas (KPA's).

33. Several meetings were held at which it was resolved to deal with the applicant's problems.

34. The toilets were supposed to be managed by support services which must report back to the engineering department.

35. Decommissioned toilets were not regularly cleaned. GSH had decided not to have those toilets used by anyone but did clean them.

36. Scott was not aware of the applicant's having any expertise on these matters.

37. Any aggrieved employees could follow the internal grievance procedures of the respondent.

38. Scott and other managers did not want to communicate with the applicant in writing for fear of his posting their communications on Facebook as he had done in the case of Antonissen. The trust relationship had completely broken down.

39. When Scott received the applicant's complaints he notified the Environmental Health Services who would then clean the toilets. Where there was a broken cistern in a toilet a bucket would be used and the hazard would be gone. Once those toilets were then locked there would be no need to flush them.

40. One dirty toilet is not a true reflection of the hospital. As far as Scott was concerned the issue had been resolved.

41. Health and safety issues were dealt with in a committee which met every 3 months. Unresolved issues would be referred to a central committee.

42. When a complaint about a dirty toilet was received it would be resolved.

43. The applicant's statements were an exaggeration of the situation e.g. if a toilet bowel was stained he would say it was dirty.

44. The blocked toilet full of rotting was cleaned and then locked again. The photograph of the rotting in the toilet was therefore out of context as it had been cleaned.

45. The problem of dirty toilets did raise its head from time to time. This was usually as a consequence of the toilets being broken into. These toilets would then be cleaned and more robustly locked thereafter.

46. New toilets with basins on top were also installed.

47. The applicant was aware that the toilets had been fixed and locked and were therefore out of circulation and that the hospital does clean where dirty toilets are reported.

48. The hospital does use chemicals to break down the rotting in the toilets.

THE EVIDENCE FOR THE APPLICANT:

49. By continuing to place photographs of the toilets on Facebook is not tantamount to disobeying an instruction from the employer because the instruction is unreasonable and therefore invalid. If the postings on Facebook were derogatory then the instruction would be valid.

50. The applicant was not convinced that the respondent would sort out the toilets therefore would not stop the postings. Scott had not told the applicant that the toilets had been decommissioned. This he learned only after he had been dismissed. Scott had told him that they were going to clean the toilets. The applicant was however aware that it was not just a cleaning problem but that the toilets were dysfunctional.

51. It was not insubordination to copy everyone in the hospital as the applicant tried to bring to the attention of Dr. Carrien(Carrien) a real problem.

52. Carrien should have had bilateral discussions with the applicant a long time ago.

53. The purpose of the Protected Disclosures Act 26 of 2000(PDA) was that employees have to make disclosures about issues in the workplace. It is there to give information to the public.

54. In making a disclosure the applicant could use any means he chose including going onto Facebook.

55. Scott did testify that the locked toilets were not for use by the public and that only staff and contractors had access thereto.

56. While the photographs were of 8 locked toilets the ninth was of the inside of the ninth toilet showing a toilet bowel which was starting to become dirty as the colour of the water was becoming dark.

57. When the applicant was running a petition in the hospital and while handing out pamphlets on the E level Antonnissen told him he required permission for his activities. The applicant told Antonissen that he did not require permission because while it constitutes a challenge to the employer it was not insubordination.

58. If someone came with a reasonable argument that the applicant was wrong he would listen.

59. It was an omission on his part that the applicant did not mention in his letter to the Public Protector that he had become sick.

60. In his communication with Dr. Carrien the applicant had attached a copy of the one toilet which he was able to take a photograph of. He had also copied nearly everyone in the hospital. These were the people within the health and safety structures at the hospital.

61. Dr. Carrien should have had a bilateral interaction with the applicant a long time ago.

62. Scott had already in 2009 responded to the applicant regarding dr. Carrien's letter.

63. Antonissen had met the applicant for the first time on 13 March 2007 when he came to see her as a patient. He had a feverish illness and cough which he thought had come about from the environment on the inter floors.

64. His condition had improved and Antonissen had sent him for TB tests. The applicant had since then raised a number of issues and had felt that no one was interested in his concerns. He felt that he was going to have a heart attack. Antonissen had given him a full examination and had tried to reassure him.

65. At an occupational health and safety workshop on 22 May 2010 the applicant's concerns were raised.

66. The health and safety officers inspected the inter-floors and the kitchen and concluded that they were not going to investigate the structure of the hospital. Antonissen however did not do a follow up inspection.

67. Of the toilets in the hospital were locked and the key was to be found in the specific department. They were not locked to deny access.

68. Those problems of the applicant that could be resolved must be dealt with by each department. Antonissen felt that if a toilet was blocked then a plumber should fix it. She had responded to each of the applicant's complaints.

69. Antonissen had not encountered any blocked toilets and had not seen any looking like those in the photographs.

70. The toilet in the photograph was very unhygienic and it would not be fit to work there save to fix it.

71. It was not a threat to one's health unless one put one's hand in it and then licked one's fingers.

72. The smell emanating from the faeces would not affect one's health. Germs would be in the faeces and not in the air.

73. The chemicals used would be an irritation if breathed in but that was all.

74. Antonissen had spoken to Scott about the issues but gave up when he did nothing. The communications from him to the applicant do show however that he did respond to the complaints.

75. Antonissen had not heard of complaints about toilets from any other employees.

76. The Public Protector referred the issue of the applicant to the Department of Labour. Its inspector de Vries visited GSH to inspect the toilets. His investigation confirmed what the plumber, Mr. Burch, had informed him of viz. that most of the toilets on the interfloors had been fixed. The 15 toilets on the inter-floors were fixed but no towels and soap had been provided.

77. De Vries duly issued a contravention notice instructing that GSH provide toilet paper and soap in each toilet and that each employee be provided with a towel or that paper towels or a blower be provided in each toilet.

78. On 6 December 2010 de Vries did a follow up inspection and found GSH to have complied with the contravention notice.

79. That day de Vries with the applicant had also inspected other toilets which were locked. He found these toilets in a bad state e.g. a cistern was gone while the hand-basin and taps had been stolen from others. Yet others had basins for cleaning mops in which cigarette butts had been disposed of. Some were unhygienic and smelled bad and lights not functioning.

80. While de Vries was there, the applicant, whom he had asked to accompany him took a photograph of one of the toilets. He had asked the applicant not to do so as that was the task of the inspector. The applicant took the photograph nonetheless. When time did not allow them to continue with the inspection and because the applicant had to fetch someone at the airport they stopped for that day. On a return visit to GSH on 9 December 2010 the applicant who was with de Vries again was denied entry to the hospital.

81. De Vries learned then that the applicant had been dismissed. No-one else showed him the rest of the toilets.

82. De Vries did not issue a notice of contravention in respect of these toilets as he did not find it necessary to do so. This was because the respondent had closed down the toilets.

83. He could however not see other toilets that the applicant had been particularly concerned about.

84. Therefore he could not issue a contravention order.

85. De Vries had done his job to his fullest capacity.

ANALYSIS OF THE EVIDENCE AND ARGUMENT:

86. In terms of the Labour Relations Act 66 of 1995 as amended a dismissal of an employee as a consequence of his having suffered an occupational detriment for having made a protected disclosure in terms of the PDA would be adjudicated in the Labour Court. In the matter before me the applicant alleges an unfair dismissal for insubordination thus leaving the jurisdiction to determine this matter squarely within this forum.

87. In dealing with this matter as one of an alleged unfair dismissal for insubordination I will have to touch on the PDA as the applicant raises as his main

defence that he had made a protected disclosure and therefore ought not to have been dismissed for insubordination. He therefore alleges that his dismissal for insubordination is unfair for his having made a protected disclosure.

88. The applicant contends that his disclosure is protected in terms of S9 of the PDA.

89. In terms of S9 of the PDA which deals with a general protected disclosure, such disclosure is defined as "(1) Any disclosure made in good faith by an employee- (a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
90. (b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;…".

91. According to S1 of the PDA a disclosure "means any disclosure of information regarding the conduct of an *employer* or an *employee* of that *employer*, made by any *employee* who has reason to believe that the information concerned shows or tends to show one or more of the following:
92. that a criminal offence has been committed, is being committed or is likely to be committed;
93. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
94. that a miscarriage of justice has occurred, is occurring or is likely to occur;
95. that the health or safety of an individual has been, is being or is likely to be endangered;
96. that the environment has been, is being or is likely to the damaged;
97. unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
98. that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;"

99. The evidence shows that the applicant had been charged with:
100. "Charge 1
101. Gross insubordination in that you failed to adhere to a lawful instruction issued to you in letters dated 12 June 2009 and 6 August 2009 that you stop with immediate effect all kinds of communication with regards to the allegations you made and refrain from publishing such information."

102. This charge clearly is an instruction pertaining to all the kinds of communications that the applicant has made on Facebook.

103. The applicant has raised the issue of the references by the respondent to allegations of murder and fraud by management as not being part of this matter.

104. The documentary evidence shows the applicant having published on Facebook allegations of fraud and murder by the management of GSH.

105. A reading of the charge shows that reference is made to all kinds of communication and publications of the applicant. It is therefore appropriate to dealt with these as they clearly form part of the reasons for the dismissal of the applicant.

106. It would in fact be inappropriate to deal only with that which the applicant selects as one of the reasons for his dismissal viz. the issue pertaining to the toilets at GSH.

107. Even if evidence were led at his disciplinary enquiry only on the issue surrounding the toilets there is nothing in law that precludes the respondent from adducing further evidence at the arbitration in support of its contention that he was publishing derogatory material on Facebook.

108. The applicant has made a challenge to the contention of the respondent that the information published on Facebook is derogatory, claiming it his right to inform the public as a duty.

109. I am of the view that the publications are in fact derogatory especially that accusing the management at GSH of fraud and murder. Calling someone a murderer or fraudster without him having been found guilty of such offences in a court of law is derogatory. It is insulting and degrading of such persons. Even the allegations without proper substantiation in respect of the toilets at GSH and the allegations of risk to health and safety are derogatory where such is without supporting evidence.

110. In the circumstances that the applicant made his disclosures on Facebook he had already been appraised by Antonissen of the fact that it was not the condition of the toilets at GSH that were the source of his illness. There is also no evidence before me of the applicant's having sought a second medical opinion, which I believe a reasonable person in his position would do. While I do not claim this to be a requirement for the purposes of disclosure as defined in S1 of the PDA I do believe that in terms of S9 of the PDA a failure to do so would place in serious doubt that the applicant at that time believed his disclosure to have been substantially true. He could therefore not have believed that his information regarding the condition of the toilets |"shows or tends to show…. that the health or safety of an individual has been, is being or is likely to be endangered" (S1 of the PDA). There is furthermore no evidence presented at this arbitration of any patients and employees at the hospital or other persons having suffered any adverse consequences as a result of the conditions of the toilets at GSH.

111. This suggested doubt that I believe should have prevailed with the applicant, does, in my view, also in turn cast doubt on the element of good faith that is required in terms of S9 of the PDA in order that the disclosure be a protected disclosure. As a consequence of my finding that the applicant ought to have doubted his belief after he had received the information of Antonissen he should have reassessed his belief and have come to the conclusion that at that stage it was not reasonable and therefore that he could not have made the disclosure in good faith. I therefore conclude that there is no protected disclosure made by the applicant and therefore that he has consequently not suffered an occupational detriment and therefore that I am not dealing with a matter of unfair dismissal in terms of S187(h) of the LRA.

112. At this stage I am of the view that I have journeyed into the PDA fairly extensively. As I have stated above it would be necessary for me to have done so in order to find as demanded by the applicant that his dismissal for insubordination

was unfair. It must be borne in mind that it was common cause between the parties that the applicant was dismissed for gross insubordination.

113. I therefore submit that I have confined myself to the parameters of my jurisdiction as conferred by the LRA.

114. I have clearly stated above that the publications on Facebook by the applicant are derogatory. The applicant has also disobeyed what is a clear instruction not to continue with his publications on Facebook.

115. The derogatory nature of the publications on Facebook renders the instruction to desist from so doing valid and lawful.

116. The applicant has rightfully been dismissed for bringing GSH into disrepute.

117. While one would almost naturally have empathy with the citizen who genuinely brings to the public attention matters of health and safety, I cannot say for the applicant that this was the case. The evidence introduced through the testimony of de Vries and the giving of his compliance order to GSH; the testimony of Scott as to what the respondent had done to address the issues raised by the applicant and the condonation thereof by de Vries demonstrates that GSH had not disregarded the applicant's issues should have been acknowledged by the applicant and should have caused him to desist from his publications.

118. Furthermore, Antonissen had brought to the attention of the applicant that financial considerations would also have to be taken into account, implying thereby in my view, that structural changes might not be possible on account of a shortage of money.

119. Notwithstanding this the evidence shows that here are issues regarding the vandalizing of the toilets at GSH and that the hospital does have a maintenance plan for dealing with its toilets. The plan does however seem to be not quite adequate for such purposes. To rely on complaints by users before action is taken could lead to inadequate maintenance of the toilets. The management at GSH would be well advised to implement a plan which would perhaps encourage the reporting of toilets that need attention. Management should in other words be more proactive in its dealing with these issues to ensure early intervention should a toilet need maintenance.

120. The serious nature of the allegations also renders the dismissal substantively fair and the sanction appropriate.

121. The evidence shows further that the applicant had been afforded an opportunity to state his case and to representation by his trade union. He has also been afforded an opportunity to call and cross examine witnesses.

122. The applicant has been afforded a fair procedure.

AWARD:

123. This application for relief in terms of the provisions of the LRA is dismissed.

124. I also order the respondent to pay the bargaining council its costs including the fee of the arbitrator for one day (24 May 2011) in respect of its being absent for one day without submitting a medical certificate in support of the illness of its representative. Such payment must be made by no later than 31 December 2011 after which it will attract interest at the legal rate of interest for non compliance.

COMMISSIONER: L. MARTIN

L.O. MARTIN
PANELIST