



ARBITRATION AWARD

Commissioner: **Janine Carelse**

Case No: **PSHS69-20/21**

Date of award: **22 September 2020**

In the matter between:

DENOSA obo SIYABULELA ZAZINI

APPLICANT

and

DEPARTMENT OF HEALTH- WESTERN CAPE

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was set down on 7 September 2020 and was heard at the Respondent's premises, Western Cape Nursing College in Athlone. The proceedings were digitally and manually recorded, and the matter proceeded in English. An interpreter, Mr. Anthony Nondala, interpreted from Xhosa to English and vice versa.
2. The applicant was present and represented by Mr. Isaac Moraka, a DENOSA shop steward. The respondent was represented by Mr. Ayanda Mniki, a labour relations official employed in the respondent's labour relations unit. The applicant referred an alleged unfair dismissal dispute relating to misconduct.
3. Both parties handed in bundles of documentary evidence on which they relied in support of their cases.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the applicant's dismissal was substantively and procedurally fair. If I decide that the applicant's dismissal is substantively and/or procedurally unfair, I must decide what the appropriate remedy will be for such unfair dismissal.

BACKGROUND TO THE MATTER

5. The applicant was employed by the respondent as a Household Aid. The applicant was charged and found guilty of dishonesty, in that it is alleged that he provided false information about his previous employment and his reference, Mrs Msutwana when he applied for the position of Household Aid at Lentegeur hospital. The applicant was dismissed subsequent to a disciplinary hearing. The applicant challenges both the procedural and substantive fairness of his dismissal and wishes to be reinstated with retrospective effect.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence

Respondent's evidence

6. Ms. Zoliswa Rikwe (Rikwe) testified for the respondent under oath and stated that she works for the Department of Health directorate labour relations. She was the chairperson of the applicant's disciplinary hearing. She found the applicant guilty of the charge of dishonesty and recommended the applicant's dismissal. She averred that the applicant misrepresented that he had worked at Chuma Primary School when he did not because the principle of Chuma Primary School testified at the applicant's disciplinary hearing and stated that he does not know the applicant and the applicant had not worked there. She contended that the applicant stated that the respondent must prove its case and they had to call Mrs Msutwana as a witness if they wanted to. She stated further that she suggested that an in loco inspection be done and the applicant refused to take them there.

7. Under cross-examination she conceded to the typographical errors made in the applicant's disciplinary hearing outcome report, as there were two matters of a similar nature that she was dealing with, but two different employees. If they had done an in loco inspection and the school turned out to be Chuma Primary School, then the outcome would have been different. The reason why she did not consider the in loco inspection of Chuma Educare Centre in respect of the other matter is because she had not gone to the Educare in respect of the applicant's matter. The two matters are separate. She did not go to the primary school that the applicant had referred to. She denied having worked with Mr Tekani.

8. Mr. Igshaan Green (Green) testified for the respondent under oath and stated that he is the HR manager and he was part of the investigation team in the applicant's case. He was informed by management that a whistle-blower has advised that the applicant had lied about where he had previously worked, and they initiated an investigation in that respect. They contacted Chuma Primary school as indicated on the applicant's cv and the principle was asked whether the applicant works there, and they said no. The whistle-blower further indicated that there was another person who had made the same misrepresentation as the applicant, Mr. Maniko. They were appointed a year after each other. When they drew the files of the two CVSs and compared it, they realised it is almost identical in terms of the duties at the school. They gave the applicant an *audi* to hear his side of the story. He stated that he did not do anything wrong and that he worked at Chuma Primary school and that's when they investigated further because they wanted further answers from the principle. In response to the audi, the applicant did not state that he worked at an Educare Centre. He averred that the department takes a very stern approach to dishonesty. The trust relationship is broken because the applicant will be placed in the wards and he will have to take care of their patients and if he is dishonest, they are probed to take action. The applicant was appointed into the post of Household Aid and he was dismissed by the respondent on 20 May 2020. The respondent has a zero-tolerance stance on fraud and any person proven guilty will be dismissed. '

9. Under cross-examination he stated that he was part of the investigation and they went to Chuma primary school to investigate. Mr Twalo indicated that he tried to get hold of

Mrs Msutwana and they could not get hold of her. He contended that if the applicant indicated in his cv Chuma Educare Centre then they would have investigated that, but he referred to Chuma Primary school. After they concluded the interview process, they handed the applicant a form to be completed by his reference. In hindsight the reference from Mrs Msutwana should not have been accepted because the applicant because the applicant stated in his cv that he had worked there since 2016 and not 2017.

10. Under re-examination he stated that if the applicant rectified the matter and stated that he made a mistake, they would have contacted the Educare Centre and it would have been acceptable. That is if he was not untruthful about the dates that he worked there and the duties that he performed.

11. Ms. Bridget McKay (McKay) testified for the respondent under oath and stated that she is the assistant manager at Lentegeur Hospital, and she was the chairperson of the interviews for Household Aids. She averred that they received the criteria which required that the successful candidate has appropriate experience in, inter alia, cleaning linen, food dishing experience, hygiene control and linen control. The shortlisting was based on experience and the applicant qualified. She stated that if the applicant did not have the additional year of 1 January 2016, as indicated in his cv, he would not have attained a score of 4 and would only have attained a score of three points. The benchmark was 70% and he would have only attained 60%, which is less than the benchmark. He would not have qualified for the shortlisting. Under cross-examination she stated that if the applicant wrote Chuma Educare in his cv, he would still be hired, if he performed the same duties. She conceded that Mrs Msutwana completed the applicant's written reference.

Applicant's evidence

12. The applicant testified under oath and stated that Chuma Educare is in Khayelitsha Kwanini. The place where he worked is called Chuma Primary school. He stated that he was not given forms to sign and no papers to sign when he commenced his employment there. He cooked and prepared the children for mealtimes. The kids at the school wear uniform and are around the age of eight. They call it Chuma primary school. The uniform that the kids were wearing was maroon and gold. He stated further that he

did his education in the Eastern Cape. He averred that his salary at Chuma primary was given to him in cash and he did not receive a payslip or receipt, just cash in hand. He was working under Mrs Msutwana. McKay asked him to take the blank reference letter to Msutwana and she wrote what she wrote and gave it back to McKay. She did not ask him to take it to anybody else.

13. Under cross-examination he stated that he worked at Chuma primary school, but it is now called Chuma Educare centre. It is now written Educare centre. He sees now that there is a difference between Chuma primary school and Chuma educare centre. While he was in the hearing, he was never questioned about whether it was an educare or primary. He stated that he worked for almost a year, but he did not finish. He worked with Mrs Msutwana and mother Mpekwa. He got the job when he was taking his child to the creche. He earned four hundred, R450,00 per month. He averred that he has matric. He does not know the difference between a primary school and an educare. He was referred to a picture of Chuma educare and stated that he recognises it as the house of Chuma. He stated that he can read that it states Chuma educare centre, however, the building was not like that. He does not know when it changed. He stated that he drafted his own cv. He stated that he helped with the preparation of food at the creche and he would get the children ready when their meal is served. He contended that the truth is that he worked at Chuma educare and they were never given documents or papers to show that he was working there. He went to Msutwana's house and he left the blank reference letter with her to complete. He does not know why Msutwana had written the incorrect date that he commenced his employment with her. He worked at Chuma primary from 2016 to 2017 and he started in January 2016. There is no difference between Chuma primary school and Chuma educare centre. He applied for the post at Lentegeur when the post came out. Chuma primary and Chuma educare is the same.

14. Under re-examination he stated that there are no standard five learners there. The children are 8,5 and 6 years old.

15. Mr. Siyabulela Nongqaza (Nongqaza) testified for the applicant under oath and stated that he represented the applicant his disciplinary hearing and the conduct of the chairperson was unfair and biased. She went as far as preventing them from interviewing the witness.

She further stated that she knows Mr Tekana and because she knows him, whatever they ask will not sit with her. She insisted that they take the applicant for an in loco inspection and they did not object to it, but they felt that it was unfair. He stated further that a week later they took the chairperson to the educare centre and they used a government vehicle and the reason why they objected that day is because of their safety. The chairperson felt that the reason why she was not taken there for the applicant's case is the reason for the dismissal. The chairperson further objected to him cross-examining the employer's witness, Tekana. The chairperson insisted that they must go there, however, it was not safe.

16. Mrs Ntombeko Msutwana (Msutwana) testified for the applicant under oath and stated that she knows the applicant because he came to her to look for a job in 2017. She told him that she has a job for him in the kitchen. She paid him cash by hand. She does not have records that she keeps. There is no need to keep records because they have a high staff turnaround. She is the owner of Chuma educare. She stated that she is from the Eastern Cape and there are no educare centres in the Eastern cape. She averred that she recalls completing the applicant's reference in writing. Since she paints around her school, she noticed and realised later that the person doing the work did not put the "H" in Chuma. The applicant was assisting with the food in the kitchen. She does have a school uniform for the school. It is a tracksuit. The boys wear grey and gold t shirts and the girls have uniform that are maroon and gold. She stated that they call her educare a school.

17. Under cross-examination she confirmed her identity number, as indicated on her identity document. She does not have an official document with surname Msutwana. Msutwana is her bridal or marriage surname but her maiden surname is Speelman. She has a lot of witnesses that know her as Msutwana. She stated that it has been a long time since her educare is called Chuma educare centre. She worked with the applicant who started in January 2017 until July 2017. It has been Chuma educare centre since 2012. The applicant was getting R400,00 per month. She contended that her daughter wrote out the applicant's reference letter, after she had explained to her what type of work the applicant did. Her daughter is English, and she cannot write proper English and she let her write it for her. She told her daughter what to write.

18. Under re-examination she stated that the name Chuma educare centre was always on the building. It has always been Chuma educare centre. The children at the educare are aged 6 months to five years and very few are six years old.

ANALYSIS OF EVIDENCE AND ARGUMENT

19. Section 192(1) of the Act provides that an employee bears the onus of proving the existence of a dismissal, whilst subsection (2) requires the employer to prove the fairness thereof. In this matter it is not in dispute that the applicant was dismissed.

Substantive fairness

20. In determining whether the applicant's dismissal was substantively fair, the factors listed in Schedule 8 of the Act under Item 7 of the Code of Good Practice: Dismissal is taken into account.

21. The applicant was charged, found guilty of and dismissed for misrepresenting on his cv that he worked at Chuma primary school. The applicant maintained that he worked at Chuma primary school and when it transpired that he had actually worked for Chuma educare centre and not Chuma primary school, he stated that he did not know the difference. The applicant's witness, Msutwana, did not corroborate the applicant's version in several material respects. Firstly, the applicant stated that the name "Chuma educare centre" was not written on the building when he worked there, whereas Msutwana testified that the name of the educare was always written on the building.

22. Secondly, the applicant stated that the children at the educare centre were up to the age of eight years old, whereas Msutwana stated that the majority of children were between the ages of 3 months old and five years old and very few children were six years old. These two conflicting versions undoubtedly has an adverse effect on the credibility and reliability of the applicant. It seems to me that the applicant was dishonest about the ages of the children at the educare to make his version seem more probable. The applicant testified that he did not know the difference between an educare and a primary school. I doubt the truthfulness of this version, for the above-mentioned reasons and because the educare centre had very young children in their care. The applicant completed matric and attended a primary school and should have known that primary schools do not take

care of babies. What is more, if the name Chuma educare centre was written on the building, the applicant can read and ought to have known that he worked at Chuma educare centre. In view of the above, I find that the applicant's actions had been deliberate and dishonest when he stated in his cv that he worked at Chuma primary school.

23. It is further important to note that the applicant had been dishonest about the period that he had worked at Chuma educare centre. He testified that he had worked at Chuma primary since January 2016, whereas Msutwana testified that the applicant had worked at the educare since January 2017. McKay testified on behalf of the respondent that the applicant had scored 70% because he had indicated in his cv that he commenced his employment with Chuma primary in January 2016. Had the applicant stated that he only commenced his employment at Chuma educare in January 2017, he would not have been successful because he would only have scored 60%. This evidence was not placed in dispute.

24. In the light of the above-mentioned, I am satisfied that the respondent has succeeded in proving, on a balance of probabilities, that the applicant had been dishonest and provided false information regarding his previous place of work.

25. I find that the applicant's dismissal is the appropriate sanction for the following reasons:

26. The applicant showed no remorse and maintained his version, despite the respondent adducing damning and compelling evidence against him. This clearly shows that the applicant is not a suitable candidate for progressive discipline.

27. Green testified that the applicant's conduct has irretrievably broken down the employment relationship. In *Impala Platinum Ltd v Jansen* [2017] 4 BLLR 325 (LAC) the court held that serious misconduct involving dishonesty self-evidently destroys the employment relationship. In this case the court held that the arbitrator correctly found that the employee's misconduct (which involved dishonesty) went to the root of the employment relationship, and that no further evidence about the sustainability of an employment relationship was required. The evidence has shown that the applicant

cannot be trusted and in view of this case law, which is relevant to the case before me, the trust relationship between the parties are broken down in cases of this nature.

28. The applicant had only worked for the respondent for about one year.

29. In the result, I find that the respondent has succeeded in proving, on a balance of probabilities, that the applicant's dismissal is substantively fair.

30. I have taken into consideration Item 4 of Schedule 8 of the Code of Good Practice: Dismissals (the code) in the Labour Relations Act of 1995 as amended to determine the procedural fairness of the applicant's dismissal. All that the code requires is that there must be an investigation and that the employer must inform the employee of the allegations in a form and language that the employee can understand. This process promotes simple and non-technical approach as highlighted in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* (2006) 27 ILJ 1644 (LC).

31. Nongqaza's evidence was not put to Rikwe, who was the chairperson of the applicant's disciplinary hearing. To this end, his evidence was not tested and therefore I seriously doubt the veracity and credibility of his evidence. Rikwe was correct to have not considered external evidence that was not presented in the applicant's case. It goes without saying that it would have been wrong of her to do so.

32. In the result, I find that the respondent has succeeded in proving that the applicant's dismissal was procedurally fair, on a balance of probabilities.

AWARD

33. The applicant's dismissal was substantively and procedurally fair.

34. The applicant's claim is dismissed.

A handwritten signature in black ink, appearing to read "Janine Carelse". The signature is written in a cursive style with a large initial "J".

Janine Carelse