



ARBITRATION AWARD

Commissioner: **Lindiwe Makhanya**

Case No: **PSHS40-20/21**

Date of award: **24 February 2021**

In the matter between:

EUGENE ZWELITHINI NDLOVU

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This matter was scheduled for arbitration before me 26 August 2020, 28 September 2020, 28 and 29 October 2020, 14 December 2020, 25 January 2021 until 17 February 2021 when it was finalised at the Respondent's premises, at Ngwelezane Hospital. It was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council ("the council") PHSDSBC in terms of section 191(5) (a) of the Labour Relations Act No.66 of 1995, as amended ("the Act").
2. The Applicant, Mr. Eugene Zwelithini Ndlovu, was represented by Mr. D.K. Dladla, a former colleague who works as an Enrolled Nurse at the Respondent and the Respondent, Department of Health -Kwazulu Natal, was represented by Mr. X.

Zwane, it's Assistant Director-Labour Relations. The proceedings were digitally recorded.

PRELIMINARY ISSUES, JURISDICTION AND ISSUES TO BE DECIDED

3. No jurisdictional issues were raised.
4. The dispute is whether the dismissal of the Applicant was substantively unfair.

BACKGROUND TO THE DISPUTE

5. The Respondent is the Department of Health which is one of the government's executive departments assigned to health matters and located in Empangeni, KwaZulu Natal.
6. The Applicant commenced his employment with the Respondent on 01 January 2013 and was employed as a Nursing Assistant. He was dismissed on 16 March 2020. At the time of his dismissal, he was earning a monthly salary of R12 773.60.
7. An unfair dismissal dispute relating to misconduct was referred by the Applicant to the council. The Applicant sought retrospective reinstatement in the event that the award is made in his favour.

SURVEY OF EVIDENCE AND ARGUMENT

8. The Respondent presented a bundle of documents which was marked "B" and the Applicant presented a bundle of documents which was marked "A". Only the Applicant submitted written closing arguments.
9. The Applicant was found guilty of one charge as per (Bundle "B", page 23) as follows:
 - a) On the 14 December 2018 to 04 January 2019, whilst allocated in Orthopaedic Clinic, you absented yourself from duty without authority from your superiors (22 days) (serious consequences).

THE RESPONDENT'S CASE

10. Mr. Bongani Ngobeni, Operational Manager in Ward E and Orthopaedic Unit testified under oath that he is responsible for supervising various staff including the Applicant.
11. In December 2018, when he realised that the Applicant had not reported for duty, he called him to enquire about his absence and the Applicant informed him that he was sick. He advised the Applicant to bring the medical certificate to have his sick leave processed, but the Applicant failed to do so. When the Applicant returned to work, he signed for unpaid leave and the Applicant was later subjected to a disciplinary enquiry.
12. He pointed to page 2 and 3, "Bundle B" where there is an unpaid leave form for the Applicant from 14 December 2018 until 03 January 2019. All these leave forms were signed by him on 7 January 2019.
13. Although the Applicant had called and reported his absence on 19 December 2018, this date is part of the charge because the Applicant had failed to produce the medical certificate. He referred to page 50, paragraph 14.5, "Bundle B" where it is stated that an employee must submit an application for sick leave personally or through a relative, fellow employee within five working days after the first day of absence.
14. According to the Applicant's medical certificate, he was seen by the doctor on 14 December 2018 and on 03 January 2019, but it appeared as if the Applicant only visited the doctor on 3 January 2019 and had asked the doctor to cover all the other periods when he was absent. The Applicant only presented his medical certificate on 7 January 2019 but it was not considered.
15. It was not the first time that the Applicant committed similar misconduct as seen on page 25, "Bundle B." where the Applicant was charged for absenting himself without authority in 2015.

16. Under cross-examination, he admitted that he called the Applicant on his 6th day of absence and that the Applicant had reported that he was sick. The Applicant ought to have submitted his medicate certificate during December 2018.
17. He denied receiving a call from the Applicant where the Applicant informed him that he was to consult the doctor again for the review and will only provide a medical certificate thereafter.
18. He conceded that when he counted the number of days which the Applicant was absent, he had included calendar days instead of working days as per the policy. He admitted that the Applicant was supposed to be charged for 12 days of absence not 22 days.
19. During the re-examination, he maintained that the Applicant was supposed to submit the medical certificate within five days of his absence.

THE APPLICANT'S CASE

20. Mr. Eugene Zwelithini Ndlovu testified under oath that on 14 December 2018 he got sick and had trouble breathing, he was taken to Doctor Manzi by his cousin where he was treated. When he returned home later that day, he remembered that he had not requested the medical certificate from the Doctor, he requested his cousin to call the Doctor and request it, but the Doctor had said since he was due for review on 3 January 2019, he would be given the medical certificate then.
21. The following Monday, he called his supervisor, Mr. Sibiya to inform him about his condition and that he would return to work on 3 January 2019. He called Sibiya again on the following days, but when he did not get hold of him, he called Mr. Ngobeni. On 3 January 2019, he visited the Doctor again who certified him fit to return to work on 5 January 2019.
22. He pointed to page 1, "Bundle A" where there is a medical certificate issued which states that he was seen by the Doctor on 14 December 2018 and on 3 January 2019. Two weeks after he returned to work, he got sick again whilst at work, this

time he was examined by the Respondent's Doctor and was later diagnosed with MDR-TB. He was booked off by the Doctor as seen on page 2, "Bundle A". On 28 January 2019, he was referred to Catherine Booth hospital to start MDR- TB treatment.

23. According to the Applicant, it was unfair for the Respondent to dismiss him because the diagnosis of Doctor Manzi in his medical certificate shows that he had symptoms related to the MDR-TB and this was confirmed by the Respondent's Doctor later. Also, he was charged for being absent for 22 days instead of 12 days.
24. He admitted that he was sanctioned during the year 2015 for absenteeism but that was a long time ago and the warning had expired. In this instance, there was a reason for his absence which was supported by a valid medical certificate from his Doctor.
25. There was also no investigation of his case as the chairperson of the disciplinary enquiry refused to take the medical certificate when he presented it.
26. He disputed that he had absented himself without authority from his supervisor as the attendance register which was compiled by his supervisor, Mr. Sibiya is written "sick" on all the days he was absent. There was no reason for the Respondent to dismiss him when they knew he had been sick and the medical certificate was presented.
27. During cross-examination, he emphasized that his dismissal had been unfair, there was no investigation of his case and that had the chairperson saw the medical certificate, he would not have dismissed him. When he returned from the TB hospital, he was charged immediately and dismissed. The Respondent did not consider that he could have contracted the disease whilst at work since he worked as a Nursing Assistant. He had lost an income for several months.
28. During re-examination, he maintained that the Respondent had treated him unfair because other employees who had been diagnosed with MDR-TB which is a contagious disease had been put on sick leave for six months but he was asked to return to work after one month of starting his treatment.

ANALYSIS OF EVIDENCE AND ARGUMENT

29. I have taken note of section 185 of the LRA which states that “every employee has the right not to be unfairly dismissed.” I read this section together with section 192(2) of the Act in terms of which the employer bears the onus to prove on a balance of probabilities that the employee’s dismissal was fair.
30. There was no challenge to the procedural fairness of the dismissal. I will only deal with the substantive fairness of the Applicant’s dismissal.
31. It was common cause that the Applicant had reported to Sibiya and Ngobeni that he was sick during December 2018. It was also common cause that the Applicant had not submitted his medical certificate within five days after the first day of absence.
32. There were no issues in dispute, even the testimony of the Applicant was not challenged during cross-examination.
33. It is unfair to dismiss an employee for misconduct in the absence of proof that the employee committed the misconduct for which he/she was charged. The Applicant was charged for being absent from duty without authority from his superiors, however, the evidence of Ngobeni revealed that the Applicant had reported his absence. The attendance registers also confirmed that both Sibiya and Ngobeni were aware that the Applicant was sick.
34. Ngobeni insisted that the Applicant had failed to submit his medical certificate within five days after the first day of absence which was not disputed by the Applicant, however the Respondent did not lead any evidence which suggests that failure to submit a medical certificate within the prescribed period lead to dismissal. More so, because the Applicant was not charged for failure to submit a medical certificate within five working days after the first day of absence but was charged for absenting himself without authority which is in contradiction with Ngobeni’s evidence as he admitted that the Applicant had reported his absence. Sibiya had also been informed by the Applicant that he was sick.

35. Ngobeni testified that the Applicant appeared to have visited the Doctor only on 3 January 2019 but the medical certificate included days from 14 December 2018. The Applicant was not charged and dismissed for presenting the medical certificate dated 3 January 2019. The Applicant claimed that he had informed Ngobeni that he would bring his medical certificate upon his return.
36. The Applicant argued that there was no proper investigation conducted regarding his case because the chairperson had refused to accept his medical certificate when he offered to present it. I agree with the Applicant because Ngobeni later admitted that the Applicant ought to have been charged 12 days of absence instead of 22 days. If a proper investigation were done, the investigator would have established that the Applicant was in possession of his medical certificate and that the Applicant had reported his absence to his superiors. Also, the chairperson would have discovered during the disciplinary hearing that the Applicant had contracted MDR-TB in December 2018 and that the diagnosis from the Applicants' first Doctor indicates such.
37. The Applicant's testimony that he had called Sibiyi and Ngobeni to report his absence remained unchallenged. The Respondent did not comply with item 7 of schedule 8 for Code of Good Practice: Dismissal of the LRA, which states that any person determining whether a dismissal for misconduct is unfair should consider whether or not the employee contravened a rule or standard. In my view, the Applicant did not contravene any rule as it was not disputed that he had reported his absence. The Respondent failed to prove that the Applicant had contravened the rule. It is therefore unfair for the Respondent to have dismissed the Applicant for misconduct he did not commit.
38. Based on the evidence and arguments presented by both the Respondent and the Applicant at this arbitration, the Respondent has failed to discharge the onus of proving that it dismissed the Applicant for a fair reason and in accordance with a fair procedure. In the circumstances, I am satisfied that the dismissal of the Applicant was procedurally fair but substantively unfair.
39. For the sake of completeness, it must be noted that both witnesses' testimony was heard only on 14 December 2020 and 17 February 2021. On 14 December 2020,

the Respondent had concluded its case early, before the Applicant testified the Respondent requested for the arbitration to be adjourned stating that there was an emergency that needed to be attended to. For all the other dates in which this matter was scheduled, the Respondent had requested postponements citing different reasons. It is for this reason that I believe the Applicant has been prejudiced in that the matter that ought to have been heard in one day took almost seven months to be finalised.

40. The Applicant sought retrospective reinstatement. I find no reason why such relief should not be granted, as section 193(4) of the Act permits the determination of the dispute on terms that the arbitrator deems reasonable. In this case, the unpaid salary amount is calculated as follows: (R12 773.60 X 10 Months = R127 736.00).

AWARD

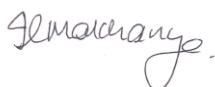
41. The dismissal of the applicant by the respondent was substantively unfair.

42. The respondent is ordered to reinstate the applicant in its employ on terms and conditions no less favourable than those that governed the employment relationship before his dismissal.

43. The reinstatement is to operate with retrospective effect from 16 March 2020.

44. As of the date of the award, the backpay due to the applicant as a result of the retrospective operation of the reinstatement amount to R127 736.00 minus such deductions as the respondent is in terms of the law entitled or obliged to make. The respondent must pay to the applicant the backpay amount by no later than 15 March 2021.

45. The applicant must tender his services to the respondent on 8 March 2021.



LINDIWE MAKHANYA

