



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS444-17/18**

Panellist: **Thando Ndlebe**

Date of award: **16 April 2018**

In the matter between:

TSOTETSI, ISAK TEBELE

APPLICANT

and

DEPARTMENT OF HEALTH- FREE STATE

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

- [1] The matter was sat down before me by the Council as an arbitration process on 26 March 2018 in Bloemfontein. The Applicant, Mr. Isak Tebele Tsotetsi, was present and was represented by Mr. Tsotetsi, an attorney from Tsotetsi Attorneys.
- [2] The Respondent was represented by Mr. Majola, its Labour Relations Manager.
- [3] The Council provided interpretation services in SeSotho through Mr. Mpitsi.

ISSUES TO BE DECIDED

- [4] I am required to determine whether or not the Applicant's dismissal was procedurally unfair when the Respondent confirmed his appeal application (relating to his

dismissal) beyond the thirty (30) days prescribed period. In the event I find in favour of the Applicant, that I order appropriate relief.

BACKGROUND TO THE DISPUTE

[5] The Applicant was appointed by the Respondent in the position of Basic Life Support – Emergency Medical Services on 1 November 2000.

[6] The Applicant's dismissal was confirmed by the Respondent in June 2017.

[7] The Applicant was earning an annual salary of R160 386.00 at the time of dismissal.

SUMMARY OF EVIDENCE AND ARGUMENTS

Applicant's case

Mr. Isak Tsotetsi

[8] He was dismissed by the Respondent on 15 March 2015. He then lodged an appeal against the Respondent decision to dismiss him. He received the appeal outcome in June 2017 whilst he worked at the Respondent's Emergency Medical Services Control Room. He was transferred by the Respondent to the position of Control Room Operator at the instruction of Mr. Mosheu and Ms. Mohlala. He occupied the position of Basic Life Support before the latter mentioned transfer. He was informed by Mr. Mosheu and Ms. Mohlala that the reason behind the transfer was that the Respondent had received complaints about his conduct.

[9] He had worked in the Respondent's Control Room for approximately two years in the past before the transfer. He had a cordial relationship with his colleagues during his employment with the Respondent. He also did not have issues with management before his dismissal. Management also provided him with opportunities to act as a Second-in-Charge in the past. When he received the appeal outcome from the Respondent, he felt bad. He became sick after receiving the appeal outcome from the Respondent. He did not know what was going to happen with his life after he received the dismissal notice from the Respondent in March 2015.

[10] He was divorced by his wife after the dismissal. He was disciplined by the Respondent three times for various acts of misconduct before the dismissal. He feels remorseful for the acts that lead to his dismissal in June 2017. The dismissal negatively affected him psychologically. The Council should find in his favour in these arbitration proceedings.

Under cross-examination, Mr. Tsotetsi, responded as follows:

[11] He was once found guilty by the Respondent of having driven an ambulance without authority and he received a sanction of a suspension without pay for three months. He never appealed the latter mentioned sanction. He would like to be reinstated by the Respondent as he still wants to serve African communities. He is not challenging the substantive fairness of his dismissal.

[12] He felt remorseful when he received the dismissal notice from the Respondent and it is not in his nature to make mistakes. The sanction of dismissal by the Respondent was too harsh. He was prejudiced by the appeal outcome as his health deteriorated to the worst thereafter. He started to consult medical doctors after he received the appeal outcome. He was also financially prejudiced by the dismissal as the Respondent stopped his salary in May 2017. The Respondent never explained to him why the salary was stopped. He discussed the issue of the salary stoppage with his supervisor.

[13] It was Mr. Mosheu and Ms. Mohlala who decided to transfer him from operating an ambulance to the Control Room as they knew that he had the appropriate experience to perform the job. He interacted with patients personally when he worked at the Control Room. He did not lose his overtime and performance management benefits when he was transferred to the Control Room. The Control Room is an important section within Emergency Medical Services. He did not receive his night shift allowance when he operated at the Control Room. The appeal application was made on his behalf by a union official.

[14] He was disciplined in the past by the Respondent for having issued a member of the public with latex gloves to perform functions of a qualified medically qualified person onto a patient. He instructed the member of the public to work on a patient.

The Respondent's case

Ms. Ntombifuthi Mohlala

[15] She is appointed by the Respondent as the Station Manager – Emergency Medical Services in Welkom. The Applicant was appointed by the Respondent as a Basic Life Support official and he worked in ambulances. The Applicant was dismissed by the Respondent for misconduct. The Respondent transferred the Applicant from the position of Basic Life Support to operate the Control Room after he was involved in four acts of misconduct. The acts of misconduct that the Applicant was found guilty on were as follows; firstly, the Applicant and a colleague left a patient at Brownville Police Station who died an hour thereafter, secondly he asked family members to clean up a patient who had suffered from diarrhoea and left the patient as he stated he was had to access a response vehicle, thirdly the Applicant and his partner refused to attend to a patient who had suffered an epileptic fit and finally, he refused to assist a pregnant patient as she had fathered “ child of a veil pop”. The last incident of misconduct was the one that resulted in the Applicant's dismissal.

[16] The Applicant's main duty at the Control Room was mainly to attend to telephone calls from the public who sought ambulance services. The Respondent's officials operating the Control Room do not have physical interaction with members of the public. The Control Room is the link between patients and the dispatch of ambulances. The mother of the pregnant patient who was not attended to by the Applicant lodged a written statement that lead to formal misconduct charges being levelled against him by the Respondent.

[17] It was the Respondent's management that decided to transfer the Applicant from Basic Life Support to the Control Room after his dismissal pronouncement. The Applicant posed a legal risk to the Respondent after his dismissal was issued by the

Respondent and some of his colleagues did not want to work with him. Management did not trust the Applicant any longer after his dismissal notice was issued. There is no trust relationship between the Applicant and Respondent any longer.

Under cross-examination, Ms. Mohlala responded as follows:

[18] The position of Basic Life Support is important like that of an Operator at the Control Room and both functions require the same qualifications. Members of the public call the Control Room and information is received by the Operators for them to access ambulances. It is the Operator of the Control Room who decides what level of care is required by patients for dispatch purposes. The Control Room Operators do not have physical contact with patients, whereas a Basic Life Support official has such physical contact.

[19] She and Mr. Mosheu had a meeting with the Applicant in respect of his transfer from Basic Life Support to the Control Room in order to save the Respondent from embarrassment. Mr. Yawa was the manager responsible for the Control Room. The role of managers is to initiate disciplinary processes against employees but they have no control on appeal applications. She has a good relationship with the Applicant. The role of management of Emergency Medical Services is to ensure that ambulances are dispatched by the Respondent to the public and to maintain discipline of employees.

Ms. Sibongile Mtshayi

[20] She is currently appointed by the Respondent as the Acting Deputy Director Labour Relations. She cannot be involved in appeal applications but assists employees to file appeal applications with the office of the Appeal Authority or Member of the Executive Council (MEC). She also follows up with the MEC so as to monitor the progress of appeal applications. When she joined the Respondent in 2016 she was the MEC of the Respondent, Dr. Molokoane left the employer. The new MEC, namely Mr. Butana Khompela has established a panel to deal with appeal applications. The

finalization of the Applicant's appeal application was as result of the political transition from MEC Dr. Molokoane to MEC Mr. Butana Khompela.

[21] The Applicant did not suffer any prejudice between the issuing of the dismissal notice and the issuing of the appeal outcome as he could have been dismissed a long time ago. The current MEC has appointed a panel of two assessors to deal with appeal applications. When political heads make a mistake, the administration suffers as was shown in the recent Life Esidimeni incident in Gauteng.

[22] The current office of the MEC has capacity to deal with appeal applications. The Respondent was accountable during the processing of the Applicant's appeal as he received his salary during that period. The Respondent is expected to finalize appeal applications within 30 (thirty). The Respondent took approximately three (3) years to finalize the Applicant's appeal application. The delay in the finalization of the Applicant's appeal application did not mean that the misconduct was not serious.

ANALYSIS OF EVIDENCE AND ARGUMENTS

[23] I have considered the evidence and written closing from both parties.

[24] The evidence of the Applicant was that in view of the fact that the Respondent took approximately twenty-seven (27) months to finalize his appeal application, the Council should find in his favour and order retrospective reinstatement. It was the contention of the Applicant that he suffered psychological harm as a result of the Respondent's delay in finalization of the appeal application. The Applicant however did not submit any documentary or corroborating evidence during the arbitration proceedings to prove that he suffered psychological harm. The Applicant submitted that he also had to consult medical doctors after the dismissal but again no documentary or corroborating evidence was presented before me to confirm these claims.

[25] In his closing arguments the Applicant submitted that “the next question becomes were there reasonable grounds for the delay. Ms. Mtshali says it’s because of the transition in political offices. It is our submission that this ground is frivolous and baseless. The change in political offices should not and cannot affect standing duties of the offices concerned”. The Respondent’s case was that the delay was as a result of the change in political heads. Ms. Mtshali stated that the Applicant did not suffer any prejudice as a result of the delay as he continued to receive his salary. On the other hand the Applicant submitted that his wife divorced him after the dismissal notice was issued and his children doubted him and same was the prejudice he suffered. I cannot find that the Applicant’s unsubstantiated claims in so far as his family issues are concerned can be viewed as prejudice. In the event the Applicant would have proven a direct correlation between the issuing of the dismissal notice by the Respondent on 15 March 2015 and his family woes, same would probably be found as prejudice.

[26] The Applicant submitted that the fact that the Respondent transferred him from Basic Life Support services to the Control Room was an indication that the employer-employee trust relationship had not broken. It was the testimony of Ms. Mohlala that management did not trust the Applicant after the 15 March 2015 and he had to be transferred to the Control Room so as not to embarrass the Respondent any further. It is my finding that there was nothing improper on the part of the Respondent when the Applicant was transferred from Basic Life Support services to the Control Room. The Applicant confirmed during the arbitration proceedings that he was found guilty for various serious acts misconduct; hence it is my view that the transfer to the Control Room was long overdue. I cannot find that the transfer of the Applicant from Basic Life Support services to the Control after the 15 March 2015 implied that the employee was still trusted by the Respondent to perform the duties he was appointed for. In my view the Respondent confirmed that the employee-employer trust relationship was broken when it dismissed the Applicant on 15 March 2015. The Respondent was transferred to the Control Room by the Respondent in compliance with ***paragraph 8.8 in the PSBC Resolution 1 of 2003*** which states that after the employer issues a dismissal notice and an employee appeals, “. . . he or she must resume duties immediately and await the appeal while on duty”.

[27] The main crux in this matter is that the Respondent was not justified in issuing the appeal outcome in June 2017 after it had issued the Applicant with a dismissal notice on 15 March 2015. The Respondent's stated that the delay was as result of change in political heads. It was the evidence of Ms. Mtshali that it was not within her office to interfere in appeal applications, save to follow up on the progress of such applications. But the question still remains; was the delayed finalization of the Applicant's appeal application by the Respondent from 2015 to June 2017 justified?

[28] It is provided at **paragraph 8.8 in the PSBC Resolution 1 of 2003** that **"Departments must finalize appeals within thirty (30) days**, failing which, in cases where the employee is on precautionary suspension, he or she must resume duties immediately and **await the appeal while on duty"** (My emphasis). It is therefore clear that the Respondent was expected to finalize the Applicant's appeal application within the prescribed thirty (30) days. I find that the delayed finalization of the appeal application could have been avoided. I however, do not agree with the Applicant's argument that the delay should have a result of the Applicant being reinstated by the Respondent. Moreover, the Applicant did not challenge the substantive fairness of his dismissal with the Council. I will not make sense for the Council to order reinstatement in matters where government employees are dismissed by their employers but there has been delayed finalization of appeals due to unforeseen circumstances. In as much I do not condone delayed finalization of appeals applications in such matters, to correct such wrongs (where reasons for the delay are provided) on the part of employers by reinstating an employee as in the dispute before me, would be a travesty of social justice.

[29] The Applicant did not lead any evidence during the arbitration proceedings to prove as what actions he took to ensure that the appeal application was expedited. In my humble view, at all material times from 15 March 2015 (when the dismissal notice was issued) and up until June 2017 (when the appeal authority confirmed the dismissal), the Applicant was receiving a salary and benefits from the Respondent. During the proceedings the Applicant did not challenge the Respondent's oral evidence that the MEC Dr. Molokoane was replaced by MEC. Mr. Butana Khompela.

I am therefore satisfied that it is highly probable that the change in political heads or the Members of the Executive Council was the main reason for the delay in the finalization of the Applicant's application. Moreover, in the event the MEC would have finalized the Applicant's appeal application, say by the 10th April 2015; would the Applicant have challenged the procedural fairness of his dismissal?

[30] In the event the Respondent did not provide an explanation for the finalization of the Applicant's appeal application, I would probably be swayed to find against the Respondent. I also cannot find that the explanation for the finalization of the appeal application was unreasonable and that same was prejudicial to the Applicant. Prejudice can be interpreted to mean detriment. I therefore cannot find that the Applicant suffered prejudice as a result of the delay. In the matter of **Dell v Seton 2009 (BLLR) /LC/ 122** the employer failed to keep to its own disciplinary code when dismissing an employee. The Labour Court held that the process that was followed, despite having deviated from the disciplinary code, was not unfair and that the deviation did not result in any prejudice to the employee. The Court therefore upheld the fairness of the dismissal.

AWARD

[31] I find that the dismissal of the Applicant, Mr. Isak Tebele Tsotetsi, by the Respondent, Head of Department of Health – Free State, procedurally fair.

[32] The referral of the Applicant is hereby dismissed.



PANNELIST: THANDO NDLEBE