ARBITRATION AWARD

Panellist/s: **Pierre Naude**
Case No.: **PSHS494-10/11**
Date of Award: **8-Dec-2011**

In the ARBITRATION between

NEHAWU OBO LUGQOLA

Applicant

And

DEPARTMENT OF HEALTH:EC

Respondent

Union / Applicant Representative

Mr Mqanta

Union / Applicant.s address

Telephone No.

0437616818

Facsimile No

0437600049

Union / Respondent Representative

Mr Mama

Union / Applicant.s address

Telephone No.

0762616144
Facsimile No.
0865629362

DETAILS OF HEARING AND REPRESENTATION:

Both parties were legally represented. The applicant is represented by Mr Mqanta of Mqanta Attorneys and the respondent is Mr Mama of Java Mama Attorneys.

The matter was heard on the 08th and 10th August 2011. Both parties made written closing submissions for which I am grateful to the parties.

ISSUES TO BE DECIDED:

The parties concluded a pre-trial minute and in terms thereof the following issues were placed in dispute:

1 Whether or not the Applicant was legitimately off sick – which relates to the charge of being absent without permission;

2 Whether or not the sanction of dismissal was too harsh – which relates to the substantive fairness of the dismissal;

3 Whether or not the applicant threatened a co-worker Mrs van Niekerk; and

4 The tardiness of the respondent in dealing with the appeal – whether or not that is fair.

BACKGROUND TO THE MATTER:

The applicant was employed by the respondent at the Frere Hospital Complex as a principle administration clerk in the document management office. She allegedly absented herself from the workplace during or about May/June 2005 without the requisite permission. During this period she allegedly refused a lawful instruction to return to work and furthermore allegedly threatened her manager.

She was brought before an enquiry which took place on the 06th July 2005. The respondent charged her with seven (7) transgressions. After the holding of a disciplinary enquiry the applicant was found guilty not guilty of transgression 1 and guilty of the balance of the transgressions. On 11th January 2006 she was advised that she had been found guilty of transgressions 2-7 and was informed by letter that she had been dismissed from the Public Service.

On the 16th January 2006 the applicant appealed. Some 4 years and 9 months later, on 08 October 2010, the outcome of her appeal was communicated to her. The Executing Authority decided, “after due consideration of the applicant.s appeal and grounds thereof to uphold the decision of the chairperson of the disciplinary enquiry”. This resulted in a referral to the council alleging an unfair dismissal dispute and ultimately this arbitration.
SURVEY OF EVIDENCE AND ARGUMENT:

The following facts are common cause:

1 Applicant was employed as a Principle Administration Clerk;

2 She was employed in the document management office at ELGC;

3 Position was at level 6;

4 She has 28 years of service with the respondent;

5 She had no previous warnings

6 The alleged offence / transgression took place in June 2005

7 The disciplinary enquiry took place on the 06th July 2005

8 The outcome was handed down 12th January 2006

9 The applicant appealed on the 16th January 2006

10 The outcome of the appeal is dated 08th September 2010

Evidence

The respondent bears the onus to prove that the applicant was dismissed for a fair reason and after following a fair procedure.

The respondent led the evidence of a number of witnesses.

Mrs Van Niekerk

The witness testified that she was a deputy director in the employ of the respondent and head of administration at the Frere Hospital. The applicant reported to a supervisor and the next level was a manager then herself. She did not deal with the applicant directly because of the reporting structure.

Van Niekerk confirmed that she had received a call from the applicant on the 17th June 2005. She stated that the applicant had said to her that she should stop harassing her. Van Niekerk explained that she told the applicant that if the applicant complied with departmental policies and procedures it would not be necessary to contact her. The applicant.s response was to ask her do you know who you are dealing with and continued by saying that if van Niekerk continued with the harassment her life would be in danger. The applicant concluded by saying that the witness would not know what would happen to her.

The witness responded by asking if the applicant was threatening her person. The response of the applicant was to repeat what she initially said. The applicant then terminated the call abrutly.

She further testified that it is the responsibility of the applicant when applying for leave, to ensure that it is granted before actually going on leave. There are departmental policies in place that prescribe these procedures.

The witness also testified that it was not a “nice feeling” to be threatened and so she placed the incident on record with her superiors. She confirmed that there was no bad blood between the applicant and her.

Miss T N Sifatyi

The witness was the supervisor of the applicant. She testified that the applicant left the leave application form1 on her desk on the 23rd May 2005. There were no exact dates showing on which days she was seeking leave. For this reason she was not able to approve the applicant.s leave. There was also no time table for the exams attached to the application for leave. The applicant should have obtained this from the institution which she was attending.

1 Page 14 of the bundle

2 Page 22 of the bundle.

The witness called the applicant to advise her that she could not approve her leave because of the issue of the dates. The applicant never responded nor did she come and correct the dates.

The witness visited the applicant on the 25th and she then went to her home where the applicant gave her a sick certificate.

The applicant has been in the employ with the respondent since 1982 and that the applicant furthermore knows the procedures relating to the taking leave.

The witness was referred to the circular 29 of 1996 which requires an employee to contact their supervisor in the event of them not coming to work. The witness confirmed that the applicant never advised the respondent.

In relation to the failure to comply with an instruction the witness testified that firstly, the applicant did not comply with the instruction to complete the leave form. Secondly, she was sent a telegram to report on the 17th June 2005. The applicant failed to report for duty and this amounted to insubordination. There were no valid reasons for her refusing to comply with these instructions.

The applicant.s conduct set a bad example to other staff and it was a misuse of state funds. The applicant was absent from the workplace for 13 days in total without authority.

The applicant was referred to a letter2 which purports to confirm that the applicant would be writing semester tests in June 2005. The witness referred to the fact that the letter refers to semester tests and not exams and secondly the fact that the letter is not written on the official stationary of the institution concerned.

The witness did not contact the institution. The applicant was assessed on her performance and was awarded a huge sum of money. The witness did not do the performance assessment on the

applicant so she could not comment.

The witness conceded that her issue with the applicant had more to do with the failure follow the procedures as she was alive to the fact that the applicant.s absence had to do with the application for leave.

Mr R Randall

Was a assistant director with the respondent. He attended the disciplinary enquiry representing the employer. Sifatya went on leave which period overlapped with the applicant unauthorised leave he would stand in for Sifatya.

He confirmed that factors in mitigation and aggravation were presented to the chairman before the decision was made to dismiss the applicant.

She was assessed during the 4 year period that her appeal was pending but that it did not come through him.

Mr Bomeni

Mr Bomeni explained that the delay in dealing with the appeal was brought about by the ever changing of MEC.s and HOD.s in the department. He conceded though that the function of hearing and deciding the appeals is not performed by the MEC personally, but by a body appointed by the MEC. Mr Bomeni stated that the documents relating to the appeal were lost on a number occasions.

Even though the applicant waited for a long period of time for her appeal to be heard, she was not prejudiced by the delay.

Applicant.s Evidence

Fezeka Lugqola

The applicant testified that:-

On the 25th of May 2005 the applicant felt unwell and had to leave her workplace. She left at 13:45 to see a doctor who then booked her off for a period of two days (26th - 27th May 2005. On the 26th May 2005 Sifatyi visited the applicant.s house, where applicant showed her the doctor`s certificate and also explained to her that she could not at that point submit her exam timetable.

The following week applicant felt sick again, saw a doctor who booked her off for 3 days. On the third day she again visited the doctor and was booked off for another 3 days. She

submitted all her sick certificates.

On the 6th of June she collected her time table from Border Technikon and informed Sifatyi about it the following day.

On the 13th June 2005 Sifatyi phoned the applicant, asking whether she is on leave. She then told applicant that she does not see her leave form. Applicant responded that she sent the form through the messenger service. Sifatyi phoned again about a minute later, telling applicant she found her leave form and apologised.

On the 15th June 2005 the applicant attended a standing committee at Cecelia Makhiwane. Her manager, van Niekerk, found out and accused her of submitting a fake doctor.s certificate. Van Nierker, along with Sifatyi, phoned the University enquiring whether applicant was writing her exam on that day.

When applicant went home that evening her daughter told her a man came to the house four times. The man was angry and accused the applicant.s daughter of not telling the truth and gave her a registered letter which she had to sign for.

On the 17th June 2005 applicant phoned Van Niekerk and asked her to stop harassing her family. Toni responded that applicant should have filled in the necessary documents. Applicant denies that she threatened Toni. On the same day the applicant was served with an unsigned telegram at her house. About two days later Peter came to the applicant.s house to deliver an unsigned notice of disciplinary hearing.

In January 2006 the applicant received a copy of a letter of dismissal from Mr Bomeni signed by the Superintendent General with the enquiries of Mr Quinton.

Applicant was however not dismissed and continued working.

In 2010 applicant attended a conference as a trade union representative. At the conference applicant raised a question concerning expectations of employees and said the Labour relations office bears the burden to educate the employees

On the 8th Mr Bhomeni gave the applicant another copy of a dismissal letter and told her he was going to delete her from the personnel system.

Argument

In the applicant.s submissions made in argument a number of additional documents, which were not tendered during the course of the arbitration, were attached for the first time. Whilst a fair amount of flexibility is built into the arbitration process, it is certainly problematic to do so at such a late stage.

ANALYSIS OF EVIDENCE AND ARGUMENT:

The arbitration challenges the fairness of the applicant dismissal relating to transgressions 2 – 7. The first two of which relate to, in one way or another, the applicant.s absence from the

workplace for the period May 2005 until 13th June 2009. The second relates to failing to comply with an instruction to return to work. Transgressions 5 and 6 relate to the allegation that the applicant threatened Mrs Van Niekerk, her superior, during the course of the telephone conversation they had on the 17th June 2005.

The first issue to be decided is whether or not the applicant was legitimately off sick. A number of medical and hospital certificates were incorporated in the bundle. The respondent did not challenge the validity of these certificates and as such they cover various periods that the

applicant was off sick as detailed in these certificates. In other words the applicant was in my view legitimately off sick. She did make herself guilty of the technical offence of not notifying her employer.

Dealing with the charges relating to the applicant.s absence first, it is common cause that prior to the applicant taking the leave, she submitted an application for leave for a period of 13 days annual leave and 6 days special leave (writing exams). The application for leave did not specify the start and end dates and it is for this reason that Sifatyi informed the applicant that the application was non-compliant and was thus not approved. The applicant, despite the intervention of Sifityi, did not rectify the leave application form by inserting the actual dates and is for this reason defective and not approved.

It is furthermore accepted that the respondent sent the applicant a letter instructing her to return to work which the applicant failed to do. Sifatya conceded that she was more concerned with the procedural aspects of the applicant.s absence rather than the fact of her absence. She did however qualify her view by stating that it did undermine discipline in the workplace. In relation the applicant.s leave form one can accept that it does not comply with what is required by the employer.

The letter containing the instruction to return to work that was delivered to the applicant.s address where it was received by her children, was ignored by the applicant. The respondent was quite justified in disciplining the applicant for her absence and failure to comply with an instruction. From the respondent.s side, they were aware from the 13th May 2005 that the applicant wanted to take leave. They also ascertained that the applicant was off sick.

The main contentious issue is the threat against van Niekerk. The applicant in her evidence stated that when she spoke to van Niekerk she told her to stop harassing her. When one considers the totality of the evidence surrounding the study leave issue, the following evidence points on the probabilities to the respondent.s version relating to the threat being more probably. The applicant was contacted by her supervisor to inform her that her leave could not be approved in its current form for the reasons stated earlier in this award. Sifatyi even went to see the applicant at her home. When this did not have the desired effect, a messenger was sent to deliver a letter to the applicant instructing her to return to the workplace. He called on the applicant.s home – according to the applicant – on four occasions. He further was angry as he believed that the applicant.s children were lying to him. It would follow, and is in my view more probable than not, that on learning of the messenger.s visits to home to deliver the letter, her perception that there was a conspiracy against her (which the evidence does not support) and the other aspect

What is furthermore important in this case in my view is the fact that the applicant made the call. Although what was said by van Niekerk was referred to as a fabrication, no contrary version of what was said was put to the van Niekerk. Instead the applicant.s representative concentrated

cross examining on the length of the call to van Niekerk with the aim to prove that what was alleged to have been the threat could not have been said in a call that lasted 34 seconds. Van Niekerk.s evidence relating to what was said by the applicant remained the same during the course of the arbitration as was testified to at the disciplinary enquiry. When considering the sequence of events of the various interactions between the parties, the fact that the applicant called van Niekerk, it is more probable than not that she would vent her frustrations. It follows also that this would explain the unchallenged evidence of the applicant putting the phone down on van Niekerk. For these reasons I fund that the applicant did utter the words complained of.

Crucially the applicant.s representative failed to put important aspects of the applicant.s version to the respondent.s witnesses. In this respect I do not intend repeating what was submitted in the respondent heads. The affect of not putting a version is not excusable where the parties are legally represented3 and the normal consequences flow as set out in various judgements.

3 See Small v Smit 1954 (3) SA 434 (SWA) at 438

4 Sidumo & another v Rustenburg Platinum Mines Ltd & others *2007+ 12 BLLR 1097 (CC) ('Sidumo')

5 Palaborwa Mining Co Ltd v Cheetham & others [2008] 6 BLLR 553 (LAC).

6 At para 13.

Having found that the applicant did breach various workplace rules, what remains is to consider the issue of sanction. There is nothing in the bundle, nor for that matter was there evidence placed before me relating to the chairman.s reasoning when deciding to dismiss. It would be important in my view given the overlap of charges. At best Randall testified that factors in mitigation and aggravation were heard but shed no further light on the content of the submissions. Be that as it may I am in any event required to consider the issue and to decide whether the decision to dismiss is fair or not.

Since Sidumo.s4 case the approach to the issue of sanction has changed the approach followed by the CCMA and council commissioners to the issue of sanction. In Palaborwa Mining5, Patel JA commented as follows in this regard:

„Sidumo enjoins a court to remind itself that the task to determine the fairness or otherwise of a dismissal falls primarily within the domain of the commissioner. This was the legislative intent and as much as decisions of different commissioners may lead to different results, it is unfortunately a situation which has to be endured with fortitude despite the uncertainty it may create..6

Sidumo and other cases enjoin a commissioner to consider various factors when deciding on the issue of sanction, including the code of good practice and issues such as:-

. importance of the rule
. the reason the employer imposed the sanction
. basis of the employee.s challenge
. additional training and instruction may result in the employee not repeating the misconduct

. the effect of the dismissal on the employee
. The absence of dishonesty
. indication that the principle of progressive discipline will not assist to adjust
. nature of the job and the circumstances of the infringement

The Resolution 1 of 20037, clause 2 states that the following principles inform the Code and Procedure and must inform any decision to discipline an employee.

7 Disciplinary Code

8 Edcon Ltd v Pillemer No & Others(2009) 30 ILJ 2642 (SCA) where the court held that Employer must lead evidence to show breakdown in trust relationship

2.1 Discipline is a corrective measure and not a punitive one.

2.2 Discipline must be applied in a prompt, fair, consistent and progressive manner.

The above factors need to be weighed up after considering the totality of circumstances of the case.

Other than to testify that the chairman considered factors in mitigation and aggravation I am none the wiser as to why the employer considered dismissal appropriate. (My role is not to criticise the decision of the chair person as my role is to hear the matter de nova. Despite this, in my view his assessment of the evidence is in my view in places incorrect.) The appeal committees finding to decline the appeal takes the matter no further and one is not sure whether or not they simply rubber stamped the decision of the chairman, or, what factors they considered as no reasons are given for upholding the decision of the chair person. Although this was not an issue placed in dispute by the parties, the respondent.s practice of simply rubber stamping the decision of the initial enquiry without dealing with the substantive issues of the appeal and furnishing reasons for rejecting them, is not a salutary practice and is one that may render the process unfair. This practice, in the absence, leads one to surmise that the appeal authority is not applying its mind to the substance of the appeal.

Be that as it may, whilst I accept that the non compliance with rules relating to obeying instructions, not threatening co-workers and complying with policies are serious, there is no indication that the principle of corrective and / or progressive discipline will not assist to adjust the employee.s behaviour. This is borne out by the fact that during the period of the applicant.s appeal she was found to be a „good. employee and there was no evidence of further disciplinary infractions on her part. Some of the transgressions related to technical offences such as not notifying her employer when she did not attend work due to illness which are less serious offences.

The most serious of the transgressions in my view relates to the threat to van Niekerk. Van Niekerk did not seem unduly perturbed by it, nor, threatened by what was said to her. In her evidence she indicated that it was „not nice. (to be threatened) and her reaction to the threat was too merely record the threat with the respondent. Whilst not trying to underscore what the applicant said to van Niekerk, one must consider it in relation to the events set out above which the applicant referred to as harassment by her employer.

In relation to the absence transgression, Sifatya also conceded that she was more concerned by the failure to comply with the process. The respondent was at all times aware that the applicant

wished to take leave and would have granted it if the applicant had done what was required of her. It would appear from the evidence of Sifatya that the applicant was assessed and received favourable assessments during the period of her appeal.

The applicant was not dishonest. There was no evidence to suggest the trust relationship had broken down8. In fact the applicant continued working in the same position for a period of 4

years and 9 months awaiting her appeal. In these circumstances and even though the collective agreement requires the person to be paid whilst awaiting the outcome of the appeal, the applicant continued working without making herself guilty during a period of 4 years an 9 months of similar transgressions.

The applicant has 26 years uninterrupted service with the respondent. There appears to be no valid warnings in place and she appears to have a clean disciplinary record. As already stated during the appeal process she did not transgress any rules. These factors are important.

In conclusion, when one considers the totality of the above factors the dismissal of the applicant is in my view unfair. The applicant.s conduct remains blameworthy. The applicant.s intransigence towards the respondent.s efforts to get her to properly complete her leave form so that it could be approved, the failure to comply with the instruction to return to work and the threat cannot escape censure.

I am not sure that given the delay in finalising this matter and the absence of further misconduct on the part of the applicant during the period that the appeal was pending that I should impose a sanction which would still be valid.

Allegation 2

. A final written warning valid for 6 months

Allegation 3

. A written warning valid for a period of 6 months

Allegation 4

. Final written warning valid for 6 months

Allegation 5

. Final written warning valid for 6 months

Allegation 6

. This is a duplication of allegation 5.

Allegation 7

. 7.1 This is a duplication of allegation 4
. 7.2 This a duplication of allegation 5 and 6.

Procedural Unfairness

The respondent.s tardiness in dealing with the appeal is in my view is an issue relating to procedural fairness. I do not believe that the tardiness, as inordinately long as it was, could render the dismissal substantively unfair. Having said that the question to be determined then is whether or not it is unfair and if so what compensation the applicant should receive, if any.

The entire framework of the Labour Relations Act is to deal with unfair dismissals expeditiously. The Resolution 1 of 2003 has a similar approach where it requires that discipline must be applied in a prompt manner. Departments must finalise appeals within 30 days.

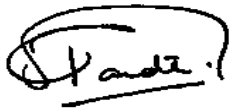
The respondent.s explanation for the delay is wholly unsatisfactory. The respondent did however submit that the applicant suffered no prejudice as she was paid for the entire period that the appeal was pending. To an extent that is true. That may be so but procedural unfairness is seen as a form of compensation for the wrong in failing to give effect to an employee.s right to a fair procedure and is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer9 (who breached the right) must pay a fixed penalty for causing that loss.

Copy of pierre1
9 Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC)

Given my decision relating to the issue of sanction and the relief to be granted for the substantive unfairness, I do not think it fair to award any compensation for this claim. Given that the appeal should have been finalised within 30 days off the appeal being lodged with the MEC, the sanctions that I have determined to be fair shall become operable on the 8th November 2005 from which date their validity shall be calculated.

AWARD:

1. The dismissal of the applicant is found to be substantively unfair as the sanction of dismissal is too harsh;
2. The dismissal is procedurally unfair for want of compliance with Resolution 1 of 2003;
4 The respondent is to re-instate the applicant to the post that she occupied at the date of her dismissal (08th October 2010), and to pay all arrear remuneration as from 08th November 2010 to date of re-instatement.
5 The applicant must be re-instated on or before the 17th December 2011;
6 All payments due to the applicant are to be made on or before the 15th January 2012;
7 There is no compensation for the procedural unfairness given the date on which the warnings become operable on.



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Name: PA NAUDE
(Public Health & Social Development Sectoral Bargaining Council) Arbitrator