ARBITRATION AWARD

Panellist: Bella Goldman
Case No.: PSHS419-11/12 and PHSS832-11/12
Date of Award: 17 May 2012

In the ARBITRATION between:

Errol Pierre Visser

(Applicant)

And

Department of Health - Western Cape

(Respondent)

Union/Applicant's representative: Wayne Field, Attorney
Union/Applicant's address:

Telephone: 021405 3846
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Respondent's representative: Feizel Rodriquez, Deputy Director: Labour Relations
Respondent's address:

Telephone: 021 483 3135
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DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an arbitration hearing at the offices of the respondent at the Athlone Nursing College on 14 May 2012. Mr Wayne Field, Attorney from Bernard Vukic, Potash & Getz Attorneys represented the applicant. Mr Feizel Rodriquez, Deputy Director: Labour Relations represented the respondent. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

2. The applicant referred two disputes to the Council which were joined. The first was with regard to his initial suspension on 8 August 2011 which he claims was procedurally and substantively unfair and the second related to the fact that he was suspended beyond the 60 days provided for by the Disciplinary Code which is contained in a collective agreement, PSCBC Resolution 1 of 2003. I have to decide whether or not the employee's initial suspension and continued suspension amounted to unfair labour practices relating to suspension in terms of the Labour Relations Act 1995 as amended (LRA).

BACKGROUND TO THE ISSUE

3. The respondent employed the applicant as a Medical Officer at the Eerste River Hospital from 1 January 2010 until 31 December 2010 on a fixed term contract. The applicant was then permanently employed from 1 January 2011 to 6 March 2012 when his services were terminated for reasons unrelated to the reasons for his suspension. He was employed as Head of the Emergency Department and was also responsible for overseeing the outpatient unit. His salary was R67, 796.82 per month.

4. The chronological sequence of events is as follows and is undisputed unless otherwise indicated.

5. The applicant on 26 July 2011 received from the respondent a letter of *'Intended Suspension From Service as a Precautionary Measure'* ***(Audi letter)*** in terms of which three allegations were made against him which the respondent intended investigation and intended suspending him on full pay as a precautionary measure whilst the allegations were being investigated.

6. In the event that he was of the opinion that he should not be suspended he was given the opportunity to submit written reasons before 1 August 2011 to Mr Roman, Director: Labour Relations.

7. The applicant on 31 July 2011 responded in writing to Mr Roman to each of the three allegations.

8. The allegations were briefly :

9. (i) *Procuring the service of a locum outside his delegation on 17 July 2011;*
(ii) Clinical mismanagement, unnecessarily inserting a chest-drain in a patient by the name of Kennedy on 13 July 2011;
(iii) Undermining local management structures by encouraging trade union representatives and other staff members on 20 July 2011 to forward complaints about management of patients in emergency centres to outside agencies without first bringing the concerns to onsite hospital management.

10. The applicant received a response on 5 August 2011 informing him that his representations had been considered and that the respondent was of the opinion that the allegations against him amounted to serious offences and that his continued presence in the workplace may jeopardise the investigations and that his suspension would be effective as from 8 August 2011.

11. On 28 October 2011 the applicant was issued with notice to attend a disciplinary hearing on 9 November 2011 the charges were different to the three referred to above in that the first two had been amended and the third was not there.

12. The hearing convened on the 9 November 2011, the Presiding Officer was Dr Classens and argument for legal representation was heard on that day and was granted. The hearing reconvened on 2 December 2011 and two witnesses were heard and the hearing was then postponed as a result of the applicant requesting and the respondent having to provide the applicant with certain documentation.

13. On 19 December 2012 the applicant through his attorney was informed that Dr Classens had been booked off sick and would not be able to continue with the disciplinary hearing and that Dr Carter would be taking over the matter

14. Shortly thereafter the applicant was served with an 'Audi letter' with regard to the termination of his services on the grounds that his appointment was unlawful and the disciplinary hearing never reconvened.

SURVEY OF THE EVIDENCE AND ARGUMENT

15. 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

16. The parties both submitted bundles of documents in evidence which were agreed as being what they purported to be. The applicant's bundle was marked 'A' and was numbered 1 to 50. The respondent's bundle was marked 'B' and was numbered 1 to 36.

Employee's Evidence

The applicant, Errol Pierre Visser gave evidence under oath. The following is a summary of his testimony:

Errol Pierre Visser

17. The applicant is a Medical Practitioner and has specialised in Emergency and Family Medicine. The applicant in his response to the Intention to Suspend Letter gave his responses to the three allegations, but did not furnish the Department with reasons as to why he should not be suspended. Further no one from the Department pointed out to him that he had not done this prior to suspending him.

18. The applicant stated that he could not have interfered in respondent's investigation in terms of any of the three allegations had he not been suspended as the respondent had control of all the information. They had all the documents relating to the locum allegation. In terms of the Kennedy issue he had alerted the respondent of the situation by filing an Adverse Incident Report on 15 July 2011 and thus he had provided the respondent with the information. With regard to the trade union allegation the incident had passed and he was never charged with regard to the allegation.

19. Dr Perez in his evidence stated that one of his reasons for suspending the applicant was that he suspected the applicant of interfering in the case against his brother, Dr T Visser, who was the Head of the Hospital and had been suspended prior to the applicant. Dr Perez had stated that relevant patient files relating to the brother's case had gone missing and he suspected that the applicant was responsible for the files having gone missing. I allowed the applicant to respond to the allegation even though it was never put to him in cross examination, despite the objection of the applicant's representative. The applicant

denied any interference in his brother's case such as being responsible for the disappearance of relevant files as suspected by Dr Perez.

20. The applicant outlined the effect that the suspension has had on him. Professionally it has affected his reputation and his standing amongst his colleagues and he was unable to find alternative employment which he sought whilst suspended as a result of his suspension. It also affected his ability to keep abreast in his field, as his employer would pay the cost of conferences and training courses he needed to attend for Professional Development purposes.

21. It has also affected his mental health and he sought the services of a Psychiatrist, Dr Simon Rubidge who prescribed medication and the services of a Counsellor, Ms Shirley Main

Employer's Evidence

The respondent called one witness, Dr Giovanni Perez, Director for Khayelitsha and Eastern Metropole who gave evidence under oath. The following is a summary of his testimony:

Dr Giovanni Perez

22. The witness is one of four Directors in the Western Cape. His duties inter alia include overseeing public hospitals, Eerste River being one of the public hospitals and the one where the applicant was employed. He initiated the suspension of the applicant as a result of the seriousness of the allegations against him, especially the second charge.

23. He became aware of allegation 1 and 3 from Dr Parak and Cheryl Steyn, Nursing Manager both of whom are employees of Eerste River Hospital and the applicant informed him of allegation 2. He thereafter sought advice from Mr Roman of Labour Relations re the way forward and it was decided to place the applicant on Precautionary Suspension as the applicant held a senior position and he could potentially interfere in the investigation that had to be completed.

24. The witness stated that all these incidents took place after the suspension of the applicant's brother Dr T Visser who was head of the hospital and who had been suspended. After Dr T Visser's suspension the applicant appeared not to acknowledge the hospital's management and would walk past members of management without greeting them. Another reason why the witness believed that it would be a good idea to suspend the applicant was that some patient's files which related to allegations against Dr T Visser went missing and the witness had unsubstantiated suspicions that the applicant was responsible for the fact that

these files had gone missing. The witness then called the applicant and asked him in view of what had happened to his brother whether he would like to take some leave, the applicant said he would not.

25. The witness stated that there are only four Directors in the Western Cape and he had to appoint some one of a higher rank (applicant's position is equivalent to that of Deputy Director) to the applicant to chair the hearing, he could not appoint himself as he was acquainted with the case and hence he only had a choice of three Directors from which to appoint the Presiding Officer. He stated that Dr Classens was appointed in the last week of September 2011. He then referred to an email from Dr Classens dated 18 October 2011 to Feizel Rodriques in which he states he is currently on annual leave. The witness stated that he was not aware of the 60 day rule.

26. The parties submitted argument in support of their respective cases which I will refer to where necessary in my analysis.

Applicants Arguments

27. The applicant argued that the suspension was procedurally unfair in that even though the applicant was given the opportunity to argue as to why he should not be suspended, it was apparent from his response that he misunderstood that and he instead responded to the allegations and the respondent should have told him that he had not answered the question as to why she should not be suspended and it is accepted law that one must have an opportunity to give reasons as to why one should not be suspended and even though he was given the opportunity he misunderstood it.

28. The suspension was also substantively unfair in that in terms of clause 7.2. (a) of Resolution 1 of 2003
The employer may suspend an employee if
(i) the employee is alleged to have committed a serious offence; and
(ii) the employee believes that the presence of the an employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well being or safety of any person or state property.

29. The applicant argued that there was no valid reason to dismiss the applicant as the only serious charge per the evidence of the respondent's witness was allegation 2 which was as a result of a mix up of X rays and hence the charge was not so serious.

30. The second part of the test refers to state property which from the evidence of respondent's witness appears to be files relating to the applicant's brothers case which were allegations which were never put to the applicant and which the applicant was never given an opportunity to respond to.

31. The respondent's witness's allegations of the possibility of the applicant being able to interfere with the respondent's witnesses are all vague and subjective and not rational and objective which the applicant believes is what is required by clause 7.2. (a) (ii) Further there was a statement in respondent's own bundle which exonerated the applicant from liability in the Kennedy case.

32. referred to clause 7 of resolution 1 of 2003 clause 7.2 (c)
If an employee is suspended … as a precautionary measure the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the of the investigation. The chair of the hearing must then decide on any further postponement.

33. The applicant argued that the suspension was unlawful as the hearing, assuming that it was a complex case, should have been held at the very latest on 7 October 2011 and that no postponement was ever decided upon by any the chair of the hearing. The applicant further argued that if the suspension was unlawful it must be unfair.

Respondent's Argument

34. The applicant was given an opportunity to provide reasons as to why he should not be suspended, he did so in the form of providing responses to the allegations and he was not denied the opportunity to provide reasons as to why he should not be suspended and there was no duty on the respondent to again remind him that he had not answered the initial question of '*why he should not be suspended*' especially as he is by no means unschooled.

35. The applicant was charged with misconduct of a serious nature and he was a senior member of management and was in a position to manipulate junior staff were he not suspended, especially with regard to the second charge.

36. Files relating to the applicant's brother, Dr Time Visser's case went missing and it was believed that the applicant was instrumental in these files going missing, which was substantiated by the applicant's conduct after Dr T Visser's suspension after 12 June 2011. If an employer has a belief that an employee may jeopardise a case he may suspend an employee which is what the employer did.

37. The respondent conceded that it exceeded the 60 day period provided for by clause 7.2 of Resolution 1 of 2003, however the respondent argued that this issue should have been raised by the applicant on 9 November 2011, hence the employer cannot be held responsible for exceeding the 60 day period. There was no further delay after 9 November 2011.

Applicant's reply

38. The respondent's contention that it was for the applicant to raise the fact that the 60 days had been exceeded is preposterous.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

39. I will deal with each of the issues raised by the applicant. The applicant submitted that the respondent should have reminded the applicant that he had not given reasons as to why she should not be suspended in his response to the intension to suspend letter he received from the respondent. The applicant replied to that letter by giving reasons as to why he was not guilty of the allegations and those were his reasons as to why he should not be suspended and I do not believe that he should have been reminded that he had not answered the intention to suspended letter. As stated by the respondent the applicant is far from unschooled and the applicant's attorney is I believe is in this case playing with semantics.

40. With regard to the seriousness of the allegations, I do not believe that I can comment on the seriousness of the charges without hearing the matters stemming from the charges, but I accept that the charges on the face of them appear to be of a serious nature, especially charge 2 and 3.

41. However what I believe to be substantively extremely unfair is that from the evidence of Dr Perez it appeared that one of the main reasons for suspending the applicant related to the missing files related to the applicant's brother's case which was not mentioned in the intention to suspend the applicant letter dated 26 July 2011 or at any other time. A suspension, even with pay has been recognised by the Courts as being harmful to an employee both emotionally and professionally and cannot be done for a reason not revealed to an employee.

42. In terms of the unlawfulness of the suspension, it is that in terms of the respondent's disciplinary code which is contained in a collective agreement which has the effect of legislation and is thus mandatory. This is both unlawful and unfair. The respondent has no excuse for not abiding by this clause; the respondent in this case sought the advice of the Labour Relations Directorate which are be the custodians of this Resolution and thus there is no excuse for not abiding with the provisions of this agreement. Even when

Dr Classens who told Mr Rodriques per email that he was on annual leave on 18 October 2011 which was already eleven days over sixty day period no bells appeared to ring with Labour Relations and the hearing did not convene till more than three weeks later. Until the termination of his services in March 2012 the respondent never addressed the 60 day period provided for in clause 7 of Resolution 1 of 2003 by the Presiding Officer of the hearing, who later was Dr Carter in the absence of Dr Classens ruling on the extension of the sixty day period. To suggest that the duty to postpone the 60 days lies with the employee is as the applicant states is preposterous. The respondent thus ran five months over the 60 days without making the slightest effort to address the issue.

43. The applicant was in December 2011 sent an audi letter relating to the unlawfulness of his initial employment; I do not understand why the respondent then found it could then dispense with the applicant's disciplinary hearing and continue suspending him given that it is trite the effect that a suspension has on an employee albeit paid.

44. The applicant has requested that he be granted relief of six months remuneration in terms of relief.

45. For the reasons stated above I find that the applicant's suspension was substantively unfair as it was for reasons not disclosed to him and it was procedurally unfair in that a hearing was not held within 60 days and no extension of that period was ever made in terms of clause 7.2.(c) of Resolution 1 of 2003.

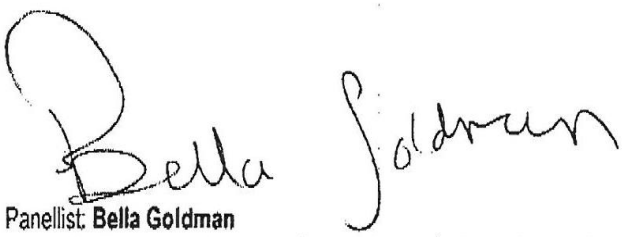
46. In terms of compensation in the case of unfair labour practises the courts have found that section 194 (4) of the LRA is awarded to address the wrong occasioned by the infringement and to deter future violations. In this case the respondent chose to blatantly ignore the applicant's right to know and respond to one of the reasons as to why he was suspended and the respondent blatantly ignored the provision of a collective agreement by five months causing professional and emotional suffering to the applicant. I am balancing that against the fact that the applicant was suspended on full pay.

47. In the circumstances I believe that it would be fair and equitable to award the applicant compensation equivalent to the remuneration he would have received over the period of three and months

AWARD

48. I find that the applicant's suspension was initially substantively unfair and his continued suspension was procedurally unfair and hence the applicant suffered unfair labour practices as a result thereof.

49. I order that in terms of compensation the respondent, The Department of Health Western Cape pay the applicant, Errol Pierre Visser the amount of R203, 390.46 (R67, 796.82 x 3) less statutory deductions in terms of compensation. This amount is to be paid by no later than June 25 2012 after which time interest will accrue at the applicable rate.



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