



ARBITRATION AWARD

Panellist/s: Leslie Martin
Case No.: PSHS466-11/12
Date of Award: 25-Jul-2012

In the arbitration between:

P.S.A. on behalf of B. Bowers

(Union / Applicant)

and

Department of Health- Western Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration was held at the Western Cape College of Nursing College in Klipfontein Road Athlone on 29 February, 23 March, 17 April, 30 May, 5 June, 7 June, 21 June 2012.
2. The applicant, Mr. Brian Clifford Bowers (Bowers), was represented by Advocate J. van der Schyff instructed by Mr. May of Adams attorneys. The respondent, the Department of Health, Western Cape (the respondent), was represented by Advocate F. Rodriguez, its deputy director.

ISSUE TO BE DECIDED

3. Was the dismissal of Bowers fair?

BACKGROUND TO THE ISSUE

4. Bowers worked for the respondent from 15 July 1988 until 1 September 2011 when he was dismissed. At the time of his dismissal Bowers was a control industrial technician at Groote Schuur Hospital (the hospital) and earned R282,000.00 p.a.
5. Bowers was charged with and dismissed on 10 counts of misconduct. Charges 1 to 6 relate to Bowers' alleged failure to notify the respondent that his father in law, as

the sole member of BS dynamics C.C (BS Dynamics), a service provider, was awarded contracts by the respondent or that he failed to recuse himself from the awarding process.

6.Charges 7 to 9 allege that Bowers awarded contracts to 3 separate companies on different occasions, which companies it is alleged he had a relationship with the owners thereof.

7.Charge 10 alleges that Bowers conducted himself in a corrupt manner by offering to manipulate the procurement documentation for financial gain.

8.Bowers had been charged with 6 counts of breaching a rule contained in Resolution 1 of 2003, read with Clause C.4.6 of the Code of Conduct, Public Service Regulations, 2001, as amended (C.4.6) and the Western Cape Procurement Act (Business Interest of Employees), No. 8 of 2010, in that he did not disclose that his father in law had an interest in BS Dynamics, or recused himself from the acquisition of services when the department awarded contracts to BS Dynamics. These were contracts of varying amounts and on varying occasions between 2008 and 2010.

9. In terms of Section 138(7) of the Labour Relations Act 66 of 1995 as amended, I am required to provide brief reasons with my award. Accordingly, I shall only refer to the evidence I consider relevant to determining the dispute between the parties.

SURVEY OF EVIDENCE AND ARGUMENT

Each party handed a bundle of documents into evidence.

10. Mark Anthony Diergaardt (Diergaardt), a forensics practitioner in the Forensics Investigation Unit (FIU), Charlotte Charmaine Humphreys (Humphreys), a senior administrative officer in procurement and tenders and Roy Charles Williams (Williams) who is self employed, testified under oath for the respondent. Bowers testified under oath on his own behalf.

THE EVIDENCE FOR THE RESPONDENT:

11. Diergardt was instructed by Clayton Appolis, the head of the FIU at the time, to investigate allegations against Bowers, the engineering department and allegations by Mr. Williams that Bowers would allocate work at an agreed price and his relationship with other service providers.

12. Bowers had signed numerous requisitions approving work for BS Dynamics. He had not declared his interest in this business in which his father in law was the main member. He had also failed to recuse himself from interacting on behalf of the respondent in meetings with BS Dynamics.

13. Diergaardt believed that charges 1 to 10 dealt with corruption and that the respondent takes a zero tolerance stance to such.

14. Williams had met with Bowers in December 2009 to establish what to do in order to get work from the hospital. He was told to submit a quote to the hospital and that Bowers would be able to manipulate the quote so as to include in it a portion which would constitute a payment for Bowers for having given Williams the work.
15. Diergaardt's mandate was to investigate Bowers in respect of his relationship with service providers and his lavish lifestyle funded by kickbacks from such service providers.
16. Diergaardt had received complaints from 2 sources viz. Harold Scott(Scott), the chief engineer at the hospital and Bowers' superior and from Williams.
17. Further investigations revealed that Bowers was a member of Ikhapa CC and his father in law a member of BS dynamics CC with its registered address being the residential address of Bowers.
18. During the first of two interviews Bowers said he was not aware of any of his colleagues or family members providing services to the hospital. He also indicated that he did not socialize with any of the service providers. An analysis of Bowers' computer revealed he had been on a golf trip with service providers.
19. Bowers had also said at the interview with Diergaardt that he was not aware of BS Dynamics providing services to the hospital. His signature however appears on Page 20 of the respondent's bundle of documents and next to BS Dynamics thus authorizing the work to be done. He said that he should not have signed the document as that was the wrong procedure.
20. Diergaardt and Humphreys agreed under cross examination that it seems that charges 1 to 6 should not have been brought against Bowers.
21. According to Diergaardt this would seem to be the case especially if the amounts involved were under R5000.00 (five thousand rand), which pertained to emergency work.
22. He agreed that by virtue of Tradeworld and the respondent being separate one can accept that any report there listing the best tenderer for a contract is not subject to manipulation by the respondent.
23. So one could accept that the list of tenderers Tradeworld provided would be uncorrupted and therefore that Bowers had nothing to do with the awarding of the tender.
24. His findings however, were submitted to the respondent and he was not involved in the official investigation or the drafting of the charges.
25. Diergaardt also agreed in respect of charge 7 that the respondent should have presented some documentary proof of Bowers' involvement in awarding a contract to Republican Builders. He agreed that in the absence of such documentation it would be difficult for Bowers to defend himself against the charge. He could not dispute that Bowers had not awarded a contract to Republican Builders on the basis of friendship with its owner.

26. He agreed too that the more Bowers would interact with a service provider the more friendly they would become.
27. Diergaardt also conceded in respect of charge 8 that the service provider appointed had submitted the cheapest quote and accordingly that nothing was therefore wrong with its appointment even if Bowers and its owner were friends. It might also not have made a difference to the appointment if Bowers had disclosed such a relationship.
28. In addition this service provider was not blacklisted by the hospital, as the case would usually be in such circumstances, and is still getting work there.
29. In terms of the rule contained in C.4.6 Bowers ought to have disclosed his relationship with BS Dynamics.
30. Bowers' function was to authorize a requisition for an item the need for which had been identified by the end user. He would so authorize it when he had established that there was a sufficient budget for the acquisition or the service.
31. Most of the items or services procured by the respondent are advertised on Tradeworld by supply chain management (SCM) for quotations.
32. When the quotations are obtained they are attached to the requisition and sent back to the engineering department where the end user will recommend the suitable company. Thereafter it is returned to procurement where it will be prepared for the quotation committee which comprises SCM officials and various departmental representatives. The most important person will be the person who authorized the requisition.
33. If the requisition had no signature authorizing the procurement it would be sent back to the relevant department for signature. The decision making process runs from the authorization to the acquisition committee.
34. Bowers had not declared any interest in BS dynamics. If he had done so Humphreys would have known about it and would have found such declaration on file with the respondent.
35. Williams, who is self employed running a business in refrigeration and air-conditioning systems, had contacted Bowers with a view to establishing how to procure work from the hospital. Bowers had informed him that for any work that could be done through Bowers the provider would have to pay him 10% in cash. This work Williams understood to be emergency work under a certain amount which did not go out to tender.
36. Williams telephoned Bowers a second time regarding procurement work. At a second meeting Bowers showed Williams documents of work to be put out to tender.
37. Williams considered the 10% a kickback and therefore unlawful and so did not want anything to do with it. This had shocked Williams who knew this was a criminal offence.

38. He however had no comment on the question whether Bowers wanted to enter into a corrupt relationship with him. Williams also could not remember many things that had occurred. Bowers did tell Williams that he would have to go through Tradeworld to procure work.
39. Williams did apply for work on Tradeworld but was unsuccessful. Williams nevertheless called for a second meeting with Bowers but just regarded this as a follow up meeting to see what work would come up.
40. THE EVIDENCE FOR THE APPLICANT:
41. Once Bowers signed off the initial requisition he had no dealings with the supplier or the awarding of the contract.
42. The head of department would send the requisition to SCM from where it would be sent to Tradeworld. Tradeworld would put it out to their subscribers and get a list of tenders which it forwards to SCM. SCM forwards it to the head of department where the request is then made. The head of department must take the tender with the highest preference points or motivate why he would have taken some other tender.
43. The head of department refers it back to SCM where the contract is awarded. Bowers has no say in who it is that SCM awards the contract to unless there is a problem. Ninety nine percent of the time the head of department would make that decision.
44. The contractor will be given an order number. The contractor will then notify the head of department as to when the works would begin or the requisition to be provided.
45. Bowers' signature was attached to the requisition to show that the job had been completed. At that stage he would see that the contractor was BS dynamics by which time he could not do anything about it.
46. He had then informed Scott that he knew BS Dynamics to which Scott had replied that if he had no interest in BS dynamic he had nothing to worry about. Proof of this can be found in the records of the disciplinary hearing in the testimony of Scott.
47. Technically Bowers does not have control over who applies through Tradeworld or who SCM awards the contract to.
48. Any work done had to be approved by Bowers as he, in his capacity as industry control technician, was ultimately responsible therefore.
49. The respondent had never informed Bowers in writing of his having to disclose his relationship with contractors who were related to him. He was also not told of what the interest was that he had to disclose.

50. Prior to 2011 Bowers never played a role in any committee. Thereafter he played a part in the evaluation committee
51. When it was put to Bowers that when he had received the Tradeworld document back and he was going to approve BS Dynamics he should have declared his interest therein he said he was not interested in who was winning contracts and who not. Also the fact that his wife did the books of BS Dynamics has nothing to do with him.
52. Bowers had also said during the investigation that he had no family connection with BS Dynamics and that he had been untruthful when he had said so as he had panicked.
53. Williams had probably raised what he did as he was angry that he did not get any work from the hospital. Bowers had never discussed any money in any percentages with him.
54. Scott had said at the disciplinary hearing that he had not specifically brought these allegations against Bowers but that he had heard these allegations in the department.

55. ANALYSIS OF EVIDENCE AND ARGUMENT

56. It is clear from the evidence presented at this arbitration that Bowers had been dismissed essentially for three reasons. These were his failure to disclose his father in law's interest in BS Dynamics or to recuse himself from the acquisition process; his going on a holiday with and paid for by service providers; and his having promised to procure work for Williams in a corrupt manner.
57. The rules and legislative framework within which Bowers is said to have transgressed is set out in above.
58. It is clear from the argument of Bowers that he challenges the provisions used in the charge sheet while recognizing that the person drafting the charges was a layperson.
59. I am however of the view that Bowers had been involved in a forensic investigation the contents of which left him with very little doubt as to what he was being charged with and the case he had to defend at the disciplinary hearing.
60. In his written heads of argument the applicant therefore contends that charges 1 to 6 contemplate that Bowers' misconduct resides in the fact that he either (i) failed to disclose his father in law's interest in BS Dynamics or (ii) that he failed to recuse himself from the awarding process when the respondent awarded the contract, that is that Bowers was party to awarding the contract. I am however of the view that this is not necessarily the case as set out below.
61. The evidence shows that the parties agree that charges 1 to 6 are similar, varying only in dates and amounts. The evidence before me shows that Bowers' argument, as postulated above, is one of his not being involved in the appointment

of BS Dynamics as the service provider because of his non involvement in the selection of the successful service provider established on Tradeworld.

62. The rule regarding disclosure and recusal as can be gleaned from C.4.6 clearly existed at the time of these transgressions. It states that an employee must recuse himself or herself from official action or process that may result in improper personal gain.
63. The applicant argues cogently that the alleged acts of misconduct in failing to disclose his father in law's interests in BS Dynamics contained in charges 1 to 6 arose before the promulgation of the Procurement Act thus requiring it to be retrospective for the charges to be valid.
64. It is trite in our law and I agree with the applicant in this regard, that retrospective legislation is unfair and invalid. It is so in this case as it would deprive Bowers of his right to conduct himself in accordance with the rule at the time of his alleged misconduct, for reasons of the rule's not being in existence at the time.
65. It is also clear from the Procurement Act that Bowers is obliged to disclose such interest upon his becoming aware thereof. The evidence shows, for example, that Bowers had become aware thereof at least at the time that the requisition form at page 30 of the respondent's bundle containing the scored service providers was returned to him. I do however not agree with the argument of the respondent that at this stage Bowers ought to have declared the interest of his father in law and his wife in BS dynamics in accordance with the provisions of the Procurement Act as this would render the application of this legislation retrospective and unfair as stated above.
66. The same cannot however be said of C.4.6 of the Code of Conduct which was in existence already at the time of Bowers' transgressions. Bowers would have been required to disclose the relationship with BS dynamics through his father in law. His failure to do so constitutes a breach of C.4.6.
67. Bowers' contention that he had in any event disclosed to Scott a relationship with BS Dynamics and that support for this is found in Scott's testimony at the disciplinary hearing is in fact not supported by the extracts thereof that he had read into the record at this arbitration. At best these extracts point to Scott's having a vague recollection of BS dynamics and that Bowers may have had a difficulty therewith but not that he had made a full disclosure of his involvement therewith.
68. It is to be noted that Scott had not been called to testify at the arbitration. Bowers had elected not to call Scott as a witness as he was out of the country at the time and in order that the matter may be finalised.
69. I am furthermore not persuaded by the argument of Bowers that he had nothing to do with the fact that his wife was the administrator of BS Dynamics. This in particular would have Bowers fall foul of C.4.6. The probabilities are greatest that he would know of the interaction of BS Dynamics with the hospital. The probabilities are greatest in fact that Bowers would know of all the business of BS dynamics and in particular its business with the hospital. Clearly enhancing such probabilities is the fact that even the registered address of BS Dynamics is the residential address of Bowers himself.

70. In these circumstances it would in fact not be far-fetched to conclude that Bowers was thoroughly involved in the business of BS Dynamics and to such an extent that he should not be allowed to rely on the separate legal personality of BS Dynamics to claim it was a business in which he had no involvement. On a balance of probabilities Bowers would through his being an employee of the respondent and for BS Dynamics probably know most of that which revolves around the need of the hospital that can be catered for by service providers.
71. BS Dynamics is therefore most likely to have been a family business, the running of which involved Bowers, his wife and father-in-law as the family concerned.
72. In the circumstances I am in fact reluctant to have the technical definition of "family" as per the Oxford dictionary come to the assistance of Bowers. Bowers' wife is clearly not of the same bloodline as Bowers which would clearly not render her not family of Bowers. The de facto position is that they are all family.
73. It is furthermore clear from the testimony of Bowers himself that he could play a role in the awarding of the contract to the service provider. This role clearly is exercised at the point that the requisition is returned from SCM to the head of department where the request for the successful service provider is then made. It must be noted that while the head of department at this stage usually appoints the service provider with the highest preference points he may appoint another service provider with proper motivation. It is unlikely that this motivation is not discussed between Bowers and the end-user.
74. Bowers, in his capacity of head of department, which capacity is delegated to him, may clearly be subject to the influence of an award to BS Dynamics in circumstances where he might be called upon to exercise this discretion which may, with proper motivation, result in the appointment of a service provider other than the one best scored by Tradeworld.
75. Further in this regard it is not really relevant that Bowers had not sat on the evaluation committee in SCM when BS dynamics was appointed as the service provider. Relevant is the fact that he must deliberately recuse himself from the acquisition process because of his involvement with BS Dynamics and its being a tender. This he did not do in breach of C.4.6.
76. In fact the recusal from the process of an employee so involved would be a removal from that process in all respects but more especially in so far as his interaction with everybody involved in that process is concerned involving the tender in question.
77. Further specifically to Bowers he would have to recuse himself from such process in order to make it clear to all that he has no involvement with in particular the end user who recommends and motivates the tender ultimately preferred for the contract. Given his position in the engineering department it is unlikely that he would not interact with his subordinates, from amongst whom the end-user will originate, which interaction C.4.6 seeks to eliminate. It seeks to eliminate the possibility of an employee of the respondent through an advantage gained by virtue of the employment relationship, depriving potential independent service providers of

a fair opportunity to tender for and acquire work at the hospital. It is this conduct that gives rise to the circumstance that generates the improper personal gain referred to in C.4.6.

78. In fact the denial of Bowers of involvement in the process within the engineering department is so unlikely and far-fetched given his position in that department that it casts serious doubt on his credibility as a witness.
79. Bowers' involvement in the acquisition process clearly has the potential of his making improper personal gain in these circumstances.
80. It is furthermore clear from the wording of C.4.6 that an employee must recuse himself or herself from official action or process that may result in improper personal gain.
81. I am of the view that even Bowers' authorizing payment to BS Dynamics is such official action from which he ought to have withdrawn as such action does have the possibility of resulting in improper personal gain. The point really is that the respondent is not required to prove the existence of any such improper personal gain but merely that the official action is of a kind that may have such a consequence as provided for in C.4.6 therefore requiring the employee to recuse him or herself from the process.
82. The difficulty that this presents for Bowers is that of the nature of such conduct being in the realm of dishonesty which an employee would know and know to avoid. In this regard the evidence shows that Bowers did know that it was wrong not to disclose his relationship with BS Dynamics or to recuse himself from the acquisition process. Bowers then clearly is untruthful when interacting with the Forensic Investigative Unit thereby further highlighting the fact that he knew that what he was doing was wrong.
83. Regarding the allegations of misconduct contained in charges 7 to 9 pertaining to Bowers' deriving an overseas trip paid for by service providers, and allegedly in contravention of the respondent's fraud prevention plan, this too would be unacceptable for reasons of this then being retrospective in its application.
84. Further documents found on Bowers' computer show his having engaged in social activities with these service providers in Phuket (see page 165 of the respondent's bundle of documents).
85. Bowers had denied such activities during his interview with Diergaardt thereby once again casting serious doubt on his credibility as a witness in respect of these charges.
86. In these circumstances it is not inappropriate to infer that Bowers attempted dishonestly to hide the fact that he had gained from the relationship between these service providers and the hospital and that such gain was improper and that it constitutes a conflict of interest between himself and the hospital.

87. In summary with regard to the legislative and rules framework under which Bowers was charged in respect of charges 1 to 9 the principles therein contained existed before the coming into being of the Procurement Act and the Fraud Prevention Plan.
88. They are principles which would have governed the employment relationship between Bowers and the respondent notwithstanding. It is clear from the testimony of Bowers, as stated above, that he was aware of the fact that he was engaged in wrongdoing. These transgressions would also have been established within the context of C.4.6.
89. Regarding charge 10 which deals with Bowers' alleged corrupt interaction with Williams it is first of all clear from the evidence that meetings had taken place between Bowers and Williams. The fact of the matter is that this was done at the behest of Williams in order that he might secure work from the hospital.
90. While the evidence shows Williams being an argumentative witness who on many occasions could not remember or who had no comment to make on questions or versions put to him his testimony is generally credible. Williams did not impress me as a vindictive person who would testify so as to take revenge on Bowers for his (Williams) not getting work at the hospital. Williams had legitimately been angered by the fact that Bowers had expected him to act in an unlawful manner in order to procure work from the hospital. It may be so that he had decided to blow the whistle on Bowers when he did not get any work but this does not preclude his testimony being used against Bowers by the respondent in order to effect the dismissal of Bowers.
91. The testimony of Williams shows a sufficient understanding of the distinction between work put out for tender on Tradeworld on the one hand and emergency work on the other for me to conclude that he had gleaned this from his meetings with Bowers and therefore that his testimony was credible.
92. It was also argued by Bowers that the provisions under which he was charged were partially not applicable. He argued furthermore that the disciplinary chairperson did not pick up on this prompting suspicions of a kind of job resulting in dissatisfaction with the partiality of the disciplinary chairperson and rendering the dismissal procedurally unfair.
93. In this regard I am of the view that as there was no such argument placed before the disciplinary chairperson on account of Bowers himself not participating properly in the disciplinary hearing, the disciplinary chairperson might easily come to the conclusion that this does not constitute an unfairness or an unfairness sufficient to render the disciplinary process procedurally unfair. It must be borne in mind, and this is recognized by the applicant, that the persons drafting the charges were lay persons and further that the charges were drafted sufficiently clearly to have Bowers understand them. This is so particularly within the context of his basic knowledge of the reasons for his being disciplined.
94. It is trite too that the disciplinary process is not a court of law and therefore should not be considered one. The evidence shows that Bowers had been afforded

ample opportunity to prepare for his disciplinary hearing. He had been afforded the right to call and cross examine witnesses and to testify himself. He failed to do so.

95. The evidence shows further that Bowers had been afforded his right to representation at the disciplinary hearing and was represented.

96. All in all I am satisfied that Bowers had been afforded a fair disciplinary process when he was dismissed.

97. Having therefore considered all the evidence presented at this arbitration I find the dismissal of Bowers to have been fair both procedurally and substantively.

Award

98. This application for relief in terms of the provisions of the Labour Relations Act 66 of 1995 as amended is dismissed.

COMMISSIONER: L. MARTIN



Panellist/s: **Leslie Martin**
Sector: **Public Health & Social Development**