ARBITRATION AWARD

PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PHSH816-16/17**

Panellist: **Paul Phundu**

Date of Award: **29 May 2017**

In the matter between:

A Phakedi Applicant

and

Department of Health- North West Respondent

DETAILS OF HEARING AND REPRESENTATION

[1] This is an arbitration award issued in terms of Section 138 of the Labour Relations Act, 66 of 1995 (as amended) and herein after referred to as the LRA. The matter was set-down for arbitration in terms of Section 191(5) (a) of the LRA.

[2] The arbitration hearing was conducted on 07 February, 28 March and 05 May 2017 at the Department of Health Boardroom, Witrand Hospital, Potchefstroom.

[3] The Applicant was present at the arbitration hearing and represented by Mr Osvald Brandt, an attorney from Osvaldt Brandt Attorneys. The Respondent was represented by, Mr Joseph Dlamini, Manager, Labour Relations.

[4] The proceedings were conducted in English and were digitally recorded. I also kept handwritten notes.

[5] Both the Applicant and Respondent handed in a bundle of documents marked Annexure "A and B", the content of the documents is not in dispute. Both parties presented oral closing arguments.

ISSUE TO BE DECIDED

[6] I am required to establish whether the Respondent committed an unfair labour practice in relation to suspension or not, if so, I must determine the appropriate remedy.

BACKGROUND TO THE ISSUE

[7] The Applicant is in the employ of the Department of Health as a Groundsman since April 2004 until he declared a dispute of an alleged unfair labour practice concerning suspension. His salary at the time of the dispute was R7621.00 rand per month.

[8] The Applicant appeared before a disciplinary hearing where he was charged with misconduct. **Charge 1**: *Damaging State Property.* **Charge 2:** *Insubordination.*

[9] The Applicant was found guilty. A sanction of suspension for three months without pay as well as a final written warning was imposed on the Applicant.

[10] Conciliation failed and the certificate of non-resolution of the dispute was issued. The matter proceeded to arbitration. In terms of relief, the Applicant prays for a no guilty verdict and a first written warning.

SURVEY OF ARGUMENTS AND EVIDENCE

Applicant's evidence in chief

[11] The Applicant had no other witnesses and led oral evidence in support of his case. His evidence was briefly as follows:

[12] **Mr A Phakedi** testified under oath that he is employed by the Respondent as a Groundsman based in Witrand Hospital. The Applicant stated that on the 25 November 2014, it was alleged that the applicant broke the kudu machine. The applicant denied the charges and stated that the allegations are baseless and untrue. The applicant indicated that he refused to submit a written a report regarding the status of the machines because he did not want to implicate himself.

[13] Under cross-examination the Applicant confirmed that he is not challenging the final written warning. The Applicant further confirmed that he is only challenging the severity of the punishment, that is, 3 months' suspension without pay. The Applicant stated that he should have at least been given a 1-month suspension because on the day of the alleged incident he had a back pain and therefore there was no way he could have used the Kudu machine as he was sick. The applicant stated that he does not know how to use the machine and later on confirmed knowing how to use the machine. The Applicant concluded by stating that Mr Elias Hlanyane is not a qualified mechanic or expert in fixing the machines and he is not responsible for the broken machine. The Applicant further stated that it was not unreasonable to refuse to write a report.

Respondent's submission

[14] The Respondent had three (3) witnesses in support of its case. The evidence was briefly as follows:

[15] Mr **Sipho Molefe** testified under oath that he is employed by the respondent as a Supervisor of the Grounds based in Witrand Hospital. The witness indicated that the Applicant reports directly to him. The witness stated that the Respondent bought six new kudu machines and one of these machines was given to the applicant on the 7 March 2017. The witness stated that he asked the Applicant to use the new machine and the Applicant agreed. The witness further stated that he observed that the Applicant is not using the machine properly, he was accelerating the machine whilst on lower gear and he immediately warned him not to accelerate while on a lower gear, or else he will damage the machine. However, the applicant told him that even though he is a Supervisor, he is new at Witrand Hospital and he cannot tell him what to do. The witness stated that his warning was ignored by the Applicant. The witness indicated that the store manager who normally services and fix the machines reported to him that the machine that was used by the Applicant is broken. Subsequently, he issued an instruction to the Applicant requesting him to

write a report about the status of his machine on the day he used it. The applicant refused to write a report, hence he was charged for misconduct.

[16] Under cross-examination the Respondent's witness stated that the Applicant has a history of not carrying out his instructions and numerous warnings have been issued to him and he was also referred to employee assistance programme.

[17] Mr **Elias Hlanyane** testified under oath that he is employed by the respondent as a Mechanic fixing all the machines that are used by Groundsmen at Witrand Hospital. The witness indicated that the Hospital bought 6 new machines and one of the machines was given to the Applicant. The witness stated that he checked the new machine before it was given to the Applicant and he can confirm that when the machine was given to the Applicant it was in good condition as it was new and never used before. The witness further indicated that even though the Applicant complained of back pains he nevertheless continued and used the new kudu / machine on the day.

[18] Under cross-examination the Respondent's witness confirmed that before knock off time on the very same day, the Applicant returned his new machine and he noticed that it had a funny noise. The witness stated that the machines crank and bearing were broken because of over-revving.

ANALYSIS OF EVIDENCE AND ARGUMENT

[19] In terms of Section 186(2) (b) of the LRA, suspension falls within the meaning of an "unfair labour practice". section 186(2) provides that; *"unfair labour practice" means an unfair act or omission that arises between an employer and employee involving – (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee"*

[20] The onus is on the Applicant to prove, on a balance of probabilities, an unfair act or omission on the part of the Respondent that gives rise to an unfair labour practice.

[21] The dispute was referred as an allegation of an unfair labour practice in relation to suspension. I am therefore required to determine whether the Respondent's conduct was fair or unfair in suspending the Applicant for three months without pay. It is my belief that to succeed in such a

claim, the Applicant must show that the Respondent's conduct was arbitrary, capricious and therefore unfair.

[22] I reject the applicant's argument that the reason for refusing to draft a report was to avoid implicating himself. The applicant should have followed this fair and reasonable instruction and stated in writing his views about the kudu machine and his argument that he had never used it. Failure to write and submit a report as requested, in my view, amounted to insubordination.it is my finding that the applicant was guilty of insurbodination. The applicant contradicted himself under cross-examination where he stated that he does not know how to use a kudu machine and later changed his version and confirmed knowing how to use the machine. To me, this was a bare denial, and if I find the applicant not a reliable witness. It is my finding that the applicant is not a credible witness. On a balance of probabilities, it is my finding that the applicant was guilty as charged. It is further my finding that the respondent did not commit an unfair labour practice concerning suspension without pay. The applicant is asking for 1-month suspension without pay instead of three months' suspension. To me this seems to be the admission of guilt. Why would the applicant prefer one-month suspension without pay instead of three months? The only inference I can draw from his statement is that he is taking responsibility for his actions, that is, he is to blame for the broken machine.

[23] I accept the respondent's argument that the applicant failed to obey the instruction of not accelerating the machine whilst on lower gear. The reason for believing the respondent is because the applicant failed to deny or challenge the respondent's argument that he has a history of failing to obey or carry out lawful and reasonable instructions. I am convinced by the respondent's argument that the applicant used the kudu machine on the day of the incident. The respondent's witnesses corroborated each other's evidence, they were consistent throughout the proceedings and there was also no contradiction in the manner in which the respondent's evidence was presented.

[24] In view of the above, I am therefore persuaded by the Respondent submission that the Applicant was guilty of the charges levelled against him and the sanction of three months without pay was an appropriate sanction under the circumstances.

[25] It is therefore my finding that the Respondent acted fairly and did not commit an unfair labour practice concerning suspension.

[26] In **Aries v CCMA & others (2006) 27 ILJ 2324 (LC)** the Court held that *"there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. The court held further that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner".*

[27] In view of the above judgement, and the reasons mentioned, I am inclined not to interfere with the decision of the Respondent, that is, to suspend the Applicant for three months without pay.

[28] In light of the above, I am convinced that the decision taken by the Respondent was the correct one. It is further my finding that the Applicant failed to discharge his onus to prove that the Respondent acted unfairly in suspending him on a balance of probabilities.

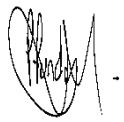
[29] I therefore make the following award:

AWARD

[30] The Applicant has not discharged the onus to show that the Respondent has committed an unfair labour practice in relation to suspension.

[31] The Applicant is not entitled to any relief.

[32] The application is dismissed



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PHSDSBC PART-TIME PANELLIST: PAUL PHUNDU