ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Panelist: **Minette van der Merwe**
Case No: **PSHS536-17/18**
Date of award: **17 April 2018**

In the matter between:

PSA obo Molefi Joel Monkhe (Union/ Applicant)

and

Department of Health- Free State (Respondent)

DETAILS OF HEARING AND REPRESENTATION:

[1] The arbitration was scheduled for **22 March 2018** at the Bophelo House in **Bloemfontein.**

[2] The Applicant was represented by Mr Jaco Greeff from PSA whereas the Respondent was represented by Ms MA Makoa, Labour Relations Officer.

[3] Proceedings were not mechanically recorded, but some notes were taken. No interpretation was required.

[4] Parties agreed to argue the merits of the dispute by way of written arguments as there were no factual disputes, but only disputes of law that needed determination. Therefore, parties were required to conduct a pre-arbitration. The pre-arbitration minutes had to contain a written statement of facts which were common cause, so as

to put me in a position to answer the legal question put before me. Such a statement of case is important in matters where parties elect to argue the dispute by way of written arguments, as was held in ***Arends and Others v South African Local Government Bargaining Council and Others*** *(2015) 36 ILJ 1200 (LAC*). The principle was again confirmed in ***Public Servants Association and others v Minister of Correctional Service and others*** *[2017] 4 BLLR 371 (LAC*).

[5] Parties agreed to submit heads of arguments as follows:

(a) Pre - arbitration minutes on or before 27 March 2018
(b) Respondent to submit heads of arguments on or before 05 April 2018.
(c) Applicant / PSA to submit heads of arguments on or before 12 April 2018.
(d) Respondent to submit heads of arguments if it needed to clarify any issued raised in the replying heads of arguments of the Applicant, on or before 16 April 2018. None was received.

BACKGROUND TO THE DISPUTE:

[6] The matter was scheduled for arbitration in terms of section 191 (5) (a) in respect of a claim for unfair dismissal related to misconduct.

[7] The Applicant's employment details formed part of the pre-arbitration minutes.

ISSUE TO BE DECIDED:

[8] According to the pre-arbitration minutes, I was called upon to only determine whether the sanction of dismissal was appropriate.

[9] According to the pre-arbitration minutes, the following facts were common cause:

i. The Applicant was employed by the Respondent as an Emergency Medical Officer since 2005
ii. The Applicant was transferred to the Free State Department of Health from the Limpopo Provincial Government during 2009
iii. The Applicant indicated in his Curriculum Vitae that he possessed a Senior Certificate

iv. The Applicant pled guilty in the disciplinary hearing that he misrepresented information in his application for transfer (bullet (ii) herein above)

[10] According to the pre-arbitration minutes the Applicant sought to be reinstated and for a lesser sanction to be imposed.

[11] Further the Applicant sought to be upgraded to the position of a Transport Officer salary level 7 (par 5.1 of the pre-arbitration minutes). This remedy cannot be awarded under of section 193 (1) of the Labour Relations Act (Act 66 of 1995) as amended, as the dispute before me is one related to an alleged unfair dismissal. The Applicant is best advised to refer an appropriate dispute if it seeks to be upgraded.

SURVEY OF EVIDENCE AND ARGUMENTS:

[12] Parties complied with the agreed dates by which to submit the pre-arbitration minutes as well as the respective heads of arguments.

[13] The heads of arguments of all parties were duly considered but will not be repeated or summarized herein.

[14] The Respondent further submitted bundle "A" into evidence.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[15] The Court held in ***Nampak Corrugated Wadeville v Khoza*** *(1999) 20 ILJ 578 (LAC),* and referred with approval to the finding of ***Computicket v Marcus NO & others*** *(1999) 20 ILJ 342 (LC)*, that in matters where the sole issue is whether the sanction of dismissal was appropriate, the Arbitrator has the limited function of ensuring that dismissals do not fall outside a 'band of reasonableness', the parameters of which are determined by general principles of fairness. The closest the Courts have come to suggesting some sort of a test, was in the judgement of ***Country Fair Foods (Pty) Ltd. V CCMA & others*** *(1999) 20 ILJ 1701 1701* at para 11 where one Judge remarked:

"*It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and to determine the*

sanction with which con-compliance will be visited, interference therewith is only justified in the case of unreasonableness and unfairness."

[16] In the same judgement, another Judge found that dismissal can be said to be unreasonable when it induces a 'sense of shock'.

[17] In ***Sidumo v Rustenburg Platinum Mines Ltd.*** *(2007) 28 ILJ 2405 (CC)* it was ultimately held that the Commissioner must consider all relevant circumstances when considering whether dismissal was the appropriate sanction in a particular case of proven misconduct. This includes the importance of the rule that has been breached, the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, other factors such as the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record and that this is not an exhaustive list.

[18] The Respondent argued that the Applicant submitted a fraudulent National Certificate in order to qualify for the transfer and misrepresented the fact that he held a National Certificate in his curriculum vitae. The Applicant's actions amounted to misrepresentation and dishonesty. The trust relationship between the Respondent and Applicant is damaged beyond repair as the acts the Applicant committed touched at the heart of the employment relationship. Dismissal was appropriate as it was a very serious transgression, which warranted dismissal in line with the Code of Good Practice and the Respondent's disciplinary code. In *Rainbow Farms (Pty) Ltd v Dorasamy and Others* the dismissal of the Applicant was upheld in similar circumstances. The dismissal of the Applicant should be upheld.

[19] The Applicant's grounds for appeal was merely re-submitted as its heads of arguments. He argued that he did not benefit from the misrepresentation he made, and he was further initially appointed without being in possession of a Senior Certificate. The Applicant pled guilty to the misconduct, which indicated him taking accountability and showing remorse. The Respondent failed to lead evidence of the breakdown of the trust relationship. The Respondent suffered no harm as a result of the incident. The Applicant was charged with dishonesty, and not gross dishonesty, and further had a

clean disciplinary record. The Applicant rendered satisfactory service and even qualified for performance bonusses.

[20] The Applicant was granted the transfer on the basis that he qualified with a Senior Certificate, and as such he benefited from the misrepresentation. The Applicant challenged the dismissal on the basis that the Respondent failed to lead evidence or prove that the trust relationship has been irreparably damaged by his actions, whereas the Respondent argued that the nature of the offence goes to the route of the employment relationship. This type of offence was not of such a nature where training or rehabilitation or instruction would have had the desired positive or changing effect. The misconduct was related to dishonesty which was a very serious offence. The Applicant argued that he had been employed by Limpopo Provincial Government, where the issue was never raised or held against him. The argument cannot be sustained. Just because the misrepresentation was never uncovered, did not mean it would not have led to an investigation against the Applicant.

[21] In the case of ***Impala Platinum Ltd v Jansen and others*** *[2017] 4 BLLR 325 (LAC)* it was held that, where the seriousness of the misconduct was of such a nature that the breakdown of the employment relationship can be inferred, evidence of same need not be led by the Respondent.

[22] Committing misrepresentation to gain employment is a serious offence and is related to dishonesty. Misrepresentation by an employee before the commencement of employment has been held sufficient to warrant dismissal, even if the misrepresentation is discovered some time later and the employee has rendered satisfactory performance (***Hoch v Mustek Electronics (Pty) Ltd.*** *(2000) 21 ILJ 365 (LC)*) and it was held by the Court that, to accept that such an Employee is entitled to guidance, training or assistance before being dismissed would be to reward such an employee for his dishonesty (***Boss Logistics v Phopi & others*** *[2010] 5 BLLR 525 (LC)).*

[23] The Applicant's plea of guilty to misconduct related to misrepresenting qualifications in order to qualify for a transfer and acting in a dishonest manner, cannot be regarding as mitigation. He pled guilty and admitted to serious acts of misconduct, which he wilfully and intentionally committed.

[24] The task of imposing sanctions vests in the Employer. It is a Commissioner's function to assess whether that Employer has exercised its discretion fairly.

[25] The sanction of dismissal was appropriate under the circumstances, as the misconduct was of a very serious nature, and had rendered the employment relationship intolerable by its very nature.

[26] The dismissal of the Applicant was substantively fair.

AWARD:

[27] The dismissal of the Applicant, **Molefi Joel Monkhe,** by the Respondent, **Department of Health- Free State**, was substantively fair.

[28] The claim for unfair dismissal is hereby dismissed.

[29] I make no order as to cost.

Signature: 

Panelist: **Minette van der Merwe**