



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: C S Mbileni

Case No.: PSHS815-13/14

Date of Award: 22 August 2014

In the MATTER between:

Bissoon, Renisha (Dr.)

Applicant

And

Gauteng Department of Health

Respondent

Applicant's representative: Amiraj Bauchoo
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Respondent's Representative: Mrs. Kedibone Maphunye
Respondent's Address: Gauteng Department of Health
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Details of hearing and representation:

- [1] The arbitration was convened in terms of s191(5)(a) of the Labour Relations Act [the "Act"], 66 of 1995 as amended. The hearing was brought to finality on 30 and 31 July 2014 at the Bank of Lisbon Building in Johannesburg.

- [2] Adv. Anthea Platt, instructed by Amiraj Bauchoo Attorneys appeared for the Applicant, Dr. Renisha Bissoon and Mrs. Kedibone Maphunye represented the Respondent at the arbitration proceedings. In attendance throughout the proceedings were Mr. A. Bauchoo and Ms E. Mtimkulu.
- [3] The Applicant and the Respondent's three witnesses were asked to testify under oath to which they did not object. The parties exchanged two bundle of documents each, all marked "Bundle A" and "Bundle B". At the close of the arbitration proceedings, parties agreed to submit their closing argument on 8 August 2014, which the Applicant party managed to do.
- [4] However, that was not the case with the Respondent. Mrs. Maphunye was off sick and she sent a message to request to submit her closing arguments on Monday, 11 August 2014. The bundles, the arbitration award and the electronic version of the award were all submitted to the NBCRFLI.

Issue to be determined:

- [4] The issue in dispute is whether or not the dismissal of the Applicant, Dr. Renisha Bissoon was procedurally and substantively unfair.

Background to the issue:

- [5] The Applicant, Dr. Bissoon submitted an application for a position of registrar with the Respondent and the Wits Oral Health Centre in terms of an advert dated 25 November 2012 for Maxilo Facial and Oral Surgery [**P1, Annexure A**].
- [6] Dr. Bissoon was shortlisted by the Head of that Department, Professor Lownie and consequently interviewed and was one of the successful candidates. Dr. Bissoon was appointed on a 4-year fixed-term contract and took up her position on 1 February 2013.
- [7] The requirements for the post were registration with the HPCSA and two years of experience as a dentist. A post graduate qualification in the field of Maxilo Facial and Oral Surgery and primary subjects were recommendations for the post.
- [8] Dr. Bissoon was placed at Chris Hani Baragwanath Hospital following her appointment into the post. On 17 October 2013, it was brought to the attention of Professor Hlongwa that Dr. Bissoon has registered to write examinations in one of the primary subjects which it was indicated Dr. Bissoon had passed according to her CV.
- [9] Dr. Bissoon was requested on 17 October 2013 to present her transcript on 18 October 2013 at 07:30. Dr. Bissoon presented her transcript before a panel of five (5). The transcript showed that Dr. Bissoon failed one module of the primary subjects. After the meeting, Dr. Bissoon went to write her anthropology examination and was prevented from doing so by Professor Hlongwa.
- [10] Dr. Bissoon approached the Head of Anthropology Department and she was then allowed to write the examination. Dr. Bissoon was presented with a dismissal letter on 21 October 2013 at Chris Hani Baragwanath Hospital and required to leave immediately.
- [11] Dr. Bissoon appealed the dismissal on 23 October 2013 and was informed on 5 November 2013 that she was no longer an employee of the Wits Oral Health Centre and therefore they could not deal with the appeal.

- [12] Dr. Bissoon referred a dispute of unfair dismissal to the CCMA for conciliation and the Respondent objected to the jurisdiction of the CCMA and the matter was referred to the PHSDSBC. Arbitration was held on 30 and 31 July 2014.
- [13] The Applicant, Dr. Bissoon contends that the dismissal was procedurally unfair due to the fact that the Respondent failed to comply with any procedures and that the dismissal was summary. Dr. Bissoon further contends that her dismissal was substantively unfair in that no charges were presented to her and her right to *audi alteram partem* was denied.
- [14] The Respondent argued that the dismissal of Dr. Bissoon was fair and the commissioner must dismiss the application of unfair dismissal.

The Respondent's case and argument:

- [15] The Respondent's **first witness** Professor Phumzile Hlongwa, Head of School/CEO testified that it came to her attention on 17 October 2013 that Dr. Bissoon has registered to write examinations of one of the primary subjects which the latter claimed in her CV to have passed. Professor Hlongwa called Dr. Bissoon to bring her academic transcript to Wits Dental the next day, 18 October 2013.
- [16] Professor Hlongwa further testified that Dr. Bissoon's transcript showed that she failed one module of the primary subjects. Professor Hlongwa stated that Dr. Bissoon was not supposed to have been shortlisted but had misled Professor Lownie that she had a qualification of what was expected of her. Professor Hlongwa testified that Professor Lownie would be charged had she not retired because a candidate without the primary subjects was appointed into a Registrarship post on Maxilo Facial and Oral Surgery. Professor Hlongwa had trusted Dr. Bissoon but she felt disappointed by her action.
- [17] The Respondent's **second witness** Dr. Rikhotso, the supervisor of Dr. Bissoon testified that Dr. Bissoon had told him that she was going for a procedure on 17 October 2013. He further testified that Dr. Bissoon did not mention anything about writing examinations on 18 October 2013. Dr. Rikhotso further testified that primaries are a prerequisite for Registrarship in Maxilo Facial and Oral Surgery.
- [18] The Respondent's **third witness** Dr. Mabongo testified that he knows Dr. Bissoon to be a sweet doctor but on 18 October 2013, Dr. Bissoon's reaction was abrupt and changed when she was confronted about the fact that she was going to write one of the primaries that she claimed in her CV to have passed.
- [19] Dr. Mabongo further testified that to be in possession of the primaries is a prerequisite especially at Wits Dental. He concluded his testimony by stating that they attended a meeting where it was agreed that all universities should follow the same route.
- [20] The Respondent's representative, Mrs. Maphunye argued that Dr. Bissoon misrepresented herself by stating in her CV that she passed Modules in Anatomy, Physiology and General Pathology. Dr. Bissoon misrepresented herself because she wanted to be shortlisted. Professor Lownie was aware that she would be retiring and there was no way that the Department would charge her which creates suspicion that Professor Lownie connived with Dr. Bissoon to appoint her.

- [21] Mrs. Maphunye argued that Dr. Bissoon deliberately kept it a secret that she was going to write one of the Modules that she claimed to have passed which she actually failed. Dr. Bissoon played dumb and relied on Administration staff for advice on Courses related to her profession. Dr. Bissoon was fully aware of the study policy of the Department; hence she took two days' leave, a day before and a day on examination day.
- [22] Mrs. Maphunye further argued that Dr. Bissoon's claim that she went for a surgical procedure is unfounded as she failed to produce a medical certificate as proof to that effect. Dr. Bissoon continued to mislead the Department. Dr. Bissoon's behaviour tarnished her relationship with the Department. Dr. Bissoon is untrustworthy and dishonest and the Department cannot retain such employees in its employ.
- [23] Mrs. Maphunye argued that Dr. Bissoon is not just a layperson but a professional who is expected to know and understand what is required when for a Course related to her job and profession. She acted in an inappropriate and unacceptable manner in the department. Mrs. Maphunye concluded her argument by stating that both parties are bound by the document they signed that should she misconduct herself, her services will be summarily dismissed.

The Applicant's case and argument:

- [24] The Applicant, Dr. Bissoon testified that when she applied for the primary subjects, the academic personnel at the university ticked the various modules she needed and thereafter, she decided to do additional modules so that she could qualify for both the university primary subjects and College of Medicine primary subjects.
- [25] Dr. Bissoon was under the impression at the time of the interview that she had her primary subjects and there was no intention to mislead anyone. Dr. Bissoon further testified that her previous understanding was incorrect and that she is now aware of the position with regard to the modules needed for primary subjects. This evidence was not directly challenged.
- [26] Dr. Bissoon testified that she did not falsify her CV and/or her transcripts. Dr. Bissoon testified that the transcripts were available to the Wits Oral Health Centre at the shortlisting stage. This evidence was not challenged. Dr. Bissoon testified that no procedure was followed in her dismissal and this was conceded by the Respondent.
- [27] Dr. Bissoon testified that at the orientation session, the Human Resources personnel did not explain the documents or the procedures, codes, regulations and standards to her. Dr. Bissoon was requested to sign the documents and she only read the contract of employment as well as the job description of what is expected of her.
- [28] Adv. Platt argued as follows, that:
- [28.1] Item 2(1) read with item 7 of the Code of Good Practice: Dismissal and s188(1) of the LRA provides that dismissal is unfair if not effected for a fair reason and in accordance with a fair procedure. Item 4(1) of the Code of Good Practice: Dismissal states that normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations.

- [28.2] Paragraph 4(3) of the Disciplinary Code and Procedures of the Public Service states that management must assess the seriousness of the alleged misconduct by considering the actual or potential impact of the alleged misconduct on the work of the public service, the employee's component and colleagues and the public; the nature of the employee's work and responsibilities, and the circumstances in which the alleged misconduct took place.
- [28.3] Paragraph 6 of the Disciplinary Code and Procedures of the Public Service provides that for serious misconduct that justifies a more serious form of disciplinary action than provided for in paragraph 5, the employer may initiate a disciplinary inquiry. The employer must appoint an employee, i.e. the manager of the employee to initiate the inquiry.
- [28.4] The Disciplinary Code and Procedures of the Public Service deals with various acts of misconduct. The act relied upon by the Respondent is falsifying records or documents.
- [29] Falsification of records or documents, in labour law, with a view of obtaining some advantage is a form of fraud. Fraud is defined as the 'unlawful making, with intent to defraud, or a misrepresentation which causes actual prejudice or which is potentially prejudicial to another [Grogan *Dismissal, Discrimination & Unfair Labour Practices* 2ed at 305].
- [30] In **SA Post Office Ltd v Mampeule (2009) 30 ILJ 664 (LC)**, the Labour Court looked at whether the termination of the employee's employment contract in terms of an automatic termination clause in a contract of employment is a dismissal in terms of s186(1)(a) of the LRA; the court held that:
- “[46] In the result, the automatic termination provisions of article 8.3, which requires the termination of the contract of employment and is thus incorporated by reference therein, are impermissible in their truncation of provisions of chapter 8 of the LRA and, possibly even, the concomitant constitutional right to fair labour practices [cf *Igbo v Johnson Matthey Chemicals Ltd* [1986] IRLR 215 (CA)]. Provisions of this sort, militating as they do against public policy by which statutory rights conferred on employees are for the benefit of all employees and not just an individual, are incapable of consensual validation between the parties to a contract by way of waiver of the rights so conferred.”
- [31] It was held in **Sugreen and Standard Bank of SA (2002) 23 ILJ 1319 (CCMA); (2002) 13(1) SALLR 36 (CCMA)** that
- (a) onus of proving something may shift to the employee if the employee denied something;
 - (b) if, for example the employee accused of theft pleads an alibi, then the burden would rest on him to show that he was elsewhere at the time of the commission of the offence and if he fails to discharge the evidentiary burden, it may be that the employer will be held to have discharged its overall onus.
- [32] The burden of adducing evidence may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other [**South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) 534 (A)** and **Mohunram v National Directory of Public Prosecution 2007 (4) SA 222 (CC)**].

- [33] In **Denel (Pty) Ltd v Vorster 2004 (4) SA 481 (SCA); (2004) 25 ILJ 659 (SCA)**, the Supreme Court of Appeal held that if the disciplinary code was expressly incorporated in the conditions of employment then it assumed contractual effect. It follows that where such code prescribes a particular sanction for a particular offence; then the sanction will be peremptory.
- [34] The evidence of Dr. Bissoon clearly shows no intention to defraud in that Dr. Bissoon informed her direct supervisor Professor Lownie that she would be writing her anthropology examination towards the end of the year and was given permission to do so. Dr. Bissoon's understanding in her evidence was that she had the necessary primary subjects.
- [35] The advert stated that primary subjects were a recommendation and not a prerequisite and the evidence of Professor Hlongwa and Dr. Mabongo was that primary subjects were determined at shortlisting stage to be a requirement and both testified that the advert does not reflect this.
- [36] The question of whether the Respondent followed the minimum norms set in Resolution 1 of 2003 or Schedule 8 of the LRA, the uncontroverted evidence was that no procedure was followed. The Respondent argued that it followed no procedure because the dismissal was in terms of paragraph 13 of the Contract of Employment [**P18 of Bundle A (Applicant's bundle)**]. This is clearly incorrect in terms of the LRA, Resolution 1 of 2003 and the Post Office case referred to above.
- [37] However, the SA Post Office case also states that an automatic termination of a contract of employment is contrary to the norms of Schedule 8 of the LRA and contravenes the employee's rights in terms of s185 of the LRA.
- [38] Adv. Platt submits that the commissioner find that the dismissal of Dr. Bissoon was unfair because no procedure was followed and prays that the commissioner orders reinstatement of Dr. Bissoon with no loss to benefits.

Analysis of evidence and the application of law:

- [39] Section 188(1) of the LRA requires that a dismissal must be for a fair reason. Misconduct might constitute such a fair reason for dismissal. The LRA casts the onus to prove the fairness of the dismissal in the employer [**Section 192(2)**]. The onus, properly speaking, comes into play only after subjecting the evidence to the appropriate test, when one has to choose between two versions on the probabilities [**Mondi Timber Products v Tope (1997) 18 ILJ 149 (LAC)**].
- [40] I am required to determine whether or not the dismissal of Dr. Bissoon was procedurally and substantively unfair. The first requirement in every case concerning the fairness of a dismissal for misconduct is that the employer must prove that the employee contravened a rule applicable to the workplace. This entails proving the existence of the rule and the infraction [**Grogan Dismissal at 143**]. The existence of a rule is a matter of fact and law.
- [41] It is clear from the contract of employment which the Applicant, Dr. Bissoon signed on 1 February 2013 [**p22, Applicant's Bundle A**] and the Respondent signed on 5 February 2013 [**p21, Applicant's Bundle A**]. An employment relationship commences when parties conclude a contract of service. The contract of employment may therefore be regarded as little more than the founding act of a relationship the content and duration of which is regulated by statute, regulation and collective agreement [**Grogan Workplace Law 10ed at 47**].

- [42] Dr. Bissoon was summarily dismissed for falsifying her CV. Falsification of any record or document with a view to obtaining some advantage is a form of fraud and medical certificates are the favourite of workplace deception and fraud for which dismissal has generally been held [**Grogan Dismissal at 194**]. It has been established that in 2012, Dr. Bissoon failed one of the Modules in Anatomy, namely “Normal and Abnormal Development of the Neck and Head” [p8, **Applicant’s Bundle A**].
- [43] According to Dr. Bissoon’s CV which she submitted with her application for the registrar’s position in 2012, stated that she is completing an MSc (Dent) in Maxilo-Facial and Oral Surgery at Wits by coursework and research. The CV goes on to say that she has passed modules in Anatomy, Physiology and General Pathology.
- [44] It seems Dr. Bissoon gave the impression that she actually passed the primary subjects when she said on her CV: “I passed modules in Anatomy, Physiology and General Pathology”. Dr. Bissoon knew that she failed a module in Anatomy and that is reflected on her academic transcript. She was aware that she was giving misleading information.
- [45] In **S v Trainor 2003 1 SACR 35 (SCA)** at [9], Navsa JA said: “*A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must be corroborative evidence, if any. Evidence of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.*”
- [46] A misrepresentation by an employee before the commencement of employment has been held sufficient to warrant dismissal, even if the misrepresentation is discovered some time later and the employee has rendered satisfactory performance [**Grogan Dismissal at 189**].
- [47] The misrepresentation need not be effected by words. Conduct alone may be sufficient. The dismissal of an employee for misconduct ‘tantamount to fraud’ was upheld because the employee had failed to reply to a question requiring disclosure of certain statutory benefits already received by him when he applied for membership of a benefit fund [**Straud v Steel Engineering Co & another (1993) 2 LCD 259 (IC)**].
- [48] I am guided by the Labour Court in **Masilela v Leonard Dingler (Pty) Ltd (2004) 13 (LC) 5.3.1** as stated by Francis J, at paragraph [26]:

“This Court is faced with two mutually destructive versions only one of which is correct. In deciding which version to accept and which one to reject I am obliged to consider inter alia the issue on a balance of probabilities. The onus is on the Respondent to prove on a balance of probabilities that its version is the truth. The onus is discharged if the Respondent can show by credible evidence that its version is the more and probable and an acceptable version. The credibility of the witnesses and the probability and improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of –a single investigation– into the acceptability or otherwise of the Respondent’s version, an investigation where questions of demeanour and impression are measured against the contents of a witness’ evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against the facts that cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety”.

- [49] I am guided by the Labour Court in **Hoch v Mustek Electronics (Pty) Ltd (2000) 21 ILJ 365 (LC)** in which the court held that the employer was justified in terminating the contract of an employee who had misrepresented her qualifications prior to her appointment.
- [50] I am further guided by the Labour Court in **Westonaria Local Municipality v SALGBC & others (2010) 3 BLLR 342 (LC)** the court found the personal assistant to the executive mayor to have been unfairly dismissed for misrepresenting her qualifications because the municipality had failed to take disciplinary action against another of its employees who had done the same. In our case, there is no question of inconsistency.
- [51] I am further guided by the Labour Court in **Boss Logistics v Phopi & others [2010] 5 BLLR 525 (LC)** where a senior employee was found to have inflated his qualifications and experience in his CV; the court held that to accept that such an employee is entitled to guidance, training or assistance before being dismissed for poor work performance would be to reward the employee for his dishonesty.
- [52] Item 3(4) of the Code of good Practice: Dismissal states that generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes continued employment relationship intolerable. Examples of serious misconduct subject to the rule that each case should be judged on its merits, include gross dishonesty.
- [53] Adv. Platt argued on behalf of the Applicant that no procedures were followed in the dismissal of Dr. Bissoon. However, Mrs. Maphunye argued that Dr. Bissoon's summary dismissal was in line with paragraph 13 of the contract of employment for which both parties agreed to and signed [**P20, Applicant's Bundle A**]. Mrs. Maphunye further argued that Dr. Bissoon is not just a layperson but a professional who was aware what she entered into.
- [54] The question that arises is whether dismissal without pre-dismissal procedures is justified. Section 188(1)(b) of the LRA states a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the dismissal was effected in accordance with a fair procedure. The right to procedural fairness extends to all employees, irrespective of their status or seniority [**Evans v CHT Manufacturing (Pty) Ltd (1992) 13 ILJ 1585 (IC)**].
- [55] I am guided by the Code of Good Practice: Dismissal which states that in exceptional circumstances, if the employer cannot reasonably be expected to comply with [its] guidelines, the employer may dispense with pre-dismissal procedures [**Item 4(4) of Code**].
- [56] I am further guided by the Industrial Court in **Lefu v Western Areas Gold Mining Co (1985) 6 ILJ 307 (IC)**, the employer was compelled to dismiss employees instantly in order to save lives and property. In our case, the reputation of the Institution was at stake if a professional employee would be allowed to continue writing examinations under a dark cloud hanging over her credibility.
- [57] The courts have occasionally condoned non-compliance with the fair hearing requirement where they are satisfied, after consideration of the merits of the case, that a hearing would not have altered the decision to dismiss [**p10, Applicant Bundle B: Termination of Contract**].

[58] In the premises, I am satisfied that on a balance of probabilities, the Respondent has discharged its onus in proving that the dismissal of the Applicant, Dr. Bissoon was founded on a fair reason based on her conduct. The dismissal was effected in accordance with Paragraph 13 of her Contract of Employment read with Item 4(4) of the Code of Good Practice: Dismissal. I deem it appropriate to make the following award:

Award:

[59] I, accordingly confirm the dismissal of the Applicant, Dr. Renisha Bissoon, and

[60] The application for unfair dismissal is hereby dismissed.

Signed and dated at Johannesburg on this the 22nd day of August 2014

Panellist: 
Chris Sizili MBELENI.