



PHSDSBC

ARBITRATION AWARD

Panellist: Bella Goldman
Case No.: PSHS331-11/12
Date of Award: 02 June 2012

In the ARBITRATION between:

NEHAWU obo Janine Annelize Thyssen

(Union / Applicant)

And

Department of Health - Western Cape

(Respondent)

Union/Applicant's representative: Anwar Meniers, Union Official

Union/Applicant's address:

Telephone:

Telefax: 021

Respondent's representative: Njonjo Duma, Labour Relations Officer

Respondent's address:

Telephone: 021 483 3990

Telefax: 021 483 3952

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an arbitration hearing at the CCMA offices in Cape Town on 16 April 2012. Mr Anwar Meniers, Union Official represented the applicant. Mr Njonjo Duma Labour Relations Officer represented the respondent. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

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

BACKGROUND TO THE ISSUE

3. The respondent employed the applicant from 2000 until 20 July 2011 when she was dismissed for misconduct. At the time of her dismissal she was employed as Personal Assistant to Dr Beth Engelbrecht Deputy Director at Head Office at salary level 7. She was earning R151, 000.00 per annum. Part of her duties included being responsible for petty cash in the office of the Chief Directorate Professional Support Services: Head Office.
4. On 6 May 2011 the applicant was issued with notice to attend a disciplinary hearing on 12 May 2011. The charges against the applicant were briefly:

Charge 1

Negligent in the performance of your duties as keeper of petty cash in that you could not give account or submit documentary proof of issuing amount of R2, 419.42 when the reconciliation was done on 10 March 2011. It was therefore assumed that you used the money for personal use.

Charge 2

Gross dishonesty when you misrepresented the truth on 10 March 2011 when you could not find the key to the petty cash box when asked by an official of the Directorate: Financial accounting to finalise the petty cash reconciliation.

Charge 3

Gross dishonesty when you used public funds for personal gain when you unlawfully drew the amount of R2, 384.60 on 28 May 2011 from the petty cash account of the Chief Directorate: Professional Support with the cash card allocated to the Chief Directorate that was erroneously paid into this account.

5. The applicant was found guilty on all charges and the sanction of dismissal was applied. The applicant is challenging her dismissal on the grounds that she was not guilty as charged 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 consisted of one page which was a reconciliation statement from April 2007 to August 2009 prepared by the applicant which was not agreed. The respondent's bundle was marked 'B' and was numbered 1 to 70.

Employer's Evidence

The respondent called two witnesses: Jamaine Bosman, Senior Clerk and Yusrah Kerekar, Chief Accounts Clerk both of whom gave evidence under oath. The following is a summary of their testimonies:

Jamaine Bosman

8. Part of the duties of the witness is to conduct spot check the contents of petty cash (PC) boxes and their registers and to ensure that all monies spent are accounted for and reconcile with monies that are drawn. Employees responsible for PC are issued with a bank card against which they can draw a limit of R2, 500.00 which they place in the PC box and record in the register.

9. On 10 March 2011 the witness came to the applicant's office to conduct a spot check, the applicant could not find the key of the PC box and said that it could be at home. The witness stated that employees are not permitted to take the keys of the PC box home; they are required to keep it at the workplace in a safe place. The witness reported this to his superior, Mr Jooste who instructed him to take the PC box and register and break the box open which he did. He broke the box open in the presence of two witnesses and found R21.03 in the box and nothing recorded in the register. The witness stated that nothing has to be written in the register if nothing is drawn and nothing is spent but an amount of R2.500.00 had been drawn on 12 December 2010. He established that R2414.00 was missing.
10. The applicant was not at work on 11 March 2011. On 10 March she wrote to the witness and told him that the key must be at her house and asked till Monday to return them. She stated she did not know who she gave R2313.90 to but could not recall who and admitted it was wrong not to document the payment. She asked to be given till the end of the month to return the money.
11. She wrote effectively the same letter to Mr Jooste and Ms Engelbrecht on 15 March 2011 by which time she had found the key.
12. On 4 April 2011 she again wrote to Dr Engelbrecht and Mr Jooste informing them that she found R2420.00 in an envelope at the back of her drawer and the money had been for books which Ms Valentine requested for Dr Angeletti. Ms Valentine was to come and collect it in November 2010 before the applicant was to have surgery and Ms Valentine did not and it must have slipped the applicant's mind.
13. The witness said that it could not be true that the money was missing since November 2010 as he did spot cheques every month and he conducted spot cheques every month and the money would have been reflected as missing since then.
14. It was put to the witness in cross examination that the witness only did a spot check before November 2010, the witness denied this. He stated that he was only appointed at the beginning of 2011 and had signatures to prove he did spot checks on a monthly basis. It was put to him he added signatures after the event.

Yusrah Kherekar

15. The witness stated that in March 2011 she was asked to conduct a full reconciliation of all petty cash usage up to about 2008. It appeared that R2, 384.60 was transferred into the account of Professional

Support Services. This was investigated and it was found that those monies were erroneously paid into that account and withdrawn using applicant's bank card and not accounted for.

- a. On 03 March 2009 Apollis requested R2,384.36
- b. On 20 April 2009 Apollis was paid R2, 384.36
- c. On 28 May 2009 R2,384.36 was also paid into the account which the applicant had access to
- d. She then withdrew the entire R2384.36 in two amounts R2, 200.00 plus R850.00 for which there was no record in her register. The witness reported the matter at the time but nothing happened at the time.

Employee's Evidence

The applicant Janine Annelize Thyssen gave evidence and called three witnesses Vivian Valentine, PA to Dr Laura Agliotti, Andrew Cunningham Chief Director: Professional Support Services and Farida Apollis, Finance Clerk. All gave evidence under oath. The following is a summary of their testimonies:

Janine Annelize Thyssen

16. On 10 March 2011 Jamaine Bosman came to the applicant and asked her to open the PC box and hand over the PC register which consisted of a lever arch files in which all the reconciliation statements were kept as well as all receipts / invoices of items purchased with PC monies. The applicant handed over the register and box but did not have the key. The applicant said she normally keeps the key with her house keys but it was not there on that day. The applicant said that she did not know that she could not take the key home. The applicant told Jamaine that the key was probably at home and that she would bring the key to work the next day.
17. The following day she brought the key to work, but Jamaine told her that the box had already been broken open. He told her to give the key to Mr Jooste, the Chief Director of Financial Accounting which she did.
18. The applicant was told by Ana Rita that more than R2, 000.00 was missing from the box and that there should have been R2, 313.90 in the box. The applicant said she did not know anything about it as she last gave out money some time ago. The applicant offered to repay the money. The applicant was charged with not being able to account for R2, 419.42, even though she was told that R2, 313, 90 was missing from the box.

19. She said there were a lot of people who require PC money and she phoned those she could think of, but to no avail.
20. One of applicant's colleagues, Ruth asked her if she had looked at the back of her drawers for the money, she said no. Ruth and the applicant looked at the back of the applicant drawer and found an envelope with the money in it. Ruth called Gail Oliver and they opened the envelope together. Vivienne name was on the envelope and there was R2, 420.00 in the envelope. Ruth counted the money and called Myrtle Michaels and Jamaine Bosman. Vivian Valentine confirmed that she requested this money in November 2010 in order to buy books for Dr Aglotti in November 2010 but forgot to collect the monies. The applicant stated that at the end of November 2010 she left work early to have an operation and only returned in December 2011.
21. In terms of charge number 3 the applicant admitted drawing the R2384.00 but was never aware that it was erroneously paid into her account and all her slips accounted for the money.
22. The applicant stated that her superior Dr Engelbrecht never liked her and tried to make her life a misery.

Ruth Lewis

23. At the end of March 2011 the applicant told the witness the story of the missing monies; she said she remembered placing the money in an envelope in her drawer. The witness asked her if it was behind the big drawer, the applicant said no and the witness suggested she pull out the big drawer. She and the applicant pulled it out and found it there.

Vivian Valentine

24. The witness confirmed requesting about R2, 400.00 from PC in November 2010 for books and conference registration in November 2010 for Dr Agliotti. When she asked for the money early in November 2010 the money had not been replenished yet. A week later the applicant called the witness to tell her the money was there, unfortunately when the witness went to fetch the money the applicant had already been booked off sick. The applicant was then transferred to a new position.
25. The witness stated that the applicant phoned her in about December to ask her who she must give money to and she told her to give it to Dr du Toit. The applicant when cross examining the witness did not recall phoning the witness and the witness telling her to give the money to Dr du Toit. The witness stuck to her version.

Andrew Cunningham

26. The witness retired as Chief Director: Professional Support Services in April 2010 he could not remember what the maximum amount of PC the person in charge could draw.

Farida Apollis

27. In 2009 she was in Jamaine Bosman's position but did not do reconciliations of PC.

28. 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

29. In a case where unfair dismissal is alleged it is for the respondent to prove on a balance of probabilities that the dismissal was fair.

30. If an applicant is dismissed for misconduct, Schedule 8 of the LRA requires the dismissal to be substantively and procedurally fair. 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.

31. 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.

32. The procedural fairness of the dismissal was never challenged and on the evidence before me I found there was none and hence I find that the applicant's dismissal was procedurally fair.

33. In terms of the substantive fairness I found the applicant to be guilty of all the charges for the following reasons:

- The applicant in her evidence in chief stated that the key was probably at home and that normally the key of the box was on her bunch of keys with her house keys, she **could not explain why she had removed it**. She wrote to the respondent on the same day requesting to be given until Monday, March 14 to return the key. She then stated that she gave R2313.90 to someone but can't remember who to. At that time the applicant did not know the box had been broken into and probably wanted until Monday to replace the money. **The applicant was thus in terms of the evidence before me guilty in terms of charge 1 and charge 2.**
- The applicant then wrote to the respondent on 14 March 2010 stating that she returned the key on 11 March. She again stated that she could not remember to whom she gave the money to and asked to be allowed to repay the money and to be relieved of the PC function.
- On 14 April 2011 she again wrote to the respondent stating that she found the money in an envelope behind her drawer. The envelope was addressed to Mrs Valentine and was for books. Mrs Valentine did not come and collect the monies and she went on sick leave and forgot about the monies.
- Mrs Valentine testified that that the applicant called her at home and asked her to whom she must give the money to. Ms Valentine said she must give the money to Dr du Toit as she had changed jobs. The applicant had no recollection of making such a call. This begs the question as to why she did not give Dr du Toit the money then, Ms Valentine had no motive to lie.
- When it came to the charge 3, the applicant's evidence was vague and impossible to follow. The respondent evidence indicates that shortly after the applicant withdrew the sum of on 29 May and 01 June 2009 she spent monies for which she not account for. **The applicant was thus in terms of the evidence before me guilty in terms of charge 3.**

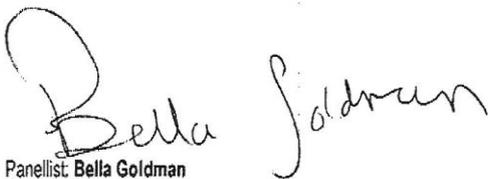
34. I thus find that the applicant was guilty of breaking rules of which she was aware or should have been aware of: where key should be, that money should be kept safely, that proper records should be kept in

order to protect the integrity of person responsible of PC. In the absence of adhering to the rules the presumption would be that person responsible made personal use of monies which applicant was not able to discharge.

35. Thus I find that the charges amounted to dishonesty and gross negligence and a sanction of dismissal is appropriate and fair even for a first offence (this is especially so when a person is entrusted to be responsible for monies) as these offences go to the heart of irretrievably damaging the relationship of trust upon which the employment relationship is based

AWARD

36. For the reasons stated above I find that the dismissal of the applicant was both procedurally and substantively fair and her referral is dismissed.

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

Panelist: **Bella Goldman**
Sector: **Public Health & Social Development Sectoral Bargaining Council**