



ARBITRATION AWARD

Panelist/s: **PRINCE KEKANA**

Case No: **PSHS506-10/11**

Date of Report: **21 November 2013**

In the ARBITRATION between:

NEHAWU obo MAKALIMA B.B.

(Union / Employee)

And

DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT - GAUTENG

(Employer)

Union/Applicant's representative: Mr. MBONGENI DEREK DLADLA

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Respondent's representative: Mr. MODISANE LELAKA

Respondent's address: Department of Health (GP)

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DETAILS OF HEARING AND REPRESENTATION

- 1] This is the award in the arbitration between Mr. Makalima, the employee, and Department of Health- Gauteng, the employer.
- 2] The arbitration was held under the auspices of the PHSDSBC in terms of section 51 of the Labour Relations Act 66 of 1995 as amended (the Act).
- 3] The arbitration hearing took place on 6 February 2013 to 30 October 2013 at the Bank of Lisbon Building in Johannesburg.
- 4] The employee was present and Mr. Mbongeni Dladla, an attorney, represented him. Mr. Modisane Lelaka, the Labour Relations Officer, represented the employer.

ISSUES TO BE DECIDED

- 5] Whether the dismissal of the employee was procedurally and substantively unfair.

BACKGROUND TO THE DISPUTE

- 6] Mr. Makalima was employed on 10 January 2006. At the time of dismissal he was an Assistant Director and his salary was R274 098.00 per annum. He was dismissed on 12 August 2010.
- 7] The employee was charged and found guilty of:

- a. Fraudulently awarding a contract to LT Enterprise to the value of R1 569 780. 00. In the alternative he was charged with failure to follow tender processes when awarding the tender.
 - b. Storing pornographic and obscene material in the employer's laptop.
 - c. Misused the employer's property by circulating pornographic and obscene material.
- 8] The employer submitted four bundles of documents. The bundles were admitted into the record as annexure A, B, D and E. The employee submitted two bundles of documents and they were admitted into the record as annexure E and F. The parties agreed that the documents are what they purport to be and will serve as evidence of what they purport to be.
- 9] Parties agreed to submit closing arguments on 8 November 2013.

SURVEY OF EVIDENCE AND ARGUMENT

The employer's evidence and arguments

- 10] The employer called two witnesses. **Mr. Pierre Jordaan** testified that he was employed at Head Office as an Assistant Director in Supply Chain Management (SCM). He was responsible for SCM in the Department. The HOD issued the Supply Chain Management Delegations to the Department on 10 July 2006. The delegations stipulated the procedure to be followed in procurement of services and assets. Emergency Medical Services (EMS) is a directorate in the Department of Health and the delegations were binding and applicable to EMS.
- 11] On 12 February 2008 EMS approached the Departmental Acquisition Council (DAC) to seek approval to participate in the Government Contract RT46 on Fleet Management Services. DAC declined the request. EMS was therefore required to follow the SCM Delegations in fleet management services. SCM Delegations required EMS to capture the Requisition Form on the system to generate a purchase order. The computer generates a purchase order which must be released to the Gauteng Shared Services Center (GSSC). The GSSC will obtain quotations and authorize the purchase order. EMS will sign for receipt of the goods. The employee did not follow the SCM Delegations.

- 12] The purchase numbers on the tax invoice signed by the employee was incorrect. The purchase was for 102 air purifiers. The invoices were split into individual ambulances. The SCM Delegations specifically forbid the splitting of invoices of related items. These items were not related but it was one item for all ambulances.
- 13] During cross examination he testified that EMS required DAC approval to participate in National Government Contracts. EMS was required to seek *ex post facto* approval from DAC and the HOD within 72 hours after an emergency service was acquired. EMS was required to use Contract RT4 to purchase accessories like air purifiers. The employee deviated from the SCM delegations and used manual purchase orders.
- 14] **Mr. Edward Frederick Celliers** testified that he was employed by Ramathe Fivaz. The HOD appointed their company to investigate irregularities in the department. They discovered irregularities regarding supply chain and procurement procedures at EMS. They traced documents and found that the employee processed documents without following SCM Delegations. The employee signed LT Enterprise invoices when they were not on the department and Wesbank supplier data base. The owner of L.T. Enterprise stated that he dealt with the employee and was asked by Italian Motors to install air purifiers.
- 15] The employee's laptop was seized and pornographic material was found inside the computer. The Internet Policy forbids the viewing and dissemination of pornographic material.
- 16] The employer argued that the employee contravened procurement procedures when he processed LT Enterprise invoices amounting to R1 569 780. There are no minutes of the employee's allegation that a meeting approved the LT Enterprise as a supplier. LT Enterprise was not placed on the supplier data base of the department. Internal procedures were not followed to source LT Enterprise as a preferred supplier.
- 17] The amount of Air Purifiers required exceeded a million rand. The SCM Delegations required a tender process to be followed. The invoices were split into individual

motor vehicles. The employee also bypassed the system when he approved LT Enterprise invoices but payment was made through Italian Motors. The employee contravened the Delegations.

- 18] The employee conceded that he watched pornographic material on the employer's Lap Top. The employee also circulated this material.
- 19] The employer's investigations pointed at the employee alone because he signed all LT Enterprise invoices. The evidence of the involvement of other managers came out of the evidence at this arbitration. The employer was not aware of any misconduct by other managers at the time the employee was charged and dismissed. The employer acted consistently.
- 20] The evidence proved that the employee was guilty of these charges. He was a middle manager and had inducted his subordinates on the department's policies. The employee was therefore aware of the employer's policies. His dismissal was therefore fair.

The employee's evidence and arguments

- 21] The employee testified and called two witnesses. Mr. Bandile Basil Makalima testified that he was an Assistant Director at EMS and he was responsible for fleet management. In 2007 and 2008 there was an outbreak of XDR and MDR TB. It was urgent to install air purifiers to stop the spread of TB. He did not award a tender to LT Enterprise. LT Enterprise was approved by an EMS Management meeting. He was tasked to ensure that LT Enterprise install Air Purifiers in all ambulances.
- 22] On 9 October 2007 he made a motivation to the EMS Chief Director and the Ems Director. He recommended that Air Purifiers be installed at a cost R4 500 per unit. He further stated that the cost was within his financial jurisdiction. The EMS had a Maintenance Contract with WesBank Auto. This contract was used for maintenance motor vehicles in EMS. He was informed to use the same contract to install Air Purifiers.

- 23] He generated manual purchase orders as it was the practice at EMS. They generated invoices per motor vehicle because vehicles were available at different times. It was impossible to have one invoice because motor vehicles were available at different times. He obtained an authorization number from WesBank Auto. He inserted the authorization number on the invoice and gave it to LT Enterprise to process payment through WesBank Auto. Payment was made by Wesbank Auto based on his signature and the authorization number. The employer did not suffer any prejudice because of the installation of these air purifiers.
- 24] He attended a Procurement Course and obtained a certificate. His manager however gave him instructions contrary to the training and the policies. EMS did not follow Departmental Policies. All other Assistant Directors followed the same process but they were not disciplined.
- 25] He was not aware of the Internet Policy and he was not inducted on policies. He did not keep pornographic material on the Lap Top. During cross examination he testified that he was aware of the procurement process and he did not follow it. There was no written approval of his motivation dated 9 October 2007. He approved 31 invoices without any purchase orders. He did sign invoices with duplicate purchase orders. He attributed that to an administrative error. There were no written agreements between EMS and LT Enterprise. He viewed the pornographic material and deleted them. He however did not email them to anyone.
- 26] Messrs. **Dominic Velaphi Tshabangu** and **Thabo Terrence Rambau** testified that they were the West Rand Regional Manager and the EMS Fleet Manager respectively. An EMS Management meeting agreed that the employee should oversee the installation of air purifiers. The meeting approved LT Enterprise to install the air purifiers. It was agreed that LT Enterprise would invoice Italian Motors because Italian motors was on the Wesbank database. They were aware of the SCM processes. The tender process would have taken a long time and it was easier to invoice each motor vehicle separately. The SCM procedures were not followed because of the TB outbreak.

- 27] The employee argued that at the time when these charges were preferred against him, he had no previous record. The gravity of these allegations did not warrant a sanction of dismissal. The employer failed or ignored to take his circumstances into account when they determined the dismissal sanction.
- 28] There was no evidence that the employee committed fraud or awarded a contract to anyone. The employee conceded that the tender process as outlined in the supply chain policy was not followed to the letter. There was a TB outbreak and the employee acted pro-actively. All managers at EMS, including the CEO, believed that the process followed was the most viable to expeditiously deal with the outbreak of MDR as a high priority.
- 29] The employee made a written motivation for the procurement of the air purifiers and received verbal authorization. He had complied with paragraph 14.3 of supply chain delegations. The employee's actions were within the ambit of clause 14.3.
- 30] The employer alleged that the employee split a case but failed to put a version to the employee to show that he was dishonest, acted without integrity or that he conducted himself in bad faith. There was no evidence to suggest that the employee's motive was to favour a particular supplier for personal gain.
- 31] The managers who acted with the employee should have been charged similarly and the employer's conduct was therefore inconsistent. In the decided case of **GCWENSHA v CCMA & OTHERS [2006] 3 BLLR 234 (LAC)** the court held that the parity principle requires that employees be measured by the same standards, and that discipline should not be capricious or give rise to a suspicion of bias. When cases are compared for the purpose of gauging consistency, care must be taken to ensure that the gravity of the misconduct in each case is evaluated and the disciplinary record of each employee assessed.

- 32] There was no evidence led to show that a particular person has been dismissed except the employee and those that may have been charged for the same misconduct are presently back at work. The scope of the investigations was not expanded to establish with certainty that none of the other participants who were part of the meeting were guilty of the same alleged misconduct. The employer's conduct was inconsistent.
- 33] The employee did not make any payments to LT Enterprise. His role was to authorize installations after same was confirmed by the respective district manager when sending their vehicles for service to also have them installed with air purifiers.
- 34] It is submitted that the employer failed to establish storage of pornographic material by the employee. The employee testified during cross examination that on receipt of these photos he deleted them. He may have omitted to empty his recycle bin.
- 35] The employee further submitted that there was no evidence to show that he either received or sent the pornographic photos presented as evidence through an email and or laptop allocated to him by the employer. There was no email by the employee produced to suggest that he was misusing his tool of trade.
- 36] The personal circumstances of the employee are such that a sanction of dismissal only served to add on the statistics of struggling families due to unemployment. The situation is not all about imposing a sanction of dismissal but to go beyond that by taking into account the members of his family that will be deprived of a livelihood due to his dismissal. It was submitted that the employee has appreciated the seriousness of the allegations against him and has shown remorse.
- 37] It was further submitted that notwithstanding the fact that the employer had a duty to invoke discipline, it also has a duty to apply its policy consistently on all employees who participated in the same misconduct even those who commissioned the investigation of this matter as it is clear they were party to the agreement to procure air purifiers viz, the CEO.
- 38] It was never a rule of thumb that in all cases of this nature a sanction of dismissal was the only appropriate sanction as it is clear in this matter that some employees who participated in the alleged misconduct are still employed by the department.

- 39] The employer ought to have applied progressive discipline and imposed a less harsh sanction such as a final written warning in view of the employee's clean record. In the case before us the employer failed to look at other means that were less formal by which the matter could have been resolved. The employee should have been subjected to training as another alternative to dismissal in that at EMS at the time there was no supply chain division where the employee could have been exposed to the practicality application of procurement processes.
- 40] Should the employee remain dismissed he will be tainted with such a stigma for the entire duration of his life, and that will significantly reduce his chances of ever finding employment elsewhere in order to feed his family. This stigma is permanent should he remain dismissed. The effect of a dismissal extends to the entire family of the dismissed employee especially those who are dependent on him. At no stage was it ever shown during the arbitration hearing of this matter that the employer had been prejudiced by the employee's conduct or a version to that effect put to him.
- 41] The sanction of dismissal was not the appropriate sanction in this matter and the employee should be reinstated in that his dismissal was substantively unfair.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 42] The charges against the employee were not a model of perfection, but the employee understood the allegations leveled against him and was able to respond to them.
- 43] It was common cause that the employee was dismissed. The employer had the onus to prove, on a balance of probabilities, that the dismissal was fair. There was no evidence led on procedural defects.
- 44] The employee was charged with awarding a contract to LT Enterprise. The employee and his witnesses testified that LT Enterprise was awarded a contract by the EMS Management team. They also testified that the employee was put in charge of the implementation of the contract. They did not testify that he was authorized to ignore the SCM delegations. In his motivation dated 9 October 2007, he did not ask to bypass the tender process and follow High Priority Procurement.

- 45] There were no written contracts or minutes to substantiate the employee's evidence. There was no written reply or written authorization to the employee's motivation. I was informed that EMS did not follow policies and procedures. I still find it improbable that LT Enterprise was awarded a contract verbally. All the installation documents were processed by the employee. He created the manual purchase orders. He obtained the authorization quotes. He finally approved LT Enterprise invoices. The probability was that the employee awarded the contract to LT Enterprise.
- 46] The employee was alternatively charged with failure to follow tender processes when awarding the tender. The employee testified that he was trained in Supply Chain Management. He was aware that LT Enterprise was not on the Department's database. He was aware that Italian motors was not awarded the contract but was going to be used to effect payments and install the purifiers. He approved invoices without a purchase order. He duplicated purchase orders. All the purchase orders he generated were manual and were not in terms of the SCM Delegations. He made a motivation to his directors at EMS. His motivation was for one unit which he alleged was within his financial mandate. He did not mention that three units would be required per vehicle. He did not mention what the total cost of installation of the air purifiers would be. He did not mention that the budget was available. He did not state that he will follow High Priority Procurement.
- 47] The employee's version changed as many times as I could blink. He finally settled on the version that the installations were high priority procurement. Clause 14 of the SCM Delegations regulates High Priority Procurements. The first requirement was that the procurement must be authorized in writing. He did not obtain written authorization in terms of clause 14.1 of the SCM Delegation. The employee therefore contravened the SCM Delegations. He conceded that he was trained on Supply Chain Management but did not comply with the delegations. He was guilty of this offence.

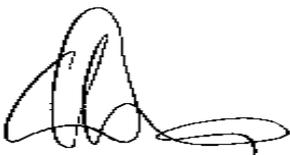
- 48] The employee was also charged with storage of Pornographic Material. The employee conceded that he viewed this material and deleted it. He however omitted to empty his recycle bin. The material was still stored on the employer's computer. The employee was guilty of this charge
- 49] The employee was also charged with circulating pornographic material. There was no evidence before me that the employee circulated this material.
- 50] The employer proved that the employee contravened a rule in the workplace. The SCM Delegations and IT policy were very reasonable and valid. The employee testified that he was aware of the SCM Delegations. He also testified that he was an Assistant Director and was responsible for induction of junior staff. He also testified that he viewed and deleted the pornographic material. The employee ought to have been aware of the IT policy.
- 51] The employee argued that the rule was not consistently applied. All the documents were signed by the employee for all vehicles. He did not produce any evidence indicating who else contravened the rule without any discipline. Tshabangu testified that he was guilty of the same offence but disappeared when I asked him to produce documents he authored for the installation of the air purifiers. There was no evidence pointing to any other employee who was responsible for the procurement of the air purifiers. The employee and his witnesses testified that the employee was responsible for the procurement of the air purifiers.
- 52] The Labour Appeal Court in **CEPPWAWU v National Bargaining Council for the Chemical Industry & others Case No. JA14/08** dated 03/09/2010 unreported, held that it was consistent for the employer to discipline the employee against whom there was sufficient evidence of misconduct. The evidence before the employer pointed to the employee alone. The court also held that the employee must prove that the employer acted arbitrarily.
- 53] The employer had evidence against this employee only. There was no evidence that the employer acted arbitrarily. I find that the employer acted consistently.

54] The employee ignored all the Supply Chain Delegations while he was aware of the delegations. He could not have relied on High Priority Procurement unless he was aware of the SCM Delegations. His conduct was aggravated by the fact that he was trained to follow proper procurement processes. His blatant disregard of standard processes was a gross misconduct. It is a serious offence to store Pornographic Material on the employer's computer. The employee tried to justify his contraventions and lacked remorse. The employee occupied a management position. I found that the sanction of dismissal was appropriate in these circumstances.

AWARD

55] The dismissal of Bandile Basil Makalima by The Department of Health was procedurally and substantively fair.

Dated at Johannesburg on this the 21st day of November 2013.



PHSDSBC Arbitrator: _____

Prince Kekana

Sector: **Public Health and Social Development**