



PHSDSBC
PUBLIC HEALTH AND
SOCIAL DEVELOPMENT
SECTORAL BARGAINING
COUNCIL

ARBITRATION

AWARD

Panelist: Bella Goldman
Case No.: PSH392-10/11
Date of Award: 12 July 2012

In the ARBITRATION between:

HOSPERSA obo Dinah Stanley

(Union / Applicant)

And

Department of Health - Western Cape

(Respondent)

Union/Applicant's representative: Marius Radameyer, Union Official

Union/Applicant's address:

Telephone: 021 591 9283

Telefax: 021 483 3952

Respondent's representative: Mr Njongo Duma, Labour Relations Officer

Respondent's address:

Telephone: 021 483 4503

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DETAILS OF HEARING AND REPRESENTATION

1. The matter was held under the auspices of the Public Health and Social Development Bargaining Council and was scheduled for an arbitration hearing at the Western Cape College of Nursing, Klipfontein Road, in Cape Town on 29 June 2012. Mr Marius Radameyer, Union Official represented the applicant. Mr Njongo 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 fact that the respondent refused to accept the withdrawal of the applicant's resignation amounted to an unfair dismissal in terms of the Labour Relations Act 1995 as amended (LRA).

BACKGROUND TO THE ISSUE

3. The respondent employed the applicant as a Staff Nurse from 1991. In 2007 the applicant suffered an IOD which resulted in an injury to her back. The applicant applied unsuccessfully to be medically boarded, however the respondent accommodated her medical condition by changing her duties and responsibilities, she became a Ward Clerk based at Victoria Hospital, and she suffered no loss of pay or benefits. On 23 March 2012 the applicant resigned in writing with three months notice, her last working day was to be 30 June 2012. The respondent accepted her resignation on the same day in writing, the applicant refused to acknowledge receipt of this letter. On 25 June 2012 the applicant attempted to withdraw her resignation, the respondent refused to accept this withdrawal and the applicant is claiming that by refusing to accept this withdrawal the respondent in effect dismissed her unfairly.
4. The applicant is in terms of relief requesting to be retrospectively reinstating to a post of clerk but not Ward Clerk as she could not cope with that work as a result of her deteriorating back condition which was caused by the IOD in 2007.

SURVEY OF THE EVIDENCE AND ARGUMENT

5. 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

6. The parties submitted bundles of documents in evidence which were agreed as being what they purported to be. The applicant's bundles were marked 'A' and 'B' and were numbered 1 to 34 and 1 to 9 respectively. The respondent's bundle was marked 'C' and was numbered 1 to 29.

Employee's Evidence

The applicant, Dinah Stanley gave evidence under oath. The following is a summary of her testimony:

Dinah Stanley

7. The applicant was employed as a Staff Nurse; as a result of an injury on duty in 2007 she damaged her back and had to undergo a back operation. After her return to work she continued to work as a Staff Nurse for a little while until through her Doctor she requested lighter duties, she was then made a Ward Clerk with no loss of salary or benefits. She did unsuccessfully apply to be medically boarded at the time.
8. Her duties as a Ward Clerk included inter alia packing stock in the stock room and packing orders for the clinics, collecting folders from the day wards which involved the climbing of steep steps. These physical duties cause her back to deteriorate and caused pain and numbness especially in her left leg. She asked her Manager, Mr Franciscus if she could be placed on lighter duty but he told her that there were no posts with lighter duties available and she took the matter no further.
9. One of the reasons she decided to resign was that Mr Franciscus used to tell her whenever she used to return from sick leave as a result of her back that she was causing trouble for him and that her colleagues were complaining that she was not completing her work.
10. She resigned on 23 March 2012 with three months notice, her last working day to be 30 June 2012, but on that same day Sister Jones advised her that that she should see Dr Poly her orthopaedic surgeon and request to be boarded. She then verbally withdrew her resignation to Mr Franciscus who told her to wait for the results of the tests and told her that he would speak to Dr Stokes, the Superintendent and Head of Admin at the time. She later said that she had a verbal agreement with Mr Franciscus that he would hold onto her resignation until the outcome of her work assessment.
11. The applicant did not request nor did Mr Franciscus give the applicant Medical Boarding forms. Dr Poly referred the applicant to Groote Schuur Hospital for a Work Assessment. She attended Groote Schuur on

the 31 May and 2 June 2012 and she received the results of the assessment on 25 June 2012. As a result of the report she decided to withdraw her resignation in writing however she said that she had a verbal agreement on 23 March 2012 with Franciscus that he would withdraw her resignation depending on outcome of tests.

12. The results of a Work Assessment Test conducted by Linda Hiemstra, Chief Occupational Therapist at Groote Schuur Hospital was that the applicant should:

- Continue to work in an admin position which should be structured in such a way that she is able to alternate between standing and sitting as needed;
- Be permitted to walk short distances to relieve the pain
- Not lift and carry weights of more than 5kgs and lifting and carrying should be reduced to a minimum;
- Be provided with a typist chair to support her lumbar spine;
- Be referred back to orthopaedics to investigate her complaints off numbness;
- Be referred back to physiotherapy for specific rehabilitation of her spinal alignment, posture, pelvic tilt and gait
- Should the above not be possible to accommodate the applicant in the kind of position as described above then retirement on grounds of ill health could be considered

13. The applicant referred to her letter dated 25 June 2012 to Dr Stokes to which she attached the Occupational Therapist's report. In terms of the letter she stated that she wished to withdraw her resignation of 23 March 2012. The reasons she gave for doing so were that at the time she wrote the letter she was very depressed as a result of her back pain and that she was off sick with the back pain more than she would have liked to be. Having discussed the matter with her Orthopaedic Consultant she has now considered being medically boarded would be a better option to resignation. She went on to state that Sisters Malherbe and Le Grange have identified the post of Infection Clerk as a more suitable one for her as that post requires minimal walking.

14. The applicant then referred to Dr Stokes's reply dated 28 June 2012 in which Dr Stokes refused to accept her withdrawal of her resignation and informed her that the Infectious Control Unit had been moved and that in order to get there 16 steps have to be negotiated daily and that the posts in this unit had been filled.

15. The following was put to the applicant in cross examination:

16. That she did not mention to Dr Stokes that she had a verbal agreement with Mr Franciscus on 23 March 2012 re withdrawing her resignation and it was put to her that this verbal agreement was an afterthought. It was further put to her that the report from Groote Schuur does not guarantee boarding.
17. The applicant was referred to a letter dated 29 January 2007 in terms of which her application for medical boarding was turned down. In that letter it was recommended that that she continues to seek regular therapy from a biokineticist or physiotherapist specialising in back care. The applicant was asked if she heeded this advice. She said she did not as it hurt. It was put to her that Physiotherapy does sometimes hurt but has long term benefits and as a nurse she should know that and that this report has the same recommendations.
18. The applicant was asked if she was ever forced to resign or disciplined for being absent from work, she said she was not.

Employee's Evidence

The respondent called one witness, Saliem Franciscus, Senior Admin Officer at Victoria Hospital who gave evidence under oath. The following is a summary of his testimony:

Saliem Franciscus

19. The applicant handed him her letter of resignation on 23 March 2012, he asked her twice before accepting it, if she was sure she wanted to resign and she confirmed that she was. The applicant handed him her letter at 09h00 on that morning but when he gave her a letter acknowledging receipt of her letter of resignation in the afternoon of the same day she refused to acknowledge receipt of that letter in writing.
20. The witness denied that he had a verbal agreement with the applicant that he would place her resignation on hold. Once she told him she was going to Groote Schuur for an assessment he told her to go and see if she would be boarded, if she had been boarded he would have gone to see Dr Stokes and tried to persuade her to accept a withdrawal of the resignation, but in any event she was not boarded.
21. The witness stated that the applicant stayed out of work a lot, sometimes with a valid medical certificate and sometimes without one and it lead to many informal counselling sessions but never to any formal disciplinary action. In 2007 the witness suggested she apply for medical boarding which was turned down. The witness then advised her to seek a second opinion re boarding but not re a Work Assessment which

she did after she resigned. The witness stated that the applicant never asked to be placed in an alternative position until her letter of 25 June 2012.

22. The parties did not submitted argument in support of their respective cases.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

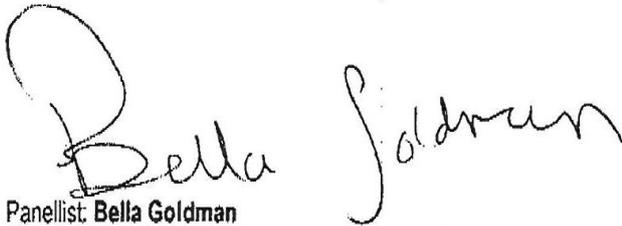
23. It is trite law that once an employee tenders a letter of resignation and it is accepted by the employer the employer is under no duty to accept a withdrawal of such resignation. The only exception to this is when the employee resigns in the heat of the moment. This case does not and cannot possibly be said to fall into this case as the applicant only attempted to withdraw her resignation nearly three months thereafter. The applicant made much of the fact that there was a verbal agreement on the same day between her and Mr Franciscus in that he would hold on to the resignation letter pending the results of a Work Assessment. If that were so, then why would he then in the afternoon of the same day request her to sign confirmation of acknowledgment of receipt of the resignation letter which she refused to sign? Franciscus's version was the more credible and probable and was that in the event that she was successful in a medical boarding application he would try and persuade Dr Stokes to accept to withdraw the resignation so that the applicant could be medically boarded. From the Work Assessment report it is apparent that there was no guarantee that the applicant would be boarded. Looking at the recommendations of the report it would appear that in all probabilities that applicant's current job could have been accommodated in line with the report had she decided not to resign and have the Work Assessment conducted prior to resigning.

24. However she decided to resign and must live with the consequences thereof. I do not understand why the applicant did not withdraw her resignation in writing on 23 March 2012, the only reason I can think of for waiting until 25 June 2012 was that she wanted to see the word **boarding** in the report, failing to understand that this did not guarantee boarding and whilst waiting for the outcome of such an application she would try and get an easier job, however this is pure speculation on my behalf.

25. It should be noted that from the evidence before me, the applicant has done little to help herself; she has not followed the course of treatment recommended in 2007 and it thus appears unlikely she will do so now. In any event the applicant resigned on 23 March 2012, her resignation was accepted by the respondent on the same day in writing. The applicant attempted to withdraw her resignation on 25 June 2012, (three months after) the respondent refused to accept the withdrawal and was under no duty to do so. The respondent's refusal to accept the applicant's withdrawal of her resignation did not amount to a dismissal.

AWARD

26. The respondent's refusal to accept the applicant's withdrawal of her resignation on 25 June 2012 did not amount to a dismissal. The Council has no jurisdiction to arbitrate this dispute and the 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**