



ARBITRATION AWARD

Panellist/s: Bella Goldman
Case No.: PSHS306-11/12
Date of Award: 13-Dec-2011

In the ARBITRATION between:

PSA obo Jacobus Abrahams (Union / Applicant)

And

Department of Health - Western Cape (Respondent)

Union/Applicant's representative: Andre Strydom, Union Official
Union/Applicant's address:

Telephone: 021 4097365

Telefax: 021 409 7399

Respondent's representative: Russell Collop, Assistant Director: Labour Relations
Respondent's address:

Telephone: 021 483 4503

Telefax: 021 483 3952

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an arbitration hearing at the Western Cape College of Nursing in Athlone, Cape Town on 07 November 2011. Mr André Strydom, Union Official represented the applicant. Mr Russell Collop, Assistant Director Labour Relations represented the respondent. The proceedings were digitally recorded. It was agreed that closing argument be submitted in writing by 11 November 2011.

ISSUE TO BE DECIDED

2. I have to decide whether or not the employee's dismissal was procedurally and substantively fair in terms of the Labour Relations Act 1995 as amended (LRA).

BACKGROUND TO THE ISSUE

3. The respondent employed the applicant as a Clinical Technician at Tygerberg Hospital from 19 October 2009 until 3 May 2011 when he was dismissed for misconduct, the applicant appealed his dismissal and the appeal hearing confirmed his dismissal on 7 July 2011. At the time of his dismissal the applicant was earning R179, 000.00 per annum.
4. The applicant was on 4 April 2011 issued with notice to attend a disciplinary hearing on 3 May 2011. The charge against the applicant of which he was found guilty of were:

Charge 1: On 8 February 2011 you had had a direct instruction from the Head of Department Mr du Plessis to report for work at 07h30 but you reported for work at 13h30

Charge 2: On 8 February 2011 you left the workplace at 14h00 without permission and did not return to work

Charge 3: Uncommunicated absence from work from 9 to 11 February 2011 and 30 March to 1 April 2011 (6 days)

Alternatively: Your addiction to drugs negatively affected your attendance at work and you are not in a position to carry out your duties.

5. The applicant is challenging his dismissal on the basis that even though he was guilty as charged, the sanction was too harsh in that the respondent did not consider the applicant's addiction and did not follow the correct procedure with regard thereto. The applicant claimed that he was now rehabilitated and is seeking reinstatement.

SURVEY OF THE EVIDENCE AND ARGUMENT

6. I have considered all the evidence and argument, but because the LRA (section 138(7)) requires an award to be issued with brief reasons for the findings, I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

Documentary Evidence

7. The parties submitted bundles of documents in evidence which were agreed as being what they purported to be. The applicant's bundle was marked 'A' and was numbered 1 to 10. The respondent's bundle was marked 'B' and was numbered 1 to 34.

Employer's Evidence

The respondent called two witnesses, Johannes Carstens, Unit Manager and both of who gave evidence under oath. The following is a summary of their testimonies:

Johannes Carstens

8. The applicant reported to the witness in terms of operation, he gave some background to the work the unit in which he and the applicant are employed in. The unit is responsible for maintaining and repairing life support machinery such as ventilators and respirators and the applicant worked on those machines. The work requires immediate attention and from October 2010 the applicant was the only technician employed in the unit.

9. The witness explained that the applicant's absence had been a problem for some time and he referred to the applicant's attendance record and disciplinary processes with regard thereto which were:

- 17 and 18 December 2009 uncommunicated absence from work, verbal warning;
- 5 and 6 January 2010 uncommunicated absence from work, written warning;
- 30 June 2010 uncommunicated absence from work, final written warning;
- 23 September 2010, reported for duty and disappeared at 7h50 and only made contact with the workplace on 01 October 2010 when he stated he would be at work on 4 October 2010

- Booked himself into a drug rehabilitation centre from 4 October until 12 November 2010. Applicant granted special leave for this period.
 - Final written warning for period of uncommunicated absence from work, 23 September to 4 October 2010.
 - The witness stated that the above absence particularly affected him as he was due to go on annual leave from 23 September 2010 and had booked a holiday and the applicant was to act in his position. As a result of the applicant's absence the witness could only take leave for a short period and had to cancel his holiday arrangements.
 - 9 to 11 February 2011 uncommunicated absence from work;
 - The applicant again booked himself into a rehabilitation centre from 18 February to 11 March 2009;
 - 30 March to 1 April uncommunicated absence from work;
 - Served with notice to attend a disciplinary hearing on 4 April 2011 for inter alia uncommunicated absence from work;
 - 14 to 15 April and 20 to 22 April 2011 uncommunicated absence from work.
10. The witness stated that it was in October 2010 then that he learnt that the applicant had a drug addiction problem but prior to that as a result of applicant's absences from work the witness advised the applicant to seek help from ICAS the respondent's contracted Employee Assistance Practitioners. It later came to his attention that the applicant had sought the help of ICAS. He stated that unless the applicant gave authority for the employer to be given a report or other information from ICAS, ICAS would not release any information to the employer.
11. The witness stated that the applicant himself never told him of his drug problem and never asked for assistance. The witness stated that as a result of his continued absence from work his duties were changed to administrative ones from February 2011 onwards. The applicant was unhappy about this and the witness asked him to for certification that he was now drug free. In April he submitted a drug testing report stating that on 13 April 2011 at 13h10 he tested negatively for cocaine.
12. In cross examination the witness was asked to comment on the quality of the applicant's work. The witness stated. The witness stated that the applicant worked well with mechanical problems but found it difficult to master new machines.

Marietjie Rousseau

13. The witness was the applicant's direct supervisor. She stated that from 25 January to 8 February 2011 the applicant was not at work for a number of reasons, mostly to work on his bakkie, however he often in that

period stayed away from work and then asked for the leave which was granted. The last of those days was 7 February 2011. The applicant phoned in early in the morning of 8 February to ask for further accumulated leave to repair his bakkie. Mr Carstens stated that he was not going to grant him leave and if he wanted the leave he should contact Mr du Preez to whom Carstens reported to.

14. The witness was in du Preez' office when the applicant phoned du Preez. The witness heard du Preez tell the applicant that he was not going to grant him more leave and that he must come to work and if he had problems getting to work du Preez would send a driver to collect him. The applicant said he did not need the services of a driver and would make his own way to work. The applicant arrived at 13h30 by which time du Preez had gone to a meeting. Thereafter the applicant left the workplace at 14h00.
15. Thereafter the applicant stayed away from work for a further two days during which he made no contact with the workplace. Thereafter the applicant booked himself into a drug rehabilitation centre. The applicant came out of the centre 18 March 2011 and then phoned in sick with a back problem.
16. The applicant stayed away from work without communicating with the employer on 30 and 31 March, on 1 April he phoned the workplace at about 11h30 and said he would not be at work. Even after the applicant was served with notice to attend a disciplinary hearing on 4 April he continued to absent himself from the workplace without communicating his absence. He did this on 14, 15, 20, 21 and 22 April 2011.
17. The witness said she first learnt of the applicant's drug problem in October 2010 after which he booked himself into a drug rehabilitation centre on two occasions for period of three weeks each time.
18. The applicant was advised to seek help from ICAS which he did. As he referred himself the employer could not get information re his progress from ICAS and the applicant did not volunteer information except for booking himself into rehabilitation centres.

Employee's Evidence

The applicant Jacobus Abrahams gave evidence under oath. The following is a summary of his testimony:

Jacobus Abrahams

19. The evidence of the applicant was hard to follow however I will set it out as I understood it. On 8 February 2011 he phoned Mr Du Preez to ask for another day of leave in order to fix his bakkie. Mr du Preez said he

must come to work and that he could send his driver to pick up the applicant. The applicant said he could make his own way to work which he did. He arrived at work at 14h00. Mr du Preez was in a meeting and so he left and told the other staff members to inform Mr du Preez that he had been at work. The applicant stated that he was thus not guilty of charges 1 and 2 as he came to work as soon as he could and that he only left the workplace as Mr du Preez had wanted to see him and was not available when the applicant came to work.

20. The applicant stated that he stayed away from work on 9, 10 and 11 February as he assumed that leave had been granted to him. The reason for his absence was that he was fixing his bakkie.
21. The applicant admitted that he was off work without permission and without contacting the workplace between 30 April and 4 April as he went back to using drugs. He was asked if he had used drugs after that date, he stated that he may have but was not using drugs any more. The applicant referred to documents which indicated that he attended support group meetings and that was helping him *'keep clean'*.
22. The applicant stated that he had worked for the same employer from 1979 to 1998 and had a clean disciplinary record during that period and used to regularly receive performance bonuses.
23. The applicant submitted documentation to indicate that he saw an ICAS Social Worker on 11, 18 and 26 April 2011.
24. The parties submitted argument in support of their respective cases which I will refer to where necessary in my analysis.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

25. In a case where unfair dismissal is alleged it is for the respondent to prove on a balance of probabilities that the dismissal was procedurally and substantively fair.
26. The respondent used the misconduct route set out in Schedule 8 of the LRA. In terms of the misconduct route in order for the dismissal to be procedurally fair the employer should prior to dismissing the employee, conduct an investigation to determine if there are grounds for dismissal. In terms of this investigation the employer is required to do the following:

- Notify the applicant of the charges against him / her;
- Give the applicant reasonable time to prepare a response the charges against him / her;
- Allow the applicant to be assisted by a fellow employee or a trade union representative and
- After the investigation the respondent should communicate the decision taken and should preferably notify the applicant in writing of the reasons for the decision.

27. In order for the dismissal to be substantively fair the respondent must prove that:

- There was a rule.
- The rule was reasonable.
- The rule was known to the applicant or should have been known.
- The rule was broken by the applicant.
- Dismissal was the appropriate sanction for the breach of the rule.

28. In this case the applicant argued that his dismissal was procedurally unfair as the respondent used the misconduct route instead of the incapacity route which the applicant alleged was the correct one to use given that he had a drug problem.

29. Item 10 of Schedule 8 of the LRA provides inter alia that in the case of ill health:

The employer should investigate the extent of the incapacity..... in the process of the investigation the employee should be given an opportunity to state his casethe degree of incapacity is relevant to the fairness of the dismissal. The cause of incapacity may also be relevant in the cases of certain kinds of incapacity for example... drug abuse; counselling and rehabilitation may be appropriate steps for an employer to consider.

30. The applicant had a history of uncommunicated absence from work, only a year after it started did he inform the respondent that he had a drug problem for which he was he was offered assistance through its outsourced Employee Assistance Programme (ICAS). The applicant in October 2010 booked himself into a three week rehabilitation programme for which he was given special leave.

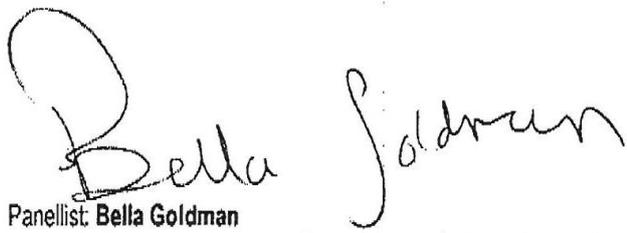
31. On the applicant's return to work he continued absenting himself from the workplace and within two months he booked himself again into a rehabilitation programme during which period he was again paid. On his return to work he was charged with misconduct for his uncommunicated absences from work which took place before he entered the second rehabilitation programme. Despite having been issued with notice

to attend a disciplinary hearing he continued rendering himself guilty of uncommunicated absence from work.

32. The applicant stated and provided evidence that he had been to visit an ICAS social worker during April 2011 **after** he had been issued with notice to attend a hearing. In terms of the evidence before me this was the first time he did this, despite having been offered the assistance of ICAAS some six months earlier.
33. The applicant when asked when he stopped using drugs did not give a clear answer. It should be noted that the applicant's reason for the first period of absence was not drug related; he was fixing his bakkie and hence even if it could be argued that the misconduct route was inappropriate for his absences due to his drug problem, the misconduct route was the correct route for this first absence and given his disciplinary history the sanction of dismissal was appropriate on this charge alone. In terms of the first two charges the applicant was clearly guilty of misconduct, for taking so long to come to work and then leaving work just because Mr du Preez was in a meeting, as it was quite obvious that he had not been granted leave for that day. The applicant held a responsible job and his reason for his absence was clearly without merit.
34. Returning to his drug problem, I find that the respondent has supported the applicant with regard thereto from the time the respondent became aware of the problem. It supported him through two periods of rehabilitation during which time he was paid and which do not appear to have been effective. Hence I do not find that the respondent could have done much more to assist the applicant. It should also be noted that the applicant has not been very forthcoming with the respondent with regard to his drug addiction. An employee cannot expect the assistance of an employer unless he/she keeps the employer in the loop with regard to his condition and treatment which the applicant in this case only did once he realised that dismissal was imminent.
35. For the reasons stated above I find that the applicant's dismissal was procedurally and substantively fair.

AWARD

36. I find that the applicant's dismissal was procedurally and substantively fair and the referral is dismissed.

A handwritten signature in black ink that reads "Bella Goldman". The signature is written in a cursive style with a large, looped initial "B".

Panelist: **Bella Goldman**

Sector: **Public Health & Social Development Sectoral Bargaining Council**

DETAILS OF HEARING AND REPRESENTATION

ISSUE TO BE DECIDED

BACKGROUND TO THE ISSUE

SURVEY OF EVIDENCE AND ARGUMENT

ANALYSIS OF EVIDENCE AND ARGUMENT

AWARD

Panellist/s: **Bella Goldman**
Sector: **Public Health & Social Development**