



ARBITRATION AWARD

Panelist/s: Faith Ncumisa Bantwini
Case No.: PSHS57-10/11
Date of Award: 10-Aug-2010

In the ARBITRATION between:

ARBITRATION AWARD

Commissioner: F. N. Bantwini
Case Number: PSHS57-10/11
Date of Award: 10 August 2010

IN THE ARBITRATION BETWEEN

NEHAWU obo Meyer, G : APPLICANT

AND

Department of Health-WC : RESPONDENT

Union/Applicant's Representative : Mr. G. Otto
Union / Applicant's Address : C/O Van Rheine veldt and Plein Street
Stellenbosch
7600

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Respondent's Representative : Mr. X. H. Nginase
Respondent's Address : Western Cape Provincial Dept of Health
PO Box 2060
Cape Town

Respondent's Telephone: 021 948 9908

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DETAILS OF HEARING AND REPRESENTATION

1. This matter was heard on 13 July 2010 at the offices of the Department of Health in Cape Town. It came before the PHSDSBC in terms of Section 191 (5) (a) of the Labour Relations Act no.66 of 1995 (the LRA) for arbitration of the applicant's dismissal dispute. The Department of Health was represented by Mr. X.H. Nginase. The applicant, Ms. G. Meyer, was represented by Mr. G. Otto, an official from NEHAWU. Parties agreed to submit written closing arguments on 19 July 2010.

ISSUE TO BE DECIDED

2. Whether the applicant's dismissal was procedural fair and if not, what the appropriate remedy would be.

BACKGROUND TO THE DISPUTE

3. The applicant started working for the respondent on 02 January 2004 as a Basic Ambulance Assistant and his services were terminated on 26 March 2010. He challenged the dismissal by referring the dispute to the PHSDSBC through his union. He was earning R87 924 per annum during the time of his dismissal. The applicant was charged and dismissed for alleged misconduct which emanated from charges relating to misrepresentation for falsely indicating in his application for employment form Z83 dated 17/12/2004 for a position of BAA that he is in possession of a senior certificate (grade 12 qualifications) while he was not in possession of such qualifications.

Charge 2 relates to misrepresentation in that the applicant submitted a senior certificate NR 585-178033 dated November 1985 to the respondent as his own whilst the certificate has been falsified and belong to another person other than himself.

SURVEY AND ANALYSIS 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 applicant.
5. According to Mr. Nginase's opening statement the applicant was charged and dismissed after a disciplinary hearing was conducted for misrepresentation. He stated in Z83 application form that he is in possession of Grade 12/standard 10. He submitted a false certificate which does not belong to him.
6. **Mr. Dean Pretorius** the first witness, for the respondent, testified that he has been working for the Department of Education for 20 years and he has been doing verifications for senior certificate and teaching qualifications for 6 years.
7. The witness was referred to a sworn in affidavit that was issued by him regarding the verification of the certificate that was submitted by Mr. Meyer. He further testified that the certificate that was submitted by the applicant was invalid as it does not correspond with Glen Meyer. The certificate with examination number S85-178033 was issued to Gavin Lennon Heyns with effect from 01 January 1986. With regards to disciplinary hearings, the policy of the Department of Education is that only affidavits are submitted for all cases more especially when the certificate is not authentic.
8. Under cross examination, the witness testified that the policy of the Department of Education on disciplinary hearings is that an affidavit is being issued in terms of Criminal Procedure Act no. 57 of 1977. A representative only testifies during the disciplinary hearings on request when the validity of the affidavit is being questioned.
9. The second witness, **Ms. Dellwin Hayward** testified that she is employed by the respondent as a Manager in the Western District of EMS since 1999. She was the presiding Officer of the applicant's disciplinary hearing. Her findings were based on the evidence led before her during the disciplinary hearing. The applicant did not dispute that the STD 10 certificate which he submitted during his employment by the respondent was fraudulent.
10. Under cross-examination the witness testified that the respondent's evidence was based on the affidavit issued by Mr. Dean Pretorius, an official from the Department of Education. A ruling on the admissibility of the document was made. The applicant did not submit anything to the contrary and the findings were submitted.

11. In closing, **Mr. Nginase** argued as follows;

12. The presiding officer followed a fair procedure during the disciplinary hearing and the verdict was issued after 5 days which was agreed upon for submission of mitigating circumstances as well as closing arguments. The presiding officer's decision was based on the documentary evidence that was presented by the respondent. Ms Hayward took cognizance of the fact that the sworn affidavit is a legal document that was made before the Commissioner of Oaths.

13. Mr. Nginase further stated that the respondent has been consistent in dismissing employees who committed serious transgressions. He finally submitted that the applicant's claim regarding procedural unfairness of the dismissal lacks substance.

Applicant's case

14. The applicant according to Mr. Otto's opening statement was dismissed unfairly as the respondent failed to follow fair procedure during the disciplinary hearing. The chairperson's decision was based on the hearsay evidence. The applicant is not challenging the substantive fairness of the dismissal. The remedy that is being sought by the applicant is 6 months salary.

15. The applicant, **Mr. Glen Meyer** testified that he is not contesting the respondent's allegations against him. He was present at the disciplinary hearing and his representative asked the chairperson about the admissibility of the respondent's documents. The chairperson made a ruling after an adjournment of 10 minutes. He was found guilty and was dismissed

16. Under cross-examination, the applicant testified he received the verdict of the disciplinary hearing after the finalization of the disciplinary hearing.

17. In closing, **Mr. Otto** submitted that the respondent based its decision on hearsay evidence although the witness from the Department of education testified that he could have testified during the disciplinary hearing if there was a request from the respondent to do so. The respondent chose not to request the representative from the Department of Education. The respondent did not make a ruling regarding the admissibility of the documents during the disciplinary hearing. The applicant seeks 6 months compensation as a remedy for procedural unfairness as no witness was called.

ANALYSIS OF EVIDENCE AND ARGUMENT

18. Evidence before me indicates that the respondent conducted a disciplinary hearing prior the dismissal of the applicant. The applicant only challenged procedural unfairness of the dismissal.

19. I am also of the view that the respondent proved its case, as far as substantive and procedural fairness is concerned

20. The respondent for instance, clearly established that the applicant misrepresented himself by indicating in Z83 form dated 17/ 12/2004 that he is in possession of STD 10/ grade 12 qualifications when applying for a BAA position in EMS section.

21. The applicant further submitted a fraudulent Senior Certificate NR-178033 dated November 1985 whilst the certificate belongs to Gavin Lennon Heyns and was dated 01 January 1986.

22. The applicant's claim of procedural unfairness is based on the fact that during the disciplinary hearing the respondent made a finding of dismissal based on hearsay evidence as no witness testified on the sworn affidavit. The chairperson also did not make a ruling regarding the admissibility of the affidavit.

23. Ms. Hayward who was chairing the applicant' s disciplinary hearing testified that the decision to dismiss the applicant was based on the sworn affidavit by Mr. Dean Pretorius who is an official of the Department of Education which was presented by the respondent. Ms.Hayward further testified that the evidence was not challenged by the applicant and his representative. She also presented a letter from the Education Department which reads as follows:

"Good Morning Mr. Boonzaaier

Re: Your e-mail dated 2009/06/09 refers

The WCED Directorate Examinations do not send staff to attend disciplinary hearings. My affidavit in terms of section 212 (1) OF Criminal procedure Act (Act 51 of 1977) attached can be used in the hearing.

Regards"

24. Mr. Pretorius further testified that a representative from his office only attend disciplinary hearings only on request when the validity of the affidavit is being questioned. Based on the evidence led before me, it is

undisputed evidence that the authenticity and the validity of the affidavit were not questioned during the disciplinary hearing.

25. It is my view that the respondent did not present hearsay evidence but documentary evidence which was not challenged by the applicant and his representative. The sworn affidavit is a legal document that was issued in terms of the Criminal Procedure Act no. 51 of 1977.

26. The applicant has been charged and dismissed for misrepresentation which in other words is fraud. It is therefore necessary for me to look at the definition of "fraud". Fraud can be defined as the unlawful and intentional making of misrepresentation which causes actual prejudice or which is potentially prejudicial to another (See **S v Myeza 1985 (4) SA 30 (T)** and **Burchell and Milton, Principles of Criminal Law 523.**)

27. One of the requirements of fraud is that there must be a misrepresentation or as it is often expressed "a pervasion of truth" and the accused must represent that a set of facts exists which in truth does not exist (See **Milne v Harilal 1961 (1) SA 799 (D)**).

28. Based on the evidence before me, I am satisfied that the respondent has discharged its onus in terms of Section 192(2) of the LRA. I am also of the view that the sanction of dismissal was reasonable and fair considering also that the applicant committed a serious offence. There is in the circumstances no reason for me to interfere with the decision of the respondent to dismiss the applicant.

29. For the above reasons and in view of the fact that I have only been asked to rule on the procedural fairness of the applicant's dismissal, I make the following award:

AWARD

30. I therefore make the following award:

30.1 The dismissal of the applicant, **Glen Meyer** by the respondent, the **Department of Health-WC** is declared to be procedural and substantively fair.

30.2 There is no order as to costs.

30.3 The application is dismissed.



Signature

Faith Ncumisa Bantwini

PHSDSBC Panelist