



ARBITRATION AWARD

Panelist: F.N. Bantwini
Case Number: PSHS564-11/12
Date of Award: 15 May 2012

IN THE ARBITRATION BETWEEN

NEHAWU obo Mgweba N.L. : APPLICANT

AND

Department of Health-EC : RESPONDENT

Union/Applicant's Representative : Mr. T. Sikithi
Union / Applicant's Address : 20 Robinson Road
PO Box 1706
Queenstown
5320

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Respondent's Representative : Mr. T. Moni
Respondent's Address : PO Box 1331
: Komani Hospital
: Queenstown
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DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was heard on 18 April 2012 at the offices of the respondent in Queenstown. It came before the PHSDSBC in terms of Section 191 (5) (a) of the Labour Relations Act, 66 of 1995 (the LRA) for arbitration of a dismissal dispute. The respondent was represented by Mr. T. Moni while the applicant was represented by Mr. Sikithi, an official from NEHAWU. Parties agreed to file closing arguments on 24 April 2012.

ISSUE TO BE DECIDED

2. The issue to be decided is whether Ms. Mgweba 's dismissal was substantively fair or not.

BACKGROUND TO THE DISPUTE

3. The employee started working for the respondent on 03 March 2006. She was holding a position of a Nursing Assistant, earning R6000, 00 per month during the time of her dismissal on 14 October 2011. She challenged the dismissal by referring the dispute to the PHSDSBC through her union.

SURVEY OF EVIDENCE AND ARGUMENT

4. In terms of section 192(2) of the LRA the onus is on the respondent to prove the fairness of the dismissal of the employee.

The Respondent's Version

5. The applicant, according to Mr. Moni's opening statement was dismissed for misconduct which emanated from absenting herself without authorization for 22 days. The applicant's dismissal was both procedural and substantively fair as pre-dismissal processes were conducted by the respondent.
6. **Ms Faith Winnie Jordaan**, the first witness for the respondent testified under oath as follows:
7. She works for the respondent as a Middle Manager; Nursing and is in charge of Nomzamo Health Center. She knows the applicant since May 2007. The applicant has a pattern of absenting herself on a regular basis. She spoke to her (applicant) on several occasions regarding the implications. Other colleagues like Professional Nurses also spoke to her in trying to caution her about her behavioral pattern. In 2007, she (the witness) started to institute formal disciplinary procedures.

8. She used to tell the officials that she went to see a Traditional Healer. In 2008, she was referred to the Employee Assistance Programme (EAP) and the applicant attended regularly for a short period. The applicant attended about 5 sessions. There was no complete change in the applicant's attendance as she continued to absent herself without authority. The respondent's officials would be sent to her home and she (the witness) asked the applicant's brother to talk to her (the applicant). On 18 November 2009 she wrote a letter to the applicant's union (NEHAWU) asking for assistance. This letter appears from page 20 to 21 of the bundle. The applicant was finally dismissed for absenting herself for 22 consecutive days without authorization.
9. The witness was referred to clause 14.4 of the Determination on leave of absence in the Public Service which reads :
10. *"If overcome by a sudden illness/injury, the employee must personally notify his/her supervisor/manager **immediately**. A verbal message to the supervisor/manager by a relative, fellow employee or friend is only acceptable if the nature and or extent of the illness/injury prevents the employee to inform the supervisor/manager personally"*
11. During Wednesdays meetings with staff are held wherein issues relating to leave policy and leave of absence and its implications are being explained. The applicant used to attend the meetings when she is on duty.
12. Under cross-examination by Mr. Sikithi, the witness testified that respondent's disciplinary procedure was followed before the applicant was dismissed. The applicant was constantly reprimanded and supervisors and other managers used to talk to her. The applicant attended the EAP programme and attended about 5 sessions after explaining to her that it would assist her. The minutes of counseling appear from page 35 to 36 of the bundle.
13. The applicant does not stay far from the clinic and at some stage she visited her home with 3 other officials to drop a letter in her home.
14. In closing, **Mr. Moni** argued that Mrs. Jordaan's evidence was a clear indication of the fact that management at Nomzamo Clinic tried their best in making the applicant a better person but they failed as a result of the applicant's unwillingness to change. The applicant was aware of the leave policy and that a Traditional Healer does not have an authority to issue sick certificate in term of leave determination. Under cross-examination the applicant could not state as to why she could not ask her neighbor who happened to be her cousin to report her whereabouts. Mr Moni finally submitted that

the applicant's dismissal was procedurally and substantively fair and her application must be dismissed.

The Applicant's Version

15. **Ms. Nomathemba Lorraine Mgweba**, the applicant testified under oath as follows:
16. She used to report to the Sister in charge of the group/ particular unit. She used to do observations and other duties. When she is sick, she used to be attended to by the Traditional Healer. She used to attend meetings on Wednesdays about leave of absence. During the 22 days of her absence from duty, she was sick and was being treated by a Traditional Healer at Ilinge. She left children at home as her brother was in East London. She could not report to the supervisor or manager about her sickness and she was suffering from headache and fufunyana.
17. She agreed to attend the EAP programme and she reported for duties regularly afterwards. After 23 November 2009, her supervisor talked to her about the absence and she was made to sign a leave without pay form. Mrs. Manzi, from the union office spoke to her about the absence and advised her to report for duties regularly.
18. Under cross-examination, the applicant testified that her duties were very important to the community service and no one used to perform them when she was absent. This means that she was tempering with the service delivery of the respondent. On Wednesdays she used to attend meetings/workshops on leave of absence and she was aware of the leave policy of the respondent.
19. She received 3 letters from management when he was absent from work. During the 22 days (from 02 November to 23 November 2009) of absence she did not report to the respondent and she could not ask her brother to report her because the brother was not at home. The neighbor who is also her cousin took her (the applicant) to the Traditional Healer at Ilinge. During 2008, she attended the EAP programme and it assisted her as she reported for duties regularly afterwards.
20. The applicant further testified that Lindiwe asked her to sign the leave without pay form without telling her. She was aware of the respondent's leave policy. Mrs. Manzi from the union office told her (the applicant) to report for duties regularly.
21. Under re-examination the applicant stated that he was made to sign a leave without pay after absenting herself for 22 days without authority. She was aware about the leave policy of the respondent.

22. In closing, **Mr. Sikithi** argued as follows:

23. He applicant was never given another chance for counseling process and she was made to sign a form without being told that it was leave without pay form. Upon enquiry of 22 days leave without pay, the applicant was not given a direct answer when she enquired about the deductions.

24. Mr. Sikithi further stated that the union is challenging inconsistency of the respondent in applying its discipline in the sense that misses. Vena and Sithole were charged for the same offences but were given final written warnings and suspension fro 3 months without pay as a sanction. This evidence was not tested during arbitration. The applicant seeks reinstatement as a remedy.

ANALYSIS OF EVIDENCE AND ARGUMENT

25. After considering the evidence presented the following is found:

26. It is common cause that the applicant was dismissed for misconduct which emanated from absenting herself without authorization from 02 November 2009 to 23 November 2009. The dismissal was pronounced after a disciplinary hearing was conducted. The union challenged substantive unfairness of the applicant's dismissal. Other common cause facts are as follows:

- That the respondent held several meetings with the applicant in trying to caution her and explain the implications of absenting herself from duty without authorization.
- That the respondent issued verbal and written warnings based on the applicant's continuous absence from duty without authorization.
- That the applicant was referred to employee assistance programme (EAP) for counseling and she attended about 5 sessions.
- That the applicant was aware of the respondent's rule/policy on leave dispensation as she used to attend meetings /workshops during Wednesdays at Nomzamo Clinic.
- That the applicant did not attempt to request anyone to report her whereabouts during the period 02 November 2009 to 23 November 2009.

27. The following issues are in dispute and will form part of my analysis:

➤ Whether the applicant was forced to sign a leave without pay form or not.

28. The applicant testified that he was aware of the respondent's rule /policy relating to leave of absence and its implications. No evidence was led to suggest that the applicant was forced to sign the leave without pay form.

29. It is trite law that once an employee provides proof by way of an authentic doctor's certificate or the verbal evidence from a doctor, the absence will be regarded as being justified.

30. It is my view that the applicant's absence was not caused by the circumstances beyond her control but willful.

31. I am satisfied that the respondent has discharged its onus in terms of Section 192(2) of the LRA and has followed a fair procedure in dismissing the applicant. I am also of the view that the sanction of dismissal was appropriate.

32. The conduct of the applicant justified dismissal and therefore her dismissal was both procedural and substantively fair.

AWARD

33. I therefore make the following award:

34. The dismissal of the applicant, **Ms Nomathemba Lorraine Mgweba**, by the respondent, **the Department of Health-EC** is declared to be procedural and substantively fair.

35. No order as to costs is made

36. The application is dismissed.



Signature

Faith Ncumisa Bantwini

PHSDSBC PANELIST