



ARBITRATION AWARD

Panellist/s: Bella Goldman
Case No.: PSHS36-11/12
Date of Award: 8-Dec-2011

In the ARBITRATION between:

PSA obo Aubrey Abrahams (Union / Applicant)

And

Department of Social Development - Western Cape (Respondent)

Union/Applicant's representative: Angelo Fisher, Union Official
Union/Applicant's address:

Telephone: 021 409 7365

Telefax: 021 409 7399

Respondent's representative: Andile Malgas, Labour Relations Officer
Respondent's address:

Telephone: 021 483 2092

Telefax: 021 483 9840

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an arbitration hearing at the offices of the respondent in Cape Town on 14 November 2011. Mr Angelo Fisher, Union Official represented the applicant. Mr Andile Malgas represented the respondent. The proceedings were digitally recorded. It was agreed that closing argument would be submitted by 25 November 2011.

ISSUE TO BE DECIDED

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

BACKGROUND TO THE ISSUE

3. The applicant was employed from 28 May 2010 to 31 December 2010 as a Child Care Worker at a salary of R5, 945.25 per month plus 37% in lieu of benefits which amounts to R8, 145.00. The applicant stated that he was employed on a four month fixed term contract and as the four month expired on 30 September 2010 and the respondent continued employing him, the applicant's contract became of a permanent nature. When his services were terminated by way of a letter dated 30 November 2010 in which he was informed that his contract would come to an end on 31 December 2010 he was dismissed and the dismissal was procedurally and substantively unfair. It was common cause that the applicant was paid for the first time in November 2010.

SURVEY OF THE EVIDENCE AND ARGUMENT

4. 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

5. 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 the respondent's bundle was marked 'B'.

Employee's Evidence

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

Aubrey Abrahams

6. The applicant stated that prior to being employed by the respondent he was until 28 February 2010 employed in the Department of Community and Safety. Whilst he was in that position, knowing that his contract was coming to an end he asked the Health MEC, Dr Meyer if there were any positions available in his Department. Dr Meyer told the applicant to contact Mr Dave McNamara, Chief Director Planning and Social Development.
7. Sometime in May 2011 McNamara contacted the applicant and asked him to come and see him in his office which the applicant did. McNamara gave the applicant an internal advertisement for a Child Care Worker at Bonnytoun Place of Safety in Wynberg.
8. The applicant was interviewed for the position by Ridwaan Paulse to who he eventually reported to and Mr Fritz Gezwind, Deputy Director. A week later he was informed that he was successful. The applicant stated that he was given a letter of appointment which he signed but was never given a copy thereof. In terms of the letter of appointment he was appointed on a four month fixed term contract which ran from 01 June to 31 August 2010.
9. The applicant referred to a letter dated 01 June 2010 from Gezwind to Human Resources recommending the applicant's employment on a four month contract which was approved by McNamara on 29 June 2010.
10. The applicant stated that the respondent's pay day is 23 of the month and he was not paid on 23 June, so the following day he went to see McNamara who contacted Jason Combrink of Human Resources who stated that he will sort the matter out for the applicant. McNamara told the applicant that he would be paid but must be patient.
11. The applicant was not paid until November 2010 but in the mean time he kept going to see McNamara who eventually referred him to Riaan Laubscher who at the time was Deputy Director Human Resources Management. Laubscher said he would assist him, apparently the applicant had a persal number but it could not be used. The applicant went to see McNamara and / or Laubscher on a weekly basis. McNamara told the applicant that after the four month period expired he would be able to tell him about the permanent post, this confused the applicant.

12. At the end of the four month period the applicant still had not received any remuneration but Gezwind told him to carry on working and that his remuneration problem would be resolved.
13. The applicant stated that he had to pay his sons college fees and that he required a letter from his employer to confirm that he would shortly receive his salary and would be able to pay the fees. The letter asked McNamara for such a letter which he wrote on 22 October referred. In that letter McNamara stated that the applicant was employed by the Department of Social Development and that there had been problems processing his salary but that he would be paid by 15 November 2010. The applicant received five months salary on 20 November 2010, the monies were paid into his bank account but he did not receive a pay slip.
14. On 30 November 2010 the applicant received a letter from the Department informing him that his contract would end on 31 December 2010. The applicant went to see McNamara who said that there was nothing he could do about the situation as the Head of Department had decided to terminate his contract. The applicant was paid his December salary. The applicant stated that he never received overtime pay, danger pay or the 7.5% increase which all public service employees received as from 1 July 2010.

Employer's Evidence

The respondent called one witness, Riaan Laubscher presently Acting Director: Operations Management Support but at the time of the applicant's employment was Deputy Director: Human Resources Management, Employee Relations. He gave evidence under oath. The following is a summary of his testimony:

Riaan Laubscher

15. The respondent's case is that the applicant's employment was not valid and was ultra vires for the following reasons:
 - No proper recruitment and selection process was followed. The process must be done in consultation with the Human Resources Management (HRM) and this was not done.
 - No person can assume duty until HRM has issued an appointment letter and none was issued to the applicant and his submission that he was issued with one is denied;
 - The advertisement required a person with a Grade 12 certificate which the applicant does not possess;
 - The applicant was the only person to be interviewed for the post;
 - Mr McNamara did not have the authority to appoint the applicant.

16. When Human Resources investigated the matter and realised that the appointment was ultra vires a decision was made not to prejudice the applicant and to remunerate the applicant for services rendered and to terminate his employment with effect 31 December 2010.
17. The parties submitted arguments in support of their respective cases which were in essence the following:
The respondent argued that for the reasons set out in Riaan Laubscher's testimony the applicant's appointment was ultra vires and hence his appointment was void and the decision to terminate his services did not amount to a dismissal.
18. The applicant argued that the applicant was employed on a four month fixed term contract and that given that he was allowed to carry out rendering services after that period he became a permanent employee. Further the applicant's dismissal is unfair in that it does not fall within the three grounds provided for in the LRA in terms of which a dismissal can be fair. These are: misconduct, incapacity or operational requirements.
19. The respondent was aware of the applicant's employment at the very latest as from the end of June 2011 when he started to query the fact that he was not paid and yet it did not rectify the situation until November 2010 and did not inform the applicant up to the date of his dismissal of any problem with the alleged validity of his appointment. Further the respondent breached the Basic Conditions of Employment 1997 as amended by not providing the applicant with pay advices.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

20. The respondent initially attempted to argue that the applicant was not an employee but then admitted that he was but its case was that he was not dismissed as his appointment was ultra vires for the reasons stated in Mr Laubscher's testimony. I do not accept this argument; the applicant was told that he was appointed on a four month fixed term contract by a very senior official, Mr McNamara who holds the position of Chief Director who in October 2010 confirmed to the College of Cape Town that the applicant was an employee.
21. Further the respondent's Human Resources Department was aware of the applicant's employment on or before August 2011 (emails of Jason Combrink of Human Resources). From that time until the applicant's

employment was terminated he was never informed that his appointment was ultra vires or that there was a problem with his appointment.

22. When his services were terminated he was still not informed that there had been a problem with his appointment he was simply informed that his contract had terminated which was not true. His contract terminated on 30 September 2010.
23. The fact that the respondent breached its own policies and procedures in appointing the applicant does not render the appointment void which the respondent would have me believe; if an official did not abide by the policies and procedures the respondent is at liberty to take action against the relevant official.
24. For the reasons stated above I am satisfied that the applicant's appointment was not *void abinitio* and that the termination of his employment was not as a result of the termination of a fixed term contract and I hence find that he was dismissed.
25. If an applicant is dismissed Schedule 8 of the LRA requires the dismissal to be fair. In terms of the LRA the only reasons for a fair dismissal are for misconduct capacity or operational requirements subject to the correct procedures being followed. The applicant's dismissal was not for any of those reasons and hence was both substantively and procedurally unfair.
26. In terms of relief the applicant has asked to be reinstated, I do not feel that this is a viable remedy as it is common cause that the applicant does not possess the minimum qualifications required for the post, this leads me to the issue of compensation. A commissioner has discretion as to the amount of compensation to be awarded, such discretion must however be exercised responsibly and must take into account a number of factors.

Some of the criteria to be considered include:

- The degree of the employer's non compliance with the procedural requirements of LRA;
- Whether the dismissal was procedurally or substantively unfair or both;
- Any unreasonable delay by the employee in initiating the dispute;
- Whether the employee has found alternative employment or the employee's prospects of finding alternative employment;
- The extent of any loss suffered by the employer as a result of the any of the employee's actions;
- The extent of any benefits already given to the employee upon his /her dismissal;

- Whether the employer has already provided the employee with some kind of redress or has made any reasonable attempt to do so;
- The employee's length of service.

27. In coming to an amount of compensation to order the respondent to pay the applicant I have taken the above factors into account plus the following: The applicant had been employed in the public service previously and must have been aware as to how it functioned. On the advice of the MEC he obtained the position through Mr McNamara a Chief Director with whom he continually liaised with, with regard inter alia to his unpaid salary and I find on a balance of probabilities that he was aware that his appointment was '*not strictly kosher*'. Had this not been the case he would have made a far greater fuss of not being paid for five months. The applicant never reduced the fact that he was not paid to writing and even though he was represented by a union in these proceedings he never contacted the union to assist him with that problem which for any employee would be extremely serious. The applicant appears to have believed that he had '*friends in high places*' and that these relationships '*would see him right*'.

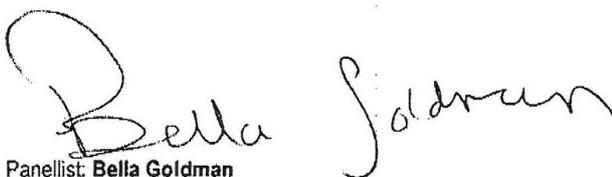
28. Thus taking all the above into account I find that it would be fair and equitable to order the respondent to pay the applicant the remuneration he would have received over a one month period which amounts to R8, 145.00.

29. The applicant's salary for the purposes of compensation is the amount he was paid at the date of dismissal, I thus do not have the jurisdiction to increase his salary by 7.5% as requested by the applicant and no details of overtime or danger pay were provided.

AWARD

30. I find that the applicant was dismissed and that his dismissal was procedurally and substantively unfair.

31. The respondent the Department of Social Development, Western Cape is ordered to pay the applicant, Aubrey Abrahams compensation in the amount of R8, 145.00 less statutory deductions. This amount is to be paid by no later than 31 December 2011 after which interest will run at the prescribed rate.



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