



ARBITRATION AWARD

Panelist/s: Faith Ncumisa Bantwini
Case No.: PSHS65-10/11
Date of Award: 1-Sep-2011

In the ARBITRATION between:

ARBITRATION AWARD

Panelist : F.N.Bantwini

Case Number: PSHS65-10/11

Date of Award: 27 June 2011

IN THE ARBITRATION BETWEEN

Lushen Pillay Att. obo Maharaj R: APPLICANT

AND

Department of Health-KZN: RESPONDENT

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DETAILS OF HEARING AND REPRESENTATIONS

1. This arbitration was part heard on 02 February 2011 and was finalized on 02 June 2011 at King Edward Hospital in Durban. It came before the PHSDSBC in terms of Section 191 (1) 5 (a) read with Section 186 (2) (b) of the Labour Relations Act 66 of 1995 (the LRA). Ms. S. Roonnarain from Lushen Pillay Attorneys appeared for the applicant, Mrs. R. Maharaj who was also in attendance while Mr. M. Khumalo appeared for the respondent, the Department of Health-KZN.

ISSUE TO BE DECIDED

2. The issue to be decided is whether the applicant's suspension by the respondent was fair or not.

BACKGROUND TO THE DISPUTE

3. The applicant, Mrs. Rajeshree Maharaj referred a dispute through her Attorneys to the PHSDSBC regarding an alleged unfair suspension. When the dispute could not be resolved at conciliation level, the applicant filed a request for arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's Version

1. According to Ms. Roopnarain's opening statement, the applicant is currently employed by the respondent since December 2001 as a Support Services Officer. She was charged with insubordination. The disciplinary hearing was scheduled for 07 April 2010. The applicant appealed but no appeal hearing was conducted. The applicant seeks reversal of the sanction as a remedy.
2. The applicant, **Mrs. Rajeshree Maharaj** testified under oath as follows:
3. She started working for the respondent on 14 December 2001 earning R70000, 00 per month. In October 2008 a general staff meeting was called by management and they (management) advised the staff the Wentworth base will relocate to Queens burgh sometime in 2009 but the staff must not entertain rumours as they will be consulted before the move. In January 2009, Mr Bisi, the manager advised them that on 15 December 2009, they will be moving from Wentworth to Queens Burgh. Relocation to Queens burgh was a management's decision. Mr. Alli, the Supervisor took herself (the applicant) and other 2 staff members, Nokuthula and Claire to Queens burgh base after the meeting that was held in October 2008. The purpose of the trip was to show them the location of the Queens burgh base.
4. During the first week of the relocation to Queens burgh, the respondent transported the staff to the base (Queens burgh) but on the second week, they were all given letters advising them that transport will be stopped. She then advised the union about the incident. After the respondent advised them that they will no longer be transported to Queens burgh, she was emotionally stressed and was booked off sick by the Psychologist for 2 weeks. On returning back from sick leave she went to Wentworth because she did not have transport to go to Queens burgh. On 06 April 2010 she was invited by her Supervisor to attend a meeting not a grievance hearing at Queens burgh. She could not attend the meeting because she was not provided with transport.
5. On 28 April 2010 she received a sanction of 3 months suspension and a final written warning. She appealed against the sanction but no disciplinary nor appeal hearing was conducted by the respondent. An amount of R360, 00 was deducted from her salary for 10 months. The applicant further testified that her place of work was Wentworth but the respondent refused her some work and she was signing an attendance register.
6. Under cross- examination the applicant confirmed that the respondent convened a general staff meeting regarding relocation from Wentworth to Queens burgh EMRS base. She started working at Queens burgh on 02 March 2010 and her last day was 06 March 2010. The reason for not reporting at

Queens burgh was that the respondent did not provide transport to Queens burgh. While she was at Wentworth, Mr. Alli refused to give her some work and he (Mr.Alli) had already relocated to Queens burgh. She performs secretarial and administrative functions.

7. The applicant further testified that it should not be acceptable that she went to a different base other than the one that she was allocated to (Queens burgh). The reason why she did not attend the grievance meeting was that the respondent did not provide transport from Wentworth to Queens burgh which was the venue. The applicant did not comment when Mr. Khumalo put to her that the respondent was not obliged to arrange transport while she was supposed to be at Queens burgh base. The applicant also confirmed that she received a notice to attend a disciplinary hearing as well as the charge sheet. She was being assisted by her unions (HOSPERSA and PSA) to prepare for the disciplinary hearing.
8. On the day of the hearing she left the venue because the presiding officer did not attend the hearing. The respondent's representative put to the applicant that the applicant waived her right of attending the disciplinary hearing due to the fact that the chairperson arrived and proceeded with the disciplinary hearing in her absence. The applicant did not comment.
9. With regards to the attendance register, the applicant submitted that she was signing it although it was not allocated to her and the other two employees. Mr. Singh used to go to Wentworth to give them letters because he was aware that she was at Wentworth. Mr. Dlodlu told her in writing that no transport will be provided for her to Queens burgh. On 07 April 2010 her unions were going to represent her at the disciplinary hearing.
- 13 Under re-examination, the applicant confirmed that Mr. Singh was aware that she was reporting at Went worth because there were no means of getting to Queens burgh. Mr. Dlodlu, an official from the head office advised her to report at Queens burgh until the problem of transport is resolved. Nobody told her and the other 2 employees to leave the venue of the disciplinary hearing. The chairperson did not arrive and she left after 2 hours.
- 14 The first witness **Mrs. Clora Andrews** testifies as follows;
- 15 She is currently working for the respondent. In October 2008 Mr. Alli approached her together with the applicant and Nokuthula to go and see where Queens burgh base is, as Mr. Singh might tell them to move. On 07 April 2010 she attended the disciplinary hearing. They waited for 2 hours and unions told them to leave as they had other businesses to do.

- 16 Under cross-examination the witness testified that Mr. Alli took herself, Nokuthula and the applicant to Queens burgh because there was a rumor to the effect that they were going to move to Queens burgh base. She reported at Queens burgh base for a week because Mr. Alli transported them. When he stopped to transport them, she reported at Wentworth base. Nobody told them to report at Wentworth.
- 17 The witness further testified that she was charged together with the applicant for reporting at Wentworth. The disciplinary hearing proceeded in their absence because the unions told them to leave after 2 hours as they had other businesses to do. She realized that the union misled them by telling them to leave the venue of the disciplinary hearing. She could not blame the respondent for proceeding in their absence.
- 18 The remedy that is being sought by the applicant is that a final written warning be removed from her file and that the money that was deducted from her salary be reimbursed by the respondent.

APPLICANT'S ARGUMENTS

19. In closing, **Ms. Roopnarain** argued as follows;
20. That the respondent's conduct was grossly unfair as the applicant was not given an opportunity to a disciplinary hearing. The chairperson was absent. The applicant should have been informed of the delay if the chairperson was delayed. The employee did not waive her right to a disciplinary hearing. The applicant was not called to attend her appeal hearing instead, the verdict was issued. The respondent did not afford the applicant an opportunity to be heard.
21. The evidence of the applicant was consistent, honest and she is a credible witness. The applicant was never consulted about a move to Queens burgh by the respondent. The applicant suffered prejudice in 3 ways:
- The money was deducted from her salary
 - The disciplinary hearing was heard in her absence
 - The applicant was suspended for 3 months with a written warning.
22. The employees were never told that they were not supposed to report at Wentworth and they never refused instruction. The applicant's monies that were deducted should be refunded.

The respondent's version

23. **Mr. Salim Enos Alli** the only witness for the respondent testified as follows;
24. He is employed by the respondent at the technical department as a Technician. He has been in the employ of the respondent for about 16 years. During the relocation of EMRS Wentworth base to Queens burgh, he was instructed by his Supervisor to transport the 3 employees, the applicant, Nokuthula and Clora to show them the Queens burgh base as well as the taxi route. When the relocation was effected, the ladies refused to move.
25. The reasons offered by the ladies were that they do not have transport to go to Queens burgh. They were transported for a week to Queens burgh and while they were in Wentworth, no work was allocated to them. They disregarded the instruction hence they were charged. The respondent consulted with all employees before the relocation to Queens burgh was effected.
26. Under cross-examination, the witness testified that she took the 3 employees ie the applicant, Nokuthula and Clora to Queens burgh because he was instructed to do so by his Supervisor. The 3 employees were not reporting to him while they were in Wentworth, he (the witness) used to see them for few minutes when he was doing his technical duties. Wentworth was not the employees designated work area.
27. There were consultations between staff and unions regarding relocation to Queens burgh. All employees were told that no transport was to be provided. There were meetings that were held and there were informal talks over a year regarding the move to Queens burgh.
28. Under re-examination the witness confirmed that all employees were consulted about the move to Queens burgh. The trip to Queens burgh from Wentworth base was official as he was instructed to take the 3 ladies i.e.; Nokuthula, the applicant and Clora in 2008.

RESPONDENT'S ARGUMENTS

29. In closing, Mr. Khumalo argued that the disciplinary code (Resolution 1 of 2003) does not stipulate that the other party must leave when the other party has not arrived at the venue of the disciplinary hearing. The applicant was consulted by the respondent before the relocation from Wentworth to Queens burgh base. It is not disputed that Mr. Alli muted the issue of moving from Wentworth to Queens burgh. The applicant committed misconduct by refusing to report at Queens burgh base.

There is no regulation that compels the respondent to transport the employees to work. According to the disciplinary code, the Appeals Authority is not compelled to call employees to testify at the appeal's hearing.

30. Mr. Alli's evidence was honest and straightforward. He said the employees including the applicant consulted their unions regarding the transport issue. Mr. Khumalo finally submitted that the respondent's evidence must be accepted and prayed that the applicant's evidence be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENTS

31. It is common cause that the applicant was charged and was found guilty for refusing to report to her designated work station and gross absenteeism.
32. It is also common cause that the sanction was a final written warning and 3 months suspension without pay.
33. The following facts are in dispute and will form part of my analysis of arguments and evidence:

➤ **Whether the applicant was afforded an opportunity to defend her case at the disciplinary hearing or not.**

34. The applicant challenged both the procedure and substantive fairness of the sanction. It is the applicant's case that the applicant was never given an opportunity to be heard as the disciplinary hearing as well as the appeal's hearing was conducted in her absence. According to the evidence of the applicant and her witness, the unions, HOSPERSA and PSA representatives advised the applicant and the other 2 employees who were charged together with the applicant (Misses Andrews and Maphumulo) to leave the venue after 2 hours when the chairperson could not arrive at the venue. The reason for leaving the venue according to the applicant's evidence was that the union representatives had other business to attend to.
35. The respondent's response to the above evidence was that the applicant's disciplinary hearing was conducted in her absence. The disciplinary code (Resolution 1 of 2003) does not stipulate anywhere that a party must leave the venue of the disciplinary hearing when the other party has not arrived. The

applicant waived her right of being heard at the disciplinary hearing. The Appeal's authority only calls the applicant to testify at the appeal hearing at his/her discretion.

36. It must be noted that both the applicant and her witness testified that the respondent never advised them to leave the venue of the disciplinary hearing. Ms. Andrews further testified that the unions misled them by telling them to leave the venue and the respondent cannot be blamed for proceeding with the disciplinary hearing in their absence.

➤ **Whether the applicant was consulted about the relocation to Queens burgh or not.**

37. According to the applicant's initial evidence, the respondent never consulted the employees including herself about the relocation from Wentworth to Queens burgh base. Mr. Alli, the respondent's witness testified that several meetings were held regarding the move from Wentworth to Queens burgh. He further testified that he was once instructed by his Supervisor to take a trip with the 3 ladies i.e. Nokuthula, Clora as well as the applicant to Queens burgh base. The purpose of this trip was to show the ladies a taxi route and the actual location of the Queens burgh base. The staff was told that no transport will be provided to transport employees to Queens burgh.

38. Mr. Alli's evidence was corroborated by the applicant and her witness, Ms. Andrews as they both testified that in October 2008 and in January 2009 Management convened a meeting with staff regarding relocation to Queens burgh. Both the applicant and her witness did not dispute that they were transported by Mr. Alli to Queens burgh base after the first meeting. It is also undisputed evidence that the unions were also consulted and were involved in the process.

➤ **Whether the applicant was told not to report at Wentworth EMRS base or not.**

39. It is the applicant's evidence that the respondent transported her and her 2 colleagues from 02 March 2010 to 06 March 2010. From 09 March she (the applicant) decided to report at Wentworth base because the respondent refused to transport them to Queens burgh base. The applicant further testified that she believed that Wentworth was her designated work area and nobody advised her and her colleagues that they were not supposed to report at Wentworth.

40. The applicant testified that when the respondent stopped transport after a week (06 March 2009), she consulted with her unions and the head office of the respondent regarding the transport issue. A certain Mr. Dlodlu advised her and her colleagues to report at Queens burgh until the issue of transport is resolved. Ms. Andrews, the applicant's witness also testified that nobody told them

(herself, the applicant and Ms. Maphumulo) to report at Wentworth and no work was allocated to them.

41. Mr. Alli, the respondent's witness testified that the applicant and her colleagues were aware that Wentworth is not their designated work area hence no work was allocated to them. This is the reason why the 3 employees were charged. A memorandum dated 24 March 2009 from Mr. NB Singh to the applicant reads:

"It has come to the attention of Management that you are currently not reporting to your place of work at Queens burgh.

Relocation from Wentworth to Queens burgh was discussed with you on numerous occasions during the course of last year and at the beginning of this year, prior to the actual date of relocation.

You are required to report to your place of work at Queens burgh, however failure to adhere to this directive will result in disciplinary action instituted against you"

42. The contents of the above memorandum to me, indicates that the applicant was aware or was expected to be aware that Wentworth was not her designated work place. The memorandum is also a warning to the fact that a disciplinary action will be taken against her if she fails to adhere to the directive.

43. It is furthermore undisputed evidence that the applicant and her colleagues were signing an attendance register which was never allocated to them and was never under the supervision of their Supervisor, Mr. Alli or any official of the respondent.

44. It is my view that the respondent followed a fair procedure in issuing a final written warning and 3 months suspension against the applicant and has discharged its onus regarding procedural and substantive fairness.

AWARD

45. I therefore make the following award:

45.1 I find that the sanction of a final written warning and suspension without pay for 3 months issued by the respondent, the **Department of Health-KZN** to the applicant, **Mrs. Rajeshree Maharaj** was procedural and substantively fair

45.2 No order as to costs is made.



Signature

Faith Ncumisa Bantwini

PHSDSBC PANELIST