



ARBITRATION AWARD

Case No: **PSHS382-20/21**

Commissioner: **Allan Kayne**

Date of award: **16 March 2021**

In the matter between:

KENNETH ANELE FASS

(APPLICANT/UNION)

and

DEPARTMENT OF HEALTH – NORTHERN CAPE

(RESPONDENT)

DETAILS OF THE HEARING AND REPRESENTATION

1. Mr. Kenneth Anele Fass, the applicant, referred an unfair labour practice dispute to the Public Health and Social Development Sectoral Bargaining Council ("the Council"), in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 ("the LRA"). The arbitration took place on 03 March 2021 at the Prieska Hospital. It was agreed that the parties could submit closing arguments in writing, which they subsequently did.
2. The applicant, who was in attendance throughout the proceedings, was represented by his attorney, Lulama Lobi, while Jack Pudikabekwa appeared for Department of Health- Northern Cape, the respondent.

3. The applicant submitted a bundle of documents to be utilised during the arbitration proceedings.
4. The proceedings were electronically recorded, and the record filed with the Council's administration.
5. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

ISSUE/S TO BE DECIDED

6. I must determine whether the respondent subjected the applicant to an unfair labour practice in terms of section 186(2)(b) of the LRA and if so, the appropriate relief should follow.
7. The applicant's prayer is for his suspension without pay to be declared unfair, he be reimbursed for the remuneration lost during the suspension, he be awarded compensation for the prejudice he suffered, and that the respondent be ordered to carry the legal expenses incurred by him.
8. The following issues were agreed to be common cause and, therefore, not in dispute:
 - 8.1. The applicant was employed as a Dental Assistant by the respondent at the Prieska Hospital, with effect from 03 January 2012, earning a monthly salary of R15,576.50.
 - 8.2. The respondent suspended him without pay on 01 April 2020.
 - 8.3. On 02 October 2020, the respondent uplifted his suspension, and he returned to work on 05 October 2020.

SURVEY OF EVIDENCE AND ARGUMENT

9. The following constitutes a summarised version of the parties' respective evidence and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

APPLICANT'S EVIDENCE

Kenneth Anele Fass ("Fass")

10. The applicant testified under oath that he qualified as a Dental Assistant with effect from 01 December 2011 as a beneficiary of a bursary provided by the respondent. The Dentist where he performed his practical hours relocated to Prieska and requested his services, resulting in him being appointed by the respondent with effect from 03 December 2012. Although he did not provide his certificate of qualification to the respondent, he provided his official results to them. Subsequently, between 2012 and his suspension, he received no request from the respondent to furnish them with anything else.
11. On 01 April 2020, he received a letter from the Chief Executive Officer ("CEO") of the Prieska Hospital, advising him of a statutory contravention of section 36(2) of the Nursing Act 33 of 2005 ("the Nursing Act"). The correspondence states that he failed to produce proof of payment of his annual registration with the South African Nursing Council ("SANC") and/or provide his Annual Practising Certificate ("APC") in terms of section 36(20) of the Nursing Act. However, he was neither a nurse, nor was he required to be registered with SANC. His registration as a Dental Assistant was held by the Health Professions Council of South Africa ("HPCSA"). He responded to the CEO's correspondence approximately 2 to 3 days later, clarifying his position and the erroneous claims made by her. He received no response to his letter.
12. He presented a screenshot from the HPCSA's Student Dental Assistants Register, which he obtained online, reflecting his status as being active since 10 March 2010, noting that, during his 8 years of service with the respondent, it had never requested any proof of registration from him.
13. He introduced a copy of his application for registration with the HPCSA as a Dental Assistant under supervisory practice, as well as proof of payment to them, dated 17 August 2020, confirming that he was in good standing with that council. He further presented an undated notice from the HPCSA indicating that all annual practising certificates which expired on 31 March 2020 would be automatically

extended to 30 June 2020 as a result of the COVID-19 pandemic. He held the view that this did not apply to him as he was already registered with the council.

14. Correspondence from his attorney, addressed to the respondent's Head of Department ("HOD"), was received by them on 20 November 2020 in which he requested redress for his erroneous unpaid suspension and the respondent's recovery of R4,672.92 in respect of arrear contributions to the Government Employees Pension Fund which was deducted from his remuneration on 15 October 2020, without explanation and apparently related to the contributions he ought to have had deducted monthly during his suspension.
15. His unpaid suspension of 6 months severely prejudiced him and resulted in him having to loan funds from others in order to survive. He incurred unnecessary legal expenses in attempting to enforce his rights and was left with a number of insurance policies that had lapsed as a result of his non-payment thereof.
16. During cross-examination, he refuted the respondent's claim that the reference to SANC in its suspension letter was simply an error, explaining that he addressed his concern in this regard with the respondent in writing. He testified that, given that he was never asked to provide any other documentation to the respondent during his tenure, he assumed that everything was in order.
17. At the time of his appointment in 2012, he was not in possession of his certificate of qualification issued by the Cape Peninsula University of Technology. He obtained a reprint of the certification on 24 July 2020 as he lost the original.
18. He confirmed that he paid registration fees to the HPCSA on 17 August 2020 and applied to them to update his record, acknowledging that, at the time of his suspension on 01 April 2020, he was not in possession of any documentation from the HPCSA reflecting an update to the register.

RESPONDENT'S EVIDENCE

19. Given the opportunity to present its case, Mr Pudikabekwa declined to call any witnesses, indicating that he would solely rely on his cross-examination of the applicant.

ANALYSIS OF EVIDENCE AND ARGUMENT

20. Section 186(2)(b) of the LRA defines an unfair labour practice to include, amongst others, any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee. In disputes of this nature, the onus rests with the referring party to prove its case on the balance of probabilities.
21. In the dispute to hand, the applicant seeks *inter alia* for his unpaid suspension to be declared unfair, he be reimbursed for the unpaid remuneration during the period 01 April 2020 to 01 October 2020, and he be awarded compensation based on the unfairness of the respondent's conduct and the impact that the suspension had on him.
22. On the evidence before me, on 01 April 2020, the respondent served the applicant with a notice of his alleged contravention of section 36(2) of the Nursing Act, and further alleging his gross misconduct based on his failure to register with SANC and to provide proof of registration to the respondent that he is licenced to practise. He was instructed to revert, within 7 days, to motivate why disciplinary action should not ensue and to submit reasons why the respondent should not recover from him the remuneration paid between January 2012 and March 2020. Concerningly, the correspondence goes on to advise that the respondent may invoke the provisions of section 17(3)(a) of the Public Service Act of 1994 in which his services may be terminated by operation of law should he absent himself from work for a period in excess of one calendar month, despite the suspension being solely at the behest of the employer.
23. It was not disputed that the applicant responded to the allegations within the stipulated timeframe but that there remained no answer to his correspondence until his suspension was uplifted some 6 months later, without any explanation being afforded to him.
24. While I accept that there is an element of responsibility on the part of an employer to ensure that its employees are registered with the appropriate professional bodies and licenced to practise within their scope by requesting proof of such active registration, the onus rests with the professional (employee) to maintain

such registration and to comply with that body's requirements. Although the applicant was indeed registered with the HPCSA, that registration was as a Student Dental Assistant, a role which he clearly no longer fulfilled.

25. Despite his failure, which he has subsequently corrected, the basis for his suspension is rooted in the respondent's assertion that he had failed to produce evidence of his registration with SANC when this was not a requirement of his profession. I do not accept the respondent's claim that it was merely an error as the correspondence is specific, citing the relevant sections of the Nursing Act and preferring allegations of gross misconduct for his failure to do so. Concerningly, after receiving the applicant's written submissions correctly explaining that he was not required to be registered with SANC, the respondent took just under 6 months to uplift the unpaid suspension and allow him to return to work. Had the respondent reverted to the applicant within a reasonable amount of time, this situation could have been avoided, and the matter of registration resolved timeously even if that action were simply to correct its erroneous allegations and to request proof of active registration with the HPCSA.
26. Despite leading the evidence of no witnesses to support its case, the respondent submitted closing arguments seeking to explain its conduct without any reference to any evidence adduced from the applicant as the sole witness whose version I accepted in the absence of another.
27. The respondent's conduct pertaining to the applicant's suspension was, without a doubt, unfair, and it has failed even to attempt to explain its reason behind the action taken, the excessive delay in reaching a decision to recall the applicant to work or the basis of its decision to do so. Accordingly, the only version before me is that of the applicant in which he asserts how the respondent's conduct impacted him and his family.
28. Therefore, the applicant has discharged the onus required of him, and I find that the respondent's conduct in this matter amounts to an unfair labour practice in terms of section 186(2)(b) of the LRA.
29. During the period 01 April 2020 to 01 October 2020, the applicant ought to have been paid his remuneration of R93,459.00 (calculated to be 6 x R15,576.50). For

the simple reason that the applicant himself carries some responsibility to have ensured that he was correctly registered with the HPCSA, which he notably failed to do, I am not prepared to consider his claim for compensation or his legal costs.

AWARD

30. The suspension of the applicant, Kenneth Anele Fass, was unfair and constitutes an unfair labour practice.
31. The respondent, the Department of Health – Northern Cape, is ordered to pay the applicant compensation in the amount of R93,459.00 by no later than 15 April 2021.

A handwritten signature in black ink, appearing to read 'Allan Kayne', is positioned above the printed name.

Allan Kayne