

Case Number: PSHS442-11-/12

Panelists: Malusi Mbuli

Date of Award: 19-12-2012

In the **ARBITRATION** between

M. G. Makeng

(Applicant)

And

Department of Health – Eastern Cape

(Respondent)

HEADNOTE:

Applicant was subjected to a disciplinary enquiry and was dismissed after he was found guilty of 5 charges appearing in the notice to attend the disciplinary hearing.

Applicant denied the allegations and held that his dismissal was substantively unfair. The applicant also disputes the procedural fairness of his dismissal because he was not notified of the last day of the hearing and the hearing proceeded in his absence.

Applicant's dismissal was procedurally and substantively fair.

DETAILS OF THE HEARING AND REPRESENTATION

1. The matter came before the PHSDSBC for arbitration in terms of section 191(5) (a) (iii) of the Labour Relations Act No 66 of 1995 (“the Act”). It was set down for an arbitration hearing at the Fort Grey Hospital in East London on the 28th of September 2012, 29th and 30th of December 2012.
2. The applicant, Mr. M. G. Makeng attended the hearing and was represented by Mr. M. Nyembezi an official of the applicant’s trade union NEHAWU.
3. The respondent Department of Health – Eastern Cape was also present at the hearing and was represented by Mr. C. X. Buhlungu an official of the respondent.
4. The matter proceeded on the 28th September 2012, 29th December 2012 and was finalized on the 30th of December 2012.

ISSUE TO BE DECIDED

5. I am required to determine whether or not the dismissal of the applicant was unfair, if so, I must determine the appropriate remedy in terms of section 193 and 194 of the Labour Relations Act 66 of 1995 as amended.

BACKGROUND TO THE ISSUE

6. The applicant prior to the dispute was employed by the respondent as an Inventory Officer and was later dismissed by the respondent for misconduct after a disciplinary enquiry that was concluded on the 12th of January 2012.
7. The applicant dispute the allegations leveled against him and argue that his dismissal was substantively unfair, the applicant also disputes the procedural fairness of his dismissal.
8. He referred a dispute to the PHSDSBC in terms of section 191 (5) (a) (iii) of the Labour Relations Act 66 of 1995 as amended, alleging that the respondent has unfairly dismissed him.

SURVEY OF EVIDENCE

Submissions by the respondent

9. The 1st respondent's witness, Nontsikelelo Gazi testified that he works for the respondent and was a direct supervisor of Mr. Makeng before he was dismissed by the respondent. She stated that in her department they are expected to conduct quarterly reviews and the applicant was invited to present his quarterly reviews for his section on more than one occasion and he did not come to present such reviews repeatedly.
10. She submitted that there was no explanation or reason that was given by the applicant for failure to present such reviews and that there was also no apology that was given by him for failure to attend. She stated that several letters were addressed notifying him of the consequences of failure to obey the instruction and do his work but the applicant ignored those letters.
11. When he was approached to do his work and advised of the steps that the employer can take if the work is not done he would even indicate that the employer can just charge him if he feels he wants to do so. She stated that the applicant would sometimes leave the workplace without notifying her and would not know his whereabouts.
12. She told the hearing that he felt disrespected by the applicant because he was just not willing to obey her instructions. She told the hearing that she reported the applicant's behavior to the CEO and even when the CEO called him he would not come. The witness testified that she never received reviews from the applicant and the absence of such reviews affected the hospital reporting because the hospital reviews were not complete. She stated that the applicant took the company property to his place without authorization when he knew that he was not supposed to take the company property outside and if there was a need to do so he must at least have authorization.
13. She also stated that the applicant has also reported late for duty several times and was not apologetic or remorseful about what he did. The respondent's representative then called their 2nd witness, Mrs. Nonceba Nqini who testified that she works for the respondent as a CEO and that she knows Mr. Makeng because he was working at the Fort Grey Hospital.
14. She stated that Mr. Makeng was reporting to Mrs. Gazi and that Mrs. Gazi has informed her of a number of complaints against the applicant Mr. Makeng. She stated that Mrs. Gazi told her that Mr. Makeng was not preparing the quarterly reviews and was insubordinate to his superior Mrs. Gazi.
15. She testified that she called Mr. Makeng to discuss these issues and Mr. Makeng refused to come to her because he would not comply with any instruction from any one. She confirmed that he did not do the

quarterly reports after he was instructed to do so. She also stated that Mr. Makeng was working in a critical department that was in charge of the stock and had to report on the stock because it was required by the District Office and failure to report made the hospital not to be compliant. She confirmed that Mr. Makeng once complained that he had a shortage of staff to assist him and even after he was provided with such staff members he did not perform his duties properly and there was no reason that he advanced for failure to perform his duties.

16. The witness testified that Mr. Makeng attended a PMDS workshop without authorization and when he was questioned about that he indicated that they must just charge him if they wanted to charge him. She stated that the applicant was just disrespectful and insubordinate to any one superior to him.
17. She told the hearing that on the 24th of December 2010 the applicant took his girlfriend to hospital using the hospital vehicle that was not authorized and there was no report that was made by him about that. She stated that there was no pass out that was authorized for the vehicle to leave the premises and it was taken after hours.
18. He also stated that after the applicant was suspended he refused to vacate the hospital apartment that he was occupying after he was instructed to do so by hospital management. She testified that the applicant was trained by the District Office and have attended a number of workshops and he cannot say that he was not capable of performing his duties.
19. The respondent's representative then called their 3rd witness, Nokuzola Xaso who testified that she complained about Mr. Makeng because he was refusing to issue out equipment in the Surgical Stores and she wrote a letter to Mrs. Gazi complaining about that matter. She stated that when she confronted Mr. Makeng about the computer Mr. Makeng shouted at her, advanced towards her, pointed at her and that she confronted him because the computer was taken away.
20. The employer representative then called their 4th witness Nathinina Fekade who told the hearing that on the 20th of July 2010 he ordered stationery from Mr. Makeng and the applicant refused to issue out stationery. He stated that Mr. Makeng then called him to his office, shouted at him saying that he was overworked in his department and for that reason she does not want him in that institution because she felt humiliated.
21. She stated that the failure to supply equipment delays the services that are supposed to be rendered by the hospital. She also confirmed that she had a good working relationship with Mr. Makeng before he shouted him.

Submissions by the applicant

22. The applicant Mr. Mtunzi Goodman Makeng stated that he use to work for the respondent as an Inventory Officer and this was a senior position and he thought that he would have assistants working under him. He stated that he requested staff several times but was not allocated people who were going to assist him.
23. He testified that he did the stock taking but sometimes did not complete it because he had no people who were working under him. He confirmed that he was reporting to Mrs. Gazi but disputed that he did not attend the meetings that were called by her and the CEO of the institution.
24. He told the hearing that part of his duties was to fill in the inventory register and it was very difficult to complete. He confirmed that he did not issue out equipment at the surgical stores because there were no records in those stores from the pharmacy. In response to an allegation that sometimes he would not issue stationary he indicated that there stationery is not issued everyday and that there are days that are specifically set aside to issue stationary and the day in question was not an appropriate day to issue out stationary.
25. He denied that he was disrespectful to any one and also denied that he shouted and pointed people working with him with a fingure. He testified that whenever he was asked to go to Mrs. Gazis office he would go there and has never defied the authority of management. He confirmed that at one stage he did not attend the meeting when he was called to attend and stated that he could not leave the employees he was working with to attend the meeting because he had to look after them. He denied that he took the vehicle of the institution without permission and without signing the register and stated that all those who are accusing him of such wrong doing are framing him.
26. He confirmed he knew his job as defined in his job description and that he did the inventory and reviews but were incomplete and did not know that he was expected to submit the reviews. He confirmed that he took the company property away and also confirmed that before the company property is taken away it must be authorized by a senior person. He denied that he did not perform his duties, that he was insubordinate and that he shouted at any member of management. He also testified that he complied with the terms of his suspension and he did not come to the hospital but came in when he was going to the residence.
27. The applicant's representative then called their 2nd witness, Mr. Monde Dondashe who testified that he was the applicant's representative at the disciplinary hearing that was held in December 2010 when the matter was adjourned because of time.

28. He stated that there were suggested dates when they were going to reconvene and those dates were not confirmed by the parties to the hearing. He stated that he did not attend the hearing on the 12th of January 2012 because he did not know about that date and was only called by Phila and he asked for the postponement.
29. He told the hearing that the chairperson did not postpone the matter and the applicant did not participate in the hearing. He also said that the notice to attend a disciplinary hearing was supposed to be in writing.
30. The last applicants witness was Linda Vakele told the hearing that he was appointed by Mr. Makeng as part of his stork taking team on the 30th of June 2010 and when he got there he noticed that there was a shortage of staff. He also said that there were 4 members of the stock taking team.
31. The applicant's representative then closed their case and I then called Mr. Bonginkosi Mncanyana the chairperson of the disciplinary hearing to confirm some of the aspects of the hearing that was adjourned. He stated that when the matter was adjourned in December 2011 the parties looked at their diaries and arranged the date of the next meet as the 12th of January 2012 and the parties proposed to start at 08:30.
32. He stated that on the date of the hearing the applicant arrived and his representative failed to attend and when the representative was called he said he did not know about hearing. He said the hearing had to proceed because the date was arranged between the parties and the parties were also reminded about the date the previous day.

ANALYSIS OF EVIDENCE AND ARGUMENT

33. Section 185 of the Act provides:-

'Every employee has the right not to be:

(a) Unfairly dismissed.

34. The Act recognizes three grounds for termination of the employment relationship between parties. These grounds are the conduct of the employee, the capacity of the employee and the operational requirements of the employers business. The employer has the onus to prove that the dismissal of the applicant was procedurally and substantively fair.
35. In this dispute the applicant dispute the procedural as well as substantive fairness of his dismissal and argues that the employer has unfairly dismissed him. On the procedural aspect the applicant and his

witness who represented him at the disciplinary hearing testified that the date of the next hearing was not arranged and confirmed between the parties at the disciplinary hearing.

36. Surprisingly the applicant attended the disciplinary hearing on the 12th of January 2012 only to find that his representative was not present even though he says he was informed a day before. The employer representative who was present at the hearing confirmed that a date was arranged and also led evidence of the chairperson of the disciplinary hearing who also testified that the 12th of January 2012 was agreed between the parties after there was no agreement on the date falling on the first week of January 2012 because of applicants representatives commitments.
37. On the substantive issue the applicant was charged and found guilty of unauthorized possession of hospital property, contravention of the Public Service Code of Conduct, Gross dereliction of duty, incompetence, insubordination, unauthorized absence and unauthorized use of government vehicle. The applicant denied all the allegations leveled against him and also argued that his dismissal was substantively unfair. The employer representative then called 4 witnesses who testified on different charges respectively.
38. The evidence of these witnesses was clear coherent and relevant to the charges for which the applicant has been charged. The witnesses as can be seen above in the topic dealing with survey of evidence confirmed that the applicant took and used the hospital property without permission and when he was confronted about that he was not even apologetic about it. These witnesses also confirmed that the behavior of the applicant was very rude to his superiors and has demonstrated an element of being insubordinate to any member of management. He also failed to perform his duties after he has been instructed and reminded of what he has to do in terms of his job description.
39. He disrespected everyone in the hospital and was not willing to take instruction from any one including the CEO of the institution. He has on a number of occasions reported late for duty and has been absent without permission of his supervisors. The response of the applicant to the charges was just a bare denial where the applicant denied every allegation leveled against him. He never showed any sign of remorse and is the type of an employee who generally does not respect his managers and for this reason cannot be trusted. At cross examination of all the witnesses the applicant failed to dispute the evidence of the witnesses and for that reason their evidence stands out as probably.
40. It is not disputed that the type of the transgressions dealt with in this dispute is a serious act of misconduct and therefore punishable by a dismissal for the first transgression. It is also not disputed that the rule relating to this type of transgression was known to the employee and also the consistent application of the rule was not placed in dispute.

41. The question that this arbitration has to answer therefore is whether the employee broke the rule that is existing and prohibited by the employer. From the evidence that has been led in this hearing I am satisfied that the applicant has broken the rules that were known to him and that dismissal was an appropriate sanction. In coming to that conclusion I have considered the bad effect that the offences have at the workplace, the consequences of allowing the employees to follow the applicant's example, the position that the applicant occupied, the example that he portrays to other employees and the general interest of the employer as a public institution.
42. I am of the firm opinion that the applicant committed the transgressions for which he has been charged and found guilty of and that the rationale that I have used in coming to this conclusion is the one that qualifies when we talk about reasonableness and weighting the interests of both parties as directed the Constitutional Court decision in *NEHAWU v/s University of Cape Town (2003) (CC)* where the court held that the arbitrator is expected to have regard to the interest of both parties in coming to a conclusion whether the conduct of the employer was fair or not.
43. In this dispute the interests of the employer far outweigh those of the applicant. The applicant also tried to justify his wrongdoing throughout the disciplinary processes leading to and including this arbitration hearing and therefore cannot be trusted.
44. The employers version in so far as it relates to substance is accepted, that of the applicant is rejected and this means that the employer has managed to discharge its onus in terms of section 192 (2) of the act. Section 188 of the Act requires that a dismissal must not only be for a fair reason, but must also be effected in accordance with a fair procedure. I accept the employer's version that a fair procedure was followed when the applicant was dismissed and the applicants claim that his dismissal was procedurally unfair is rejected.
45. This means that the dismissal of the applicant was procedurally and substantively fair.
46. I therefore make the following award.

AWARD

47. The dismissal of the applicant, Mr. M. G. Makeng, by the employer Department of Health Eastern Cape was procedurally and substantively fair.
48. The applicant is therefore not entitled to any relief.

Signature:



Commissioner: **Malusi Mbali**
