



ARBITRATION AWARD

Commissioner: **Khehla Khanyile**

Case No: **PSHS371-20/21**

Date of award: **17 December 2020**

In the matter between:

NUPSAW obo BUSISIWE ZULU

Applicant

and

DEPARTMENT OF HEALTH – KWAZULU NATAL

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was scheduled for 09 November 2020 and 07,08 December 2020 at Nkonjeni Hospital in Ulundi and King Cetshwayo Health District in Empangeni. The applicant appeared in person and was represented by the Union Official, Mr. Mlondi Memela from NUPSAW. The respondent was represented by the Assistant Director Labour Relations, Mr. Mzovukile Lembethe. The proceedings were digitally recorded and I also took down notes.

ISSUE TO BE DECIDED

2. I am required to decide whether the dismissal of the applicant was fair or not.

BACKGROUND TO THE DISPUTE

3. The applicant was employed by the respondent as a Human Resources Manager on 01 March 2014. She was earning R32, 000.00 monthly at time of dismissal on 07 September 2020.

4. The applicant was found guilty on six counts as follows:

4.1 Count 1

During the month of October 2018, you unlawfully and intentionally deducted the amount of R18,660.16 of Mr. Mncube without completing Z1 form or leave form bearing his signature. Your action is tantamount to fraud.

4.2 Count 3

On the 5th of October 2017 at Nkonjeni Hospital as a Responsible Manager you have wrongfully made payment of pay progression to Miss B.S Buthelezi who passed away while on the assessment tool is mark unsatisfactory that resulted to overpayment for the amount of R2,522.79. (Gross negligence)

4.3 Count 4

During the month of September and October 2018 as a responsible manager you neglected your duties in that, you failed to terminate Ms. MP Nxumalo that resulted to the Department to incur salary overpayment amounted to R30,375.94. (Gross negligence)

Count 5

4.5 On the 31th of October 2018 as a Responsible Manager you failed to implement the resignation or terminate Mrs.BG Mbatha that resulted in Ms. Mbatha sustaining an injury on her way to work while the resignation was already approved by the CEO. (Gross negligence)

Count 21

4.6 As a Responsible Manager you entered the names of EXCO members, Mr. Gumede JR, Ms. Ngcobo GN, Zulu BN, Ms. Shezi TT, and Ms. DT Khumalo for

payment of pay progression for 2018/2019 while the CEO marked them as having unsatisfactory performance and you misled the CEO. You neglected your duties intentionally and deliberately.

Count 23

4.7 On the 21st of November 2017 at Nkonjeni Hospital: HR, Ms M.P Nxumalo: Enrolled Nurse applied for unpaid for an unpaid leave for study purposes with effect from 11 October 2017 to 23 November 2017 (32 days). As an HR Manager, you failed to implement unpaid leave in that you contravened leave policy of the Department

5. It is the applicant's case that her dismissal was unfair as the respondent had no plausible reason. It is the respondent's case that the dismissal of the applicant was substantively fair.

SURVEY OF EVIDENCE AND ARGUMENTS

6. The parties herein relied on the oral testimonies of witnesses as well as documentary evidence. The Respondent led evidence in respect of count 1, 5, 21, 23 respectively.

Respondent's case

Witness 1

7. Ms. Zodwa Sibiyi (Operations Manager) stated that the Enrolled Nurse, Ms. Mbali Nxumalo took an unauthorised study leave from 11 October 2017 to 23 November 2017. She submitted that the aforesaid Ms. Nxumalo only applied for an unpaid leave on 21 November 2017 which was approved on 08 December 2017. She testified that she then gave the application to HR Department to be captured on the system. Under cross examination she stated that Nxumalo did not follow a leave policy and also the application for leave was submitted late with no motivation letter.

Witness 2

8. Mrs. Franscica Dube (HR Officer) stated that she knows the applicant as her ex-HR Manager. She submitted that Ms. Nxumalo failed to follow the study leave procedure in that she first took unauthorized leave on the aforesaid dates 21 October 2017 to 23

November 2017. She testified that she was required to apply for leave beforehand and the supervisor to motivate it to the Head of Department.

9. Under cross examination she stated that no motivation letter was attached to the application for unpaid leave and therefore, she did not capture it on the system. She conceded that alphabet M file was allocated to her and she did not to implement the unpaid leave for her.

Witness 3

10. Mr. Musawenkosi Mncube (Labour Relations Officer) stated that he was absent from work on 17 August 2018 until 02 September 2018. He submitted that he sent a text message to the applicant informing her that he had a vehicle breakdown in Newcastle, but the message deleted. He testified that upon his return, he fell sick and went to the doctor, but he did not submit a medical certificate to the applicant. He stated that the applicant deducted from his salary an amount of R18, 000.00 being the days that he was absent from work.

11. Under cross examination he conceded that he had no evidence prove that he reported his absence to the applicant. He further conceded that he did not submit the medical certificates to the applicant. He submitted that an HR Officer, Mrs. Sithole was the one who deducted the amount of R18, 660.16 from his salary, but not the applicant.

Witness 4

12. Mrs. Buyisiwe Mbatha (Retired Security Guard) stated that she first resigned in July 2018 and her last day at work was supposed to be the end of October 2018. She submitted that an HR Officer, Mrs. Sithole called her to report to the office and upon arrival, she informed her that she was not going to leave work on 30 October 2018 as the respondent owed her the pay progression. She testified that she continued working while she was waiting to be paid until she got injured and sustained injuries.

13. Under cross examination she stated that Mrs. Sithole informed her that she could not leave work until the respondent paid her the pay progression.

Witness 5

14. Ms. Makhosazane Mkhize (CEO) stated that she supervised Mr. Junior Gumede, Ms. Gloria Ngcobo (Finance Manager), Ms. Busisiwe Zulu (HR Manager), Ms. TT Shezi (Deputy Nursing Manager). She testified that an HR Officer, Ms. Thabiso Mbatha submitted a spreadsheet to her with the aforesaid officials for approval for pay progression, and realized they were not supposed to have been entered because they were rated unsatisfactory in 2017/2018. She stated that she questioned the applicant and responded to her that she did not notice that their names on the spreadsheet. She submitted that she was not satisfied with her explanation satisfactory and sent it back to HR for corrections.
15. Under cross examination she conceded that she was not aware who prepared the spreadsheet. Thereafter, she submitted that the applicant rectified the error, and it did not destroy the employment relationship.

Applicant's case

Witness 1

16. Ms. Busisiwe Zulu stated that Mr. Mncube absented himself without authority for fourteen (14) days from 16 August 2018 to 04 September 2018, but he submitted a sick note for three (3) days for 27 - 29 August 2018. She testified that she telephoned him at around 5 am, on 20 August 2018 to remind him about the arbitration which he was required to attend to on that day, but he informed her that he had a car breakdown in Newcastle. She testified that Mr. Mncube sent her a texted message requesting two (2) days annual leave for 03, 4 September 2018, but she did not approve it. She stated that he reported for duty on 06 September 2018 and insulted her in the office. She further stated that Mr. Mncube did not report his absence to her nor submitted the medical certificates to HR Department except the 27-29 August 2019. She testified that a leave without pay was implemented. She further testified that she had a bad relationship with the CEO.
17. She testified that Ms. Nxumalo contravened leave policy of the respondent in that she failed to apply for unpaid leave three months beforehand, but she took unauthorized study leave from 11 October 2017 to 23 November 2017. She submitted that an HR

Officer Mrs Dube was responsible to implement her unpaid leave which was approved on 08 December 2020.

18. She testified that Mrs. Mbatha resigned from work in October 2018. She submitted that Mrs. Sithole (HR Officer) who was allocated to the file and responsible to implement the resignation informed her that she was no longer leaving on 30 October 2018 as it had been discovered there was outstanding pay progression for her which had to be corrected before she could exit the service. She stated that she did not fail to implement the resignation as Mrs. Sithole was the one responsible to implement the aforesaid resignation, but she was never subjected to a disciplinary enquiry.
19. She stated that Ms. Thabiso Mbatha prepared the spread sheet. She testified that Ms Mbatha mistakenly entered the names of the officials who were rated unsatisfactory. She submitted that she did not notice the aforesaid names as Ms. Mbatha brought during the knock off time and appended her signature. She testified that she had no intention to mislead the CEO who picked up the error and was rectified later.

Witness 2

20. Mrs. Shezi Temperance Shezi stated that she qualified for pay progression but the CEO rated her unsatisfactory. She submitted that she had a bad relationship with the CEO.

ANALYSIS OF EVIDENCE AND ARGUMENTS

21. The applicant referred an unfair dismissal dispute to the council in terms of section 191(5) of the LRA. I am required to determine whether the dismissal of the applicant was fair or not.
22. In terms of section 185 every employee has a right not to be unfairly dismissed. In terms of section 192(2) the Respondent bears the onus to prove the dismissal of the Applicant was fair. In terms of 188(1) (a) states that the respondent must prove that the reason for dismissal was fair and that the dismissal was effected with a fair procedure. In terms of item 7 of the code of good practice states that any person who is determining whether a dismissal for misconduct is unfair should consider-

- Whether or not the employee contravened a rule or standard regulating conduct in, or relevance to, the workplace; and
- If a rule or standard was contravened, whether or not –
- The rule was a valid or reasonable rule or standard;
- The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- The rule or standard has been consistently applied by the employer, and
- The dismissal was an appropriate sanction for the contravention of the rule.

23. Before I proceed with the analysis of evidence, I would like to bring to the attention of the parties that I had regard to all the evidence before me and the closing arguments.

24. It appeared as common cause that two HR Officers, Mrs. Sithole implemented leave without pay on Mr. Mncube. It further appeared as common cause that Mrs. Dube implemented unpaid leave on Ms. Nxumalo.

25. The respondent argued that the dismissal of the applicant was fair. I reject the respondent's argument to be less probable than that of the applicant. The evidence led by five (5) witnesses of the respondent was not consistent and credible. Mr. Mcube contradicted himself in that he did not submit medical certificates and changed his version that he submitted them to the applicant. He submitted that he reported his absence to the applicant by SMS, but failed to provide proof. He absented himself without permission, and Mrs. Sithole implemented leave without pay, but she was not charged. In my view, Mr. Mcube's conduct compromised service delivery. The argument that the applicant implemented leave without pay of Mr. Mcube stands to fail.

26. The evidence led by two witnesses of the respondent, Mrs. Franscica Dube and Mrs. Zodwa Sibiyi stated that Ms. Nxumalo took an unauthorized study leave from 21 October 2017 to 23 November 2017. In my view, Ms. Sibiyi ought to have not approved her unpaid leave as she submitted it late on 21 November 2017 and compromised service delivery. In this instance, the HR Officer, Mrs. Dube conceded that she was responsible to implement Ms. Nxumalo unpaid leave and she did not implement it as

there was no attached motivation letter from the supervisor. She submitted that the file was allocated to her and responsible to capture unpaid leave. The argument that the applicant failed to implement Ms. Nxumalo unpaid stands to fail.

27. The evidence led by Mrs. Buyisiwe Mbatha was clear that the HR Officer, Mrs. Sithole informed her that she was no longer leaving as it had been discovered that there was outstanding pay progression for which had to be corrected before she could exit the service. The evidence led by Mrs. Mbatha was clear that the decision to not implement her resignation was taken by Mrs. Sithole after discussing with her. The argument that the applicant failed to implement the aforesaid resignation stands to fail.

28. The evidence led by Mrs. Mkhize stated that she realized that the aforesaid officials including the applicant were not supposed to have been entered as they were rated unsatisfactory. She submitted that she questioned the applicant about the fact that officials were wrongly entered on the spreadsheet which she had appended her signature, and the applicant responded that she did not notice an error, and rectified it. The fact that she accepted her plausible explanation that it was a human error which she corrected later. In my view, this issue was resolved. She also submitted that the trust relation was good with the applicant. I am also mindful that the spreadsheet was prepared by Ms. Thabiso Mbatha. The argument that the applicant neglected her duties intentionally and deliberately stands to fail.

29. The respondent failed to lead evidence and prove that the applicant was guilty on count 3 and 4 respectively. I find the applicant not guilty of the aforesaid charges.

30. I accept the applicant's argument that the respondent dismissed her for no plausible reason. The evidence of the applicant was consistent and credible. It is evident that Mr. Mncube failed to submit medical certificates or proof that he reported to the applicant. I consider that he was not entitled to be paid for days that were unauthorized absence as he compromised the service delivery. Under cross examination he conceded that his salary was deducted by the HR Officer, Mrs. Sithole, but not the applicant as charged. The question that needs answers as to why she was also not

subjected to a disciplinary enquiry. In this instance, I find that the rule or standard had not been consistently applied by the respondent.

31. It is evident that the aforesaid Mrs. Sithole did not implement Mrs Mbatha's resignation after she discovered that there was outstanding pay progression for her. Evidence led by Mrs. Mbatha was clear that the decision was taken by the aforesaid HR Officer, but not the applicant. The question that also needs answers as to why Mrs. Sithole was never subjected to a disciplinary enquiry. In this instance, the rule or standard had not been consistently applied by the respondent. I find the applicant not guilty of the charge.

32. According to Mrs Dube evidence that she was the one responsible to implement an unpaid leave for Ms. Nxumalo, but she did not implement it as she was still waiting for the supervisor motivation letter. Mrs Sibiya conceded that Ms Nxumalo contravened leave policy what I do not understand how she approved her unpaid leave for 32 days which were already taken. The question that begs answers as to why the respondent did not charge her as well. The rule and standard was not applied consistently by the respondent. I find that the respondent failed to prove that the applicant failed implement an unpaid leave for Ms Nxumalo.

33. It is an undisputed fact that Ms. Thabiso Mbatha mistakenly entered the names of the officials who were rated unsatisfactory. Mrs Mkhize (CEO) questioned the applicant and was satisfied with her explanation. The spread sheet was rectified later. Mrs Mkhize submitted error never affected their employment relationship. The applicant was not the author of the spread sheet, but she appended her signature. In this instance, the respondent did not charge Ms Mbatha as well. I find that the rule or standard was not consistently applied by the respondent. The argument that the applicant misled the CEO stands to fail.

34. On the balance of probabilities, I find that the respondent dismissed the applicant for no valid reason. The respondent failed to prove the applicant's dismissal was fair. Therefore, I find that the dismissal of the applicant, on the balance of probabilities was substantively unfair. The procedural fairness, the applicant did not challenge it. In

Sidumo and another v Rustenburg Platinum Mines Ltd and Others [2007] 28 ILJ 2405 (CC), [2007] 12 BLLR 1097 (CC) in terms of the LRA the commissioner has to determine whether the dismissal was fair or not. A commissioner is not given power to consider refresh what he or she would do, but simply to decide whether the employer's actions was fair. In arriving at a decision of the employer. What is required is that he or she must consider all the relevant factors and circumstances.

35. In terms of Section 193(2) of the Labour Relations Act, re-instatement is a primary remedy unless the factors enlisted in section apply. The applicant wanted re-instatement and I find that she is entitled to it on the grounds of my above- mentioned findings. The respondent had no valid reason to dismiss the applicant. The applicant is also entitled to the wages that she would have received had she not been dismissed. The applicant was dismissed on 07 September 2020, from that date of dismissal to the date of arbitration consists of 3 months and two weeks' salary. In monetary terms is $R32,000.00 \times 3 = R96,000.00 + 2 \text{ weeks}' \times R8,000.00 = R16,000.00$ $R96,000.00 + R16,000.00 = R112,000.00$

AWARD

36. The dismissal of the applicant was substantively unfair. The respondent being Department of Health- KwaZulu Natal is ordered to, within seven (7) days of receipt of this award by both parties (Applicant and respondent):
37. re-instate the applicant on terms and conditions not less favorable than those which governed her employment prior to her dismissal;
38. pay the applicant arrear salaries for the period of her unemployment from 07 September 2020 to 17 December 2020 (date of this award) amounting to R112, 000.00 (R32, 000.00 x 3 months and two weeks).
39. The applicant is to resume work within seven (7) days of her becoming aware of this award.
40. I make no order as to costs.



Khehla Khanyile