



ARBITRATION AWARD

Case No: PSHS541-15/16

Commissioner: Allan Kayne

Date of Award: 13 May 2019

In the matter between:

Thembi Prudence Thabede and 1 Other

(Applicant/ Union)

and

Department of Health- Gauteng

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

1. The applicants referred separate disputes to the Public Health Social Development Sectoral Bargaining Council (“the Council”), on 21 September 2015, in terms of section 191(5)(a)(iii) of the Labour Relations Act, 66 of 1995 (the LRA), pertaining to their dismissals for reasons unknown.
2. The two matters remained unresolved, and certificates of outcome to this effect were issued on 02 December 2015. The matters were set down for arbitration on 11 March 2016, in respect of PSHS541-15/16, and 31 March 2016, for PSHS539-15/16.
3. The matters were subsequently heard by a panellist, appointed by the Council. However, the rulings and/or awards were never rendered by him/her. The present

panellist met with the parties on 05 November 2018 in order to discuss the process going forward, and the following was collectively agreed between the parties:

- 3.1. The respondent stood by its submissions regarding the preliminary issues raised before Commissioner Wimpy Ferreira that the applicants were not its employees and that the Council lacked jurisdiction to arbitrate the dispute.
 - 3.2. The applicants similarly stood by their argument that the applicants were employed by the respondent.
 - 3.3. Both parties would be afforded an opportunity to review the arguments, previously submitted in this regard and, if necessary, to supplement them; however, neither party did so.
4. I accordingly issued a jurisdictional ruling in which I found that the applicants were indeed employees of the respondent, that the Council had jurisdiction to arbitrate the dispute, that the two applicants' matters be consolidated under the present case number and that the Council set the matter down for arbitration.
 5. The matter was arbitrated on 02 May 2019, at the SG Lourens Nursing College, corner Theodore Hove and Soutpansberg Streets, Pretoria.
 6. Adv. Dube of the Pretoria Bar, instructed by Prosper Nkala of the University of Pretoria Law Clinic represented the applicants, while Faith Masoka appeared for the respondent.
 7. Thulani Maluleke provided translation services, and the proceedings were electronically recorded, the record thereof being filed with the Council's administration.
 8. The parties had previously exchanged bundles of documents. The respondent, however, supplemented her existing bundle with an additional set of documentation.
 9. This award is issued in terms of s138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

ISSUE/S TO BE DECIDED

10. On the basis that I had previously ruled that the applicants were employees of the respondent, I must decide whether their dismissals were both procedurally and substantively fair.

PRELIMINARY ISSUE

11. During its opening statement, the respondent, seemingly oblivious to the ruling that had previously been handed down, submitted that it would demonstrate that the applicants were never its employees and that it never dismissed them.

12. Masoka claimed to be aware of the ruling but did not agree with same and for the sake of good order, I read the entire ruling into the record for the benefit of both parties.

13. The respondent subsequently raised a preliminary issue calling on the applicants to prove the existence of their dismissal.

Evidence of Prudence Thabede (“Thabede”)

14. Thabede testified under oath that she had been volunteering at the Rivoningo Care Centre since the beginning of 2015 performing basic duties which included assisting paralysed patients, escorting patients to Weskoppies and performing HIV testing and counselling. Marlies Dauber (“Dauber”), who headed up the centre, approached her and the second applicant in May 2015 advising them that they could sign contracts with the respondent and that they should go to the respondent’s offices. Dauber arranged to take them to the respondent’s offices where a representative of the respondent, by the name of Johanna Sekgaolelo (“Joey”), issued them with contracts of employment and explained to them that the contracts were for a fixed period of 12 months. They signed the contracts of employment and provided the details of their banking accounts to Joey, the following day, as requested. According to Thabede, the signature appearing on the contract of employment was her own although she did not know who had pre-signed the contract as a witness.

15. Upon returning to the Rivoningo Care Centre, they continued their duties working mainly from 7am to 7pm, but occasionally from 7am until 1pm, daily. They received no payment for the months of May, June and July 2015 but understood from their colleagues that it could take up to 5 months to be paid. By August 2015, they confronted Dauber who directed them back to the respondent where they met with Joey. Joey advised them to cease working immediately. Upon their return to the Rivoningo Centre, Dauber attempted to call Joey to discuss, but she was unavailable. The applicants returned to the Centre the following day, and Joey reconfirmed that they were to cease working immediately as the respondent did not have money to pay them and that the issue needed to be resolved first.
16. Thabede confirmed that there had been approximately 5 other ladies whose services had similarly been terminated. While Dauber had supported the applicants and had followed-up with them, there had been no communication from Joey since their last encounter with her. Thabede was shocked by the situation as Joey knew them very well, based on their dealings with her.
17. During cross-examination, Thabede reiterated her stance that they had been employed by the respondent and not by the Rivoningo Centre as the contracts of employment had been issued to them by Joey, as a representative of the respondent, in the presence of Dauber.
18. Thabede testified that neither she nor the second applicant had been subject to any disciplinary action or process prior to their dismissals and the respondent conceded that there had been no process followed in giving effect to the termination of the services of the applicants as the contracts that they had presented had not been authentic.
19. Neither the respondent nor the applicant sought to call further witnesses to lead evidence.

RULING

20. The dispute to hand, dating back to 2015, relates to an alleged unfair dismissal of the two applicants by the respondent for unknown reasons and is purported to have taken place on 10 August 2015.

21. I have previously ruled that both the applicants were employees of the respondent, based on the submissions and arguments advanced by the parties previously to Commissioner Wimpy Ferreira and subsequently to me. In essence, the evidence led by Thabede has been nothing more than a regurgitation of that which was previously introduced confirming the engagement of the applicants as employees of the respondent. It cannot alter my previous ruling by which I am bound. Accordingly, my findings pertaining to the current preliminary issue must proceed on the basis of my previous ruling that the two applicants were both employees of the respondent, pursuant to contracts of employment entered into between them and the respondent on 06 May 2015.
22. Section 192 of the LRA prescribes that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal and, only once that has been established, does the onus shift to the employer to prove that the dismissal was fair.
23. Section 186(1)(a) of the LRA defines dismissal to mean that an employer has terminated employment with or without notice.
24. Joey, as a representative of the respondent, provided a clear and unequivocal instruction to both the applicants to cease working. According to the previously supplied heads of argument, she did so on 05 August 2015 and reiterated it to them on 10 August 2015. In the circumstances, she verbally terminated the applicants' contracts of employment without notice and brought an immediate end thereto.
25. The applicants have accordingly established the existence of their dismissals and, section 192 of the LRA now requires that the respondent prove that the dismissals were for fair reasons and were effected in accordance with fair procedures.

SURVEY OF EVIDENCE AND ARGUMENT

The following constitutes a summarised version of the written submissions of the parties and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the submissions tendered.

Respondent's evidence

Johanna Sekgaolelo ("Joey")

26. Joey testified under oath that she was employed by the respondent and that her primary function was to work with NGOs within Region 3 and to oversee the work of the Community Health Workers ("CHWs") and to ensure that they were paid their monthly stipend.
27. She denied any knowledge of the applicants' dismissal as they were never contracted by the respondent. She further testified that she had only become acquainted with the applicants once the dispute had been referred to the Council and denied ever knowing the applicants prior to this.
28. Referring to the contract of employment signed by Thabede, she explained that these contracts were utilised for individuals placed at different institutions (such as hospitals, clinics and regional offices) in terms of the Extended Public Works Programme ("EPWP"). The procedure to be followed by the respondent was to engage with the individuals, requesting them to visit their offices where the contract was supplied to them for completion after which it would be endorsed by the Chief Director allowing them to despatch the workers to the different institutions where they would be perform non-nursing duties.
29. Joey denied ever having any contact with the two applicants. She denied that they had ever presented themselves, accompanied by Dauber, at her office in order to sign the contracts of employment.
30. According to Joey, Rivoningo received funding based on the number of beds it provided to patients. Based on this model, it received funding for approximately 4-5 CHWs who were trained to work with terminally ill patients. These CHWs, funded by the respondent, were paid by its Central Office.
31. Joey identified the contracts of employment that had been signed by the applicants as non-nursing EPWP contracts which specified the weekly working hours to be 30 and excluded weekend work. However, she had ascertained that the applicants had not been working according to such an EPWP contract. She denied that the

applicants had ever been appointed by the respondent and further denied that it owed them any outstanding remuneration.

32. She presented a copy of a letter from the Absolute Central College of SA & Projects, dated 29 April 2019. The letter confirmed that Thabede was a registered student of the institution, studying ancillary health care during the 2015 academic year. According to her understanding, Thabede had been placed at the facility by her principal.
33. During cross-examination, she confirmed that as the Chief Community Liaison Officer, her duties included accepting responsibility for the CHWs. She reiterated never having met either of the applicants until the dispute was referred to the Council. She was not aware of the previous ruling by Council and claimed never to have seen it.
34. She confirmed that, although she was not personally responsible for disciplinary procedures, she was aware of the requirement for employees to be afforded an opportunity to state a case, at a hearing, in response to any allegations made against them and that disciplinary processes could lead to the dismissal of employees.

Further witnesses

35. A short adjournment of 15 minutes was granted, at the request of the respondent, as she was unable to reach her witnesses telephonically. On resumption of the matter, the respondent requested a postponement of the proceedings in view of her witness still not being contactable. The request was not granted on the basis that the matter had been set down for 10h00 that morning and, the respondent's inability to ensure that its witnesses were readily available to testify at the proceedings was its responsibility and, without a valid reason being supplied as to their absence at 13h15, no postponement would be granted. Despite my ruling that the matter proceed, a further 15 minutes was granted to the respondent to try and secure her witness which she failed to do.

Applicant's evidence

36. The applicants declined to call any witnesses to lead evidence.

ANALYSIS OF EVIDENCE AND ARGUMENT

37. Section 185(a) of the LRA prescribes that every employee has the right not to be unfairly dismissed and, section 188(1) provides that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for the dismissal is, *inter alia*, a fair reason related to the employee's conduct or capacity. According to section 188(2), any person considering whether or not the reason for the dismissal is a fair reason must take into account any relevant code of good practice.

38. Having previously ruling that the applicants were employees of the respondent and, more recently, that the respondent dismissed the applicants from its employ on 10 August 2015, section 192 of the LRA requires that the employer prove that the dismissals were affected for fair reasons and in accordance with a fair procedure, guidelines of which are provided in Schedule 8 to the LRA, the Code of Good Practice: Dismissal ("the Code")

39. The only evidence led by the respondent during the arbitration hearing related to the testimony of Joey who denied any contact with the applicants until she encountered them at the first arbitration hearing.

40. For the most part, the remaining evidence presented by Joey confirmed her role overseeing the CHWs appointed by the respondent in the region and she recognised the EPWP contracts of employment as being those utilised by the respondent for EPWP appointments. The evidence, however, contributed nothing to establish the fairness or otherwise of the applicants' dismissals.

41. I fail to understand the relevance of the letter presented into evidence by Joey, purportedly from the Absolute Central College of SA & Projects which ostensibly confirms that Thabede was registered as a student at that institution in 2015 and accordingly attach no weight to it.

42. I also question the credibility of Joey's testimony in which she denies making the acquaintance of the applicants until the dispute was referred to the Council which is in sharp contrast to the heads of argument filed by the respondent previously which makes no such mention. Similarly, both the evidence and argument previously submitted by the applicants' that there were a number of engagements with Joey has never previously been challenged by the respondent.
43. With the respondent's further witnesses failing to arrive at the arbitration hearing to lead evidence and, without any reasonable explanation being preferred to explain their absence, the respondent has dismally failed in discharging the onus required of it to prove that the dismissals of the applicants were fair. Not only is it evident that their employment was summarily terminated, but they were not provided with any valid reason relating to their conduct, capacity or the employer's operational requirements to justify the dismissal.
44. Accordingly, in the circumstances, the dismissals of the applicants by the respondent were both procedurally and substantively unfair.
45. The applicants indicated that they sought compensation and I see no reason as to why this should not be granted to them. In determining the quantum, I have taken into account that the applicants were only employed by the respondent from 06 May 2015 to 10 August 2015 and that prior to their appointment, they had been operating as volunteer workers at the Rivoningo Care Centre and could, presumably, have continued in that role post-dismissal. Therefore, 4 months compensation, calculated to be R9,454.52 (4 x R2,363.63) would be just and equitable.

AWARD

46. The dismissal of the applicants, Thembi Prudence Thabede and Nomhle Lorraine Liwela, by the respondent, Department of Health-Gauteng, was both procedurally and substantively unfair.

47. Department of Health- Gauteng, as the respondent in this matter, is ordered to pay each of the applicants, Thembi Prudence Thabede and Nomhle Lorraine Liwela, the amount of R9,454.52 by 31 May 2019.

A handwritten signature in black ink, appearing to read 'Allan Kayne', with a small dot at the end.

Allan Kayne