



ARBITRATION AWARD

Panellist/s: **John M. Siavhe** _____
Case No.: **PSHS 335-11/12** _____
Date of Award: **31 October 2012** _____

In the ARBITRATION between:

NEHAWU obo TLHOMOLA, ALFRED _____
(Union / Applicant)

and

DEPARTMENT OF HEALTH - (GAUTENG) _____
(Respondent)

Union/Applicant's representative: David Melk (NEHAWU Official) _____
Union/Applicant's address: _____

Telephone: _____
Telefax: _____

Respondent's representative: Mr. Modisane Lelaka _____
Respondent's address: _____

Telephone: _____
Telefax: _____

DETAILS OF HEARING AND REPRESENTATION

[1] The arbitration hearing was held at Chris Hani Baragwanath Hospital on more than one occasion, starting from the 12th of March 2012 and was only finalized on the 10th of October 2012 and parties agreed to forward their arguments to the Bargaining Council and copy me with the same documents on the 19th of October 2012; that did not happen as agreed upon. Mr. Modisane Lelaka appeared for the Respondent whereas David Melk, NEHAWU official represented the Applicant. The Respondent entered a bundle of documents to the proceedings that were accepted without any objection and I recorded them as the only Bundle of documents. The proceedings were recorded digitally. My hand written notes are kept in the file.

PRELIMINARY ISSUE

[2] There was no preliminary issue to be decided.

ISSUE TO BE DECIDED

[3] Existence of dismissal is not in dispute, I am therefore called upon to decide whether or not the Applicant's dismissal was procedurally and substantively fair, should I find that the dismissal was unfair I must determine and grant appropriate remedy in terms of section 193 of the Labour Relations Act 66 of 1995, as amended (hereinafter referred to as "the Act").

BACKGROUND TO THE ISSUE

[4] The Applicant is an employee of the Respondent. He was stationed at Chris Hani Baragwanath Hospital. He worked at the mortuary. The Applicant was summarily dismissed for allowing without permission of management media people access into the mortuary, who took pictures that appeared in Mail & Guardian Newspaper; by so doing the Applicant was charged with gross misconduct and putting the Department of Health, Gauteng into disrepute; and violating the rights of the deceased and transgressing the Public Service Code of Conduct.

[5] The Applicant challenged his dismissal on both procedural and substantive grounds; procedurally his case is that his dismissal was not preceded by an enquiry and he did not commit the offence of allowing journalists take pictures without permission, he did not know if the people that he found at the waiting area and approached him was a journalist; there were no rules that regulated access to the mortuary, and the taking of photos, that he knew and could not be reasonably be expected to have known what to do if approached by such people except the police, the next of kin of the deceased and those that come to check their lost ones. Lastly, the Applicant's case is that dismissal as a sanction for the alleged misconduct is too harsh and he prayed for retrospective reinstatement.

[6] The Respondent's case on the other hand is that the Applicant's dismissal was for fair reasons and in accordance with fair procedure.

This arbitration award is with brief reasons as contemplated in section 138 (7) (a) of the Act. I therefore do not intend to record "verbatim" the evidence led and the submissions and arguments placed on record, it is only the salient points raised by each party that have a bearing on the issues in dispute to be decided that are recorded hereunder.

SURVEY OF EVIDENCE AND ARGUMENT

The Respondent's case

The Respondent called two witnesses, Johanna More (Johanna) and Frans Sibisi (Frans) that testified under oath and a brief account of the testimonies is as follows:

[7] **Johanna Mores'** testimony is that as the CEO of Chris Hani Baragwanath Hospital she is responsible for running the institution. She conducted her investigations when she was informed about the incident of journalists that came and took pictures of corpses in the mortuary and she saw the pictures in the Mail & Guardian. According to her findings the person that allowed journalist take pictures was the Applicant. She, could not confirm if the Applicant knew that they were the media people; but all she knows is that the Applicant knew that he could not allow people in the mortuary unless they were family members or undertakers, and the undertakers would not come alone.

[8] The Applicant knew that strangers that came to the mortuary should have been reported to management. All the Applicant did violated human rights and the rights of the families of the deceased in the constitution, and that there was a possibility of the Respondent being sued as a result of one of the name tags visible. She expects the Applicant to know the standards for the mortuary because he has been long with the Respondent that is he as far back as 2009, he was at the mortuary.

[9] She dismissed the Applicant after watching the CCTV footage; he was informed of the seriousness of the transgression and was summarily dismissed. She did not consider the personal circumstances of the Applicant when deciding on dismissal sanction.

[10] Under cross-examination she maintained that the Applicant knew the procedures to be followed at the mortuary but she conceded that he could not have known if the people he was dealing with were journalists, he should have still reported the visit to management. She conceded to have violated the Applicant's right to be heard prior his dismissal.

[11] **Frans Sibisis'** testimony is that he was the supervisor to the Applicant at the time of his dismissal. He found the Applicant working at the mortuary when he came over. The right procedure for accessing the mortuary by strangers is that they have to start at the enquiry office and the officer will send them to him who in turn would send them to the office of the PRO (Public Relations Officer) before they could do any thing. The Applicant was aware of the procedures as were discussed at their briefings or meetings. He would not allow strangers inside the mortuary.

[12] Under cross-examination his testimony is that from the number of years he worked with the Applicant, it is his conclusion that he was aware of the procedures at the mortuary because he briefed them at their meetings. He however conceded that there would be some people that would not start from the office but would instead walk straight to the mortuary, the auxiliary worker will then take them to him, and he expected the same of the Applicant.

The Applicant's case

Alfred Tihomola, the only witness of the Applicant party testified under oath, a summary of his account is as follows:

[13] He has been the employee of the Respondent since January 1991 until his dismissal on the 14th of July 2011. He started working at the mortuary in 1992. His monthly remuneration at the time of the dismissal was R6016.75. His dismissal was not preceded by an enquiry, all he recalls was that he was asked about the pictures in the newspaper and he indicated that he knew nothing about them. He did not know that the person that introduced himself to be from the office was a journalist; he however would not have problems with him take photos because he told him he was from the office. He found him in the office where the next of kin wait to identify their deceased, he could not suspect any thing wrong.

[14] He did not know of a rule or standard that prohibits people from taking photos or that he could grant permission to take photos with concert of higher authority. He was never given a set of rules for the mortuary, neither was they discussed at the meetings, all what would happen was that if there was a problem encountered it would be discussed at the meeting so that when it happens again they know what to do. He did not even know anything about the Public Service Code of Conduct because he was never inducted. He did not know any of the rights of the deceased he is alleged to have violated, he does not know them, and he did not know that those pictures were in the newspaper.

[15] Under cross-examination his testimony is that he learnt about the operations at the mortuary from colleagues he found doing the job. According to him there was no need for permission to visit the mortuary, if there was a reason, like with the people that are tracing their lost ones, people that come to repair the refrigerators and police. He denied having any knowledge that people must first report to the supervisor for permission in the mortuary, all he knows is that if people come they will explain their request and be assisted and if they say they are from the office they would assist them without further questions.

[16] He did not suspect any wrong from the person that was later identified to be a journalist. Ellof came when he was showing them around and were taking photos and he took them to his office. He was surprised when he was showed pictures in the newspaper. He was dismissed on the 14th of July 2011 by the CEO; the only explanation he got was that he allowed some one take pictures.

CLOSING ARGUMENTS

[17] The submitted arguments are in the file, they have been considered in my determination.

ANALYSIS OF EVIDENCE AND ARGUMENT

[18] Existence of dismissal in this matter is not in dispute; it is common cause that it was not preceded by an enquiry. Principles of fairness are in the Act, schedule 8, code of good practice: dismissal. I am enjoined by sections 138 (6) and 188 (2) of the Act to take into account any code of good practice relevant to the dispute when I am to determine the fairness thereof. Onus to prove on the balance of probability rests with the Respondent.

[19] The Respondent called two witnesses, Johanna More and Frans Sibisi to discharge its onus. None of the two witnesses testified if the Applicant's dismissal was preceded by an enquiry, but it was Johanna's testimony, in attempt to address the omission, that the severity of the transgression in particular, allowing a journalist take photos without management's permission and its consequences made her to summarily dismiss the Applicant without giving him a hearing. She however under cross-examination conceded to have violated the Applicant's right to be heard. I find the reason advanced by the Respondent for non compliance with the procedural requirement for the dismissal to be unacceptable, he should have been afforded chance to state his case; there is no prejudice the Respondent would have suffered. It is therefore my conclusion that the Applicant's dismissal is procedurally unfair.

[20] The Applicant has been dismissed for allowing media take pictures in the Hospital mortuary without permission. Johanna, in her evidence in chief could not tell if the Applicant knew that the people he attended to were from the media, the Respondent, through both its witnesses and during cross-examination could not argue the contrary to the Applicant's case that the manner in which the gentleman introduced himself to him made him conclude that he was from the office; and also that if a person told him that he was from the office there would not be any suspicion that he would not be telling the truth or he must produce something. Item 3 (1) of the code of good practice: dismissal, requires that '**All employers should adopt disciplinary rules that establish the standard of conduct required of their employees.This requires that the standards of the conduct are clear and made available to employees in a manner that is easily understood.**' The

Respondent could not prove that it has the rules or standards in relation to taking photos, that permission should be sought first with management or dealing with people other than those who normally came. Frans' testimony was just that he briefed his subordinate during meetings, this I find to be insufficient and lacking. In the circumstances I find that this far the Respondent failed to discharge its onus. How does it claim to have done so if it concedes that it does not have facts that the Applicant identified the journalist and further failed to prove that it has rules or standards to regulate the conduct? This kind of the conduct would not, in my view fall under the category of rules or standards that are well established and known that it is not necessary to communicate.

[21] According to evidence in the bundle, Eloff's statement, when he was telephonically informed about the taking of photos by the media with the Applicant, he went down and came back to the his office with the media people. If Eloff knew that the people taking photos were from the media, and it was wrong for them to do so without permission I would expect him to have confiscated the camera or called the security to do that so that 'the Department and the institution should not be put into disrepute'; that could only have happened if there were rules and he (Eloff) knew them. Through Eloff, the Respondent became aware of the media activity but failed to stop it that in my view mitigates the gross nature of the charge in favour of the Applicant.

[22] The Respondent's failure to lead its witnesses show me which human rights of the 'deceased and their families' the Applicant violated makes me conclude that there was nothing of the sort. It was insufficient for Johanna to just say they are in the constitution, which constitution? On the basis of my conclusions above, that the Respondent could not discharge its onus to prove the principal charge of allowing media to take photos without permission, it then follows that the secondary charge of contravening the Constitution of the Country and Public Service Code of Conduct fall off, they do not stick.

[23] In the light of the above, and after applying my mind to all facts and circumstances of this case including all evidence, oral and documentary, I find it competent that a reasonable commissioner will find that on the balance of probabilities the Respondent failed to discharge its onus to prove that the Applicant's dismissal was for a fair reason and was effected in accordance with fair procedures. According to the provisions of section 193 of the Act reinstatement is the appropriate remedy for a dismissal that is found to be substantively unfair or both substantively and procedurally unfair; and this is exactly the Applicant prayed for. I therefore find it appropriate to order as follows:

AWARD

[24] The Respondent, Department of Health Gauteng Province, must reinstate the Applicant, Alfred Tihomola, into his position that he occupied before the dismissal on the 14th of July 2011. The reinstatement is without a change to any terms and conditions and without any loss of benefit if there were any.

[25] This reinstatement is with back pay in the amount of R102, 280.75 (one hundred and two thousand, two hundred and eighty rand and seventy five cents) less applicable tax, calculated at the rate of the Applicant's monthly remuneration of R6016.75 at the time of his dismissal. This back pay is payable not later than Monday the 31st of December 2012 into the Applicant's account. [if the account has changed the Applicant must accordingly advise the Respondent on receipt of this award.]

[26] The Applicant must report for duty on the 2nd of January 2013, at the premises of the Respondent at the normal reporting time.

[27] In the circumstances I make no order as to costs.

Thus done and signed at Chris Hani Baragwaneth Hospital.

Panellist/s: **John M Siavhe**
Sector: **Public Health & Welfare**