



# ARBITRATION AWARD

Panellist/s: Paul Kirstein  
Case No.: PSHS44-10/11  
Date of Award: 3-Mar-2011

In the ARBITRATION between:

In the matter between

**DENOSA obo B KOOPMAN**

Applicant

and

**DEPARTMENT OF HEALTH: WESTERN CAPE**

Respondent

## ARBITRATION AWARD

### DETAILS OF HEARING AND REPRESENTATION

1.

The matter was set down for arbitration on 24 February 2011 at the Eben Donges Hospital in Worcester. The applicant was represented by BP Lose, an official of

DENOSA. The respondent was represented by M September, an officer in the employment of the respondent. The parties submitted a bundle of documents marked bundle "A". The arbitration was mechanically recorded.

2.

The respondent's representative referred to an agreement of postponement dated 9 November 2010. The following was *inter alia* agreed in terms of the mentioned agreement:

- (a) The respondent's main witness has gone missing. Therefore the only way to lead evidence is to transcribe the DC record. This DC record will be used at the arbitration.
- (b) The respondent also wants to secure the chairman of the disciplinary hearing since the evidence was presented to him.

The respondent's representative submitted that the disciplinary record should be allowed as evidence to confirm the respondent's case regarding substance and procedure. The applicant's representative disputed the content of the disciplinary record and indicated that it was not agreed that the disciplinary record would be submitted as evidence without having the opportunity to cross-examine witnesses of the respondent. It has not been agreed in the postponement agreement that the disciplinary record would be allowed as evidence by agreement. The applicant is

entitled to dispute the content thereof. The applicant is further entitled to cross-examine witnesses of the respondent. The ruling was made that the respondent needs to prove the authenticity of the disciplinary record and cannot rely on the agreement to allow the disciplinary record as the only evidence to prove the substantive and procedural fairness of the applicant's dismissal. The respondent's representative requested a postponement to enable the respondent to call the chairman of the disciplinary hearing. The applicant's representative opposed the application for postponement on the basis that the matter has already been postponed on three previous occasions. The respondent should have had the disciplinary hearing chairman available to testify at the arbitration. The request for a postponement was dismissed. The only procedural issue that the applicant's representative put on record at the arbitration was that DENOSA was not informed of disciplinary action against the applicant in that the applicant was a shop steward of DENOSA. Having considered the abovementioned and the extended period of time since the applicant's dismissal it was determined that the arbitration should proceed.

## SUMMARY OF EVIDENCE

3.

The applicant testified and indicated that he was employed at the respondent for a period of twenty-nine years. The applicant started his employment at the respondent in the capacity as a cleaner and later became a nurse. The applicant confirmed that he was dismissed on 18 March 2010. The applicant denied the allegations of misconduct. The applicant indicated that it was indeed necessary for the patient to wear a nappy. For an extended period a nappy was supplied to the patient. The applicant indicated that he clapped the patient's hand away because the patient attempted to remove a drip. The applicant testified that he watched the patient and assisted the patient to return to his bed. In the process the applicant slipped and fell on top of the patient on the bed. The applicant explained that in this process he must have hit the patient at the back of his head. The patient was in the ward for approximately four months. The applicant does not know why the patient made the allegations of misconduct against him. The patient did not complain to the hospital staff. The patient complained to his family members. The patient was the only person in the ward. The applicant confirmed that he attended a disciplinary hearing. The applicant received the notice to attend a disciplinary hearing seven days prior to the set down of the disciplinary hearing. The respondent did not inform DENOSA of the disciplinary hearing. No explanation was given by the applicant as to why he did not inform DENOSA. The applicant

indicated that he did not obtain a representative for the disciplinary hearing because he believed that he was innocent. The applicant has a clean disciplinary record. The applicant seeks reinstatement. The applicant indicated that he attempted to find alternative employment but was not successful. The applicant's gross salary per month at the date of dismissal was R8 775.07.

4.

The respondent closed its case without calling witnesses.

## **ANALYSIS**

5.

It is common cause that the applicant was dismissed on 18 March 2010. The allegations of misconduct upon which the applicant was dismissed for are the following:

*"You are allegedly guilty of misconduct in that on during the period 24 and 27 August 2009, you ill-treated a patient, Mr Robert Makhaba by committing the following:*

- (a) you forced him to use the "nappy" when it was not necessary or he did not require it.*
- (b) you clapped him when you were washing him.*
- (c) you threw him on the bed after washing him.*

(d) *you hit him with a fist behind his head on the night of 27 August 2009."*

The applicant denied the allegations of misconduct. In the absence of counter allegations by the respondent there is no reason to reject the version of the applicant. The applicant's explanation on what transpired between him and the patient does seem rational and reasonable. The indication is that there was no intention by the applicant to ill-treat the patient. The applicant must however accept that a patient must be treated with the utmost care. It is determined that the dismissal of the applicant was substantively unfair.

## 6.

With regard to the procedural issues the only issue that was put on record was that DENOSA was not informed of the applicant's disciplinary hearing. It is undisputed that the applicant was shop steward. The procedural guidelines in schedule 8 of the LRA does state that in such circumstances a union must be informed of disciplinary action taken against shop stewards. The applicant was given seven days prior notice of the disciplinary hearing. There is no reason why the applicant could not have informed DENOSA of the disciplinary action. The applicant elected not to have a representative because he believed that he was innocent. During cross-examination the applicant confirmed that he was afforded the opportunity to

present a version at the disciplinary hearing. The applicant's participation during the disciplinary hearing was however limited because he believed that he was innocent. Although there was not compliance with the procedural guidelines as set out in schedule 8 of the LRA with regard to the notification to DENOSA of the disciplinary action against the applicant the indication is that the applicant had the opportunity to present his case at the disciplinary hearing. There is no indication that the applicant was prejudiced because of the failure to notify DENOSA of the disciplinary action. In such circumstances it is determined that the dismissal of the applicant was procedurally fair.

7.

The applicant seeks reinstatement. In terms of Section 193(2) of the LRA an arbitrator must require the employer to reinstate or re-employ an employee unless:

- The employee does not want to be reinstated or re-employed;
- The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- It is not reasonably practicable for the employer to reinstate or re-employ the employee;
- The dismissal is unfair only because the employer did not follow a fair procedure.

Having considered the peremptory condition set out in Section 193(2) of the LRA it is determined that the applicant must be reinstated. Although it has been determined that the applicant did not deliberately ill-treat a patient, the patient did complain which is an indication that the applicant may not have acted with utmost care. The applicant's failure to fully participate in the disciplinary hearing had the result that the chairman of the disciplinary hearing had one version to decide upon. The abovementioned contributory issues towards the termination of the applicant's services must also be considered in determining an appropriate remedy. The



indication is that the applicant did not contribute to the extended time period since the dismissal and the date of the conclusion of the arbitration. Having considered the abovementioned issues it is determined that the applicant must be reinstated. The reinstatement must be effective from 1 July 2010.

## **AWARD**

1. The dismissal of the applicant on 18 March 2010 was substantively unfair. The dismissal of the applicant on 18 March 2010 was procedurally fair.
  
2. The respondent must reinstate the applicant without loss of benefits and on the same terms and conditions as before the termination of the applicant's services. Although the reinstatement is effective from the date of dismissal, i.e. 18 March 2010 the applicant is only entitled to remuneration with effect from 1 July 2010 at the remuneration rate of 8 775.07 per month less statutory deductions. Payment of the outstanding remuneration from 1 July 2010 must be effected within 30 (thirty) days after the date of this award. The applicant must tender his services at the respondent within twenty-four hours after receipt of this award.
  
3. No order as to costs.

SIGNED AT PRETORIA ON THIS THE 1<sup>ST</sup> DAY OF MARCH 2011

A handwritten signature in black ink, appearing to read 'PH KIRSTEIN'. The signature is written in a cursive style with a large initial 'P' and 'K'.

**PH KIRSTEIN**

**ARBITRATOR**