



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS87-18/19**

Commissioner: **Adv. Terry Malgas- Senye**

Date of award: **22 April 2019**

In the matter between:

NEHAWU obo Thandiswa Matoti

(Union/ Applicant)

and

Department of Health- Eastern Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This unfair dismissal dispute was arbitrated in terms of section 191(5)(a) of the Labour Relations Act 66 of 1995 as amended (“hereinafter referred to as the Act”). The hearing was held at Cofimvaba Hospital in Cofimvaba at approximately 10h00 am and was digitally recorded. The matter was postponed on numerous occasions but finalised on 4 April 2019.
2. The Applicant Ms. Thandiswa Matoti, was present and was represented by Mr. Mkutukana an official of NEHAWU.
3. The Respondent, Department of Health- Eastern Cape was represented by Mr. Moni of its Labour Relations Division.

ISSUE TO BE DECIDED

4. The issue to be decided concerns the fairness of the dismissal of the Applicant and the sanction.
5. The Applicant is challenging the substantive fairness thereof and is seeking reinstatement with retrospective effect.

BACKGROUND TO THE ISSUE

6. It was common cause that the Applicant was charged for misconduct in terms of the disciplinary code of the Respondent and was subsequently dismissed at a disciplinary enquiry. She appealed the dismissal and was unsuccessful.
7. It is also common cause that the Applicant at the time of this matter was stationed at Cofimvaba as a General Worker (Assistant).
8. After the failed appeal, she then referred an unfair dismissal dispute to the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC).

SURVEY OF EVIDENCE AND ARGUMENT

9. This is a brief summary of the evidence considered as provided for in terms of section 138(7)(a) of the Act relevant to the dispute at hand.
10. The Applicant did not call any witnesses and testified in her defence and relied on a common bundle of documents.
11. The Respondent's case against the Applicant was supported by the testimony of two witnesses, Mr. Sivuyile Nothlithi and Ms. Nomapelo Nelani.
12. At the time of writing this award both parties submitted closing arguments.

RESPONDENT'S EVIDENCE AND ARGUMENT

Sivuyile Nothlithi testified:

13. That he is a Manager: Labour Relations Department and testified that he is in charge of investigations and disciplinary hearings.
14. The Respondent's Senior Administration Officer, Labour Relations testified that he produced evidence that they obtained during their investigation into fraud at Cofimvaba Hospital.
15. The witness testified that during the investigation, they found that it was a syndicate that was operating at the hospital, being led by a recently deceased, Ms. Zine Sentile, who was an HR Practitioner. Mr. Nothlithi's testified that other employees who took part in the fraud had chosen to resign before and after being charged for misconduct.
16. The witness testified that other employees, S. Tyoda; ZP Jilajila and Matoti, the Applicant herself had been charged and found guilty of the same fraud and dishonesty and were all dismissed from the service.
17. The witness stated that this shows in all probability that they were all involved in the misconduct and we further submit that each had their own unique story about why they received these unwarranted payments. Matoti's story is that she was waiting for Injury of Duty (IOD) monies, which we have established cannot be proven.
18. Under cross examination the witness maintained that a thorough investigation was made and it was clear that the Applicant knew she received these payments fraudulently.

Ms. Nomapelo Portia Nelani

19. The witness testified that she is responsible of IOD matters dealing with employees. at Cofimvaba Hospital.

20. She stated that during 2015 she dealt with the Applicant's matter where she submitted a claim. She assisted the Applicant to complete the application form and informed her to submit at the Department of Labour.
21. She informed the Applicant that payments from the Injury of Duty would be paid directly to herself and not the Department of Health.
22. The witness testified that at all material times the Applicant was aware that the Department of Health would not pay out any IOD payments.
23. Under cross examination, all questions were not relevant to the evidence in chief.

APPLICANTS EVIDENCE

Thandiswa Matoti

24. The Applicant testified that she is a General Assistant at Cofimvaba Hospital.
25. She testified that she got an injury at work and subsequently submitted an application at work. All submissions was made and send to Department of Labour.
26. The Applicant testified that Zine informed her asking her whether she received money in her bank account. She was informed that this money was from the IOD office.
27. The Applicant testified that the first payment was one thousand rand (R1000.00) and the last amount received was twelve thousand rand (R12000.00).
28. The Applicant testified that when she received the R12000.00, a man called her to inform her to give Zine R6400,00 and keep the balance. This amount was paid wrong as this was supposed to be paid by a different person.
29. The Applicant submitted that she subsequently submitted the money to Zine.
30. During cross examination when asked as to whether she received any proof as to some payments was for holidays and public holidays, she stated no.

31. When asked during cross examination whether she have any proof of payments of IOD, she stated no.

RESPONDENT'S CLOSING ARGUMENT

32. The Respondent's representative, Mr. Moni argued that the Applicant's case should be dismissed. He believes that the evidence tabled by the Respondent's witnesses has proven that the Applicant was guilty of serious misconduct.

33. Furthermore, the Applicant pleaded guilty during a disciplinary hearing and failed to provide any evidence during the arbitration proceedings.

34. The Respondent further submits that the Respondents evidence stands uncontested as no contrary evidence was submitted by the Applicant.

35. He prayed for the dismissal to be upheld.

APPLICANT'S CLOSING ARGUMENTS

36. The Applicant's representative, Mr. Mtukukana argued that Applicant committed the misconduct, however pleaded for a lessor sanction.

37. He prayed for retrospective reinstatement.

ANALYSIS OF EVIDENCE AND ARGUMENT

38. Since the dismissal is not in dispute, it is the Respondent who bears the onus of proving that the dismissal of the Applicants was substantively and procedurally fair. Section 185(a) of the Act, which fortifies the employee's constitutional right to fair labour practice, and guarantees employees a right not to be unfairly dismissed.

39. Section 188 of the Act recognizes the conduct of the employees as one of the broad reasons on which the dismissal could be justified. Section 188(1) requires that if misconduct is the reason for dismissal it must be a fair reason. Schedule 8, item 7,

provides that when considering the substantive fairness of a dismissal for misconduct the commissioner must consider the following:

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

Did the rule exist?

40. In the present case the Applicant was dismissed for misconduct namely:

- *From the 22nd March 2016 to the 23rd May 2016, you displayed gross dishonesty, in that you received unlawful payments of standby allowance, night duty, public holidays and Sundays from the Department of Health for duties which you ever performed.*
- *From the 22nd March 2016 to 23rd May 2016, you failed to report fraudulent payments you received administered by Z. Sentile, to the authorities, thus contravening the provisions of C.4.10 of the Code of Conduct for the Public Service.*
- *From the 22nd March 2016 to 23rd March 2016, you allowed Ms. Sentile to deposit unlawful payments of standby allowance, night duty, public holidays into your bank account for the duties you never performed, which is tantamount to fraud.*
- *On the 22nd March 2016 2016 to the 23rd May 2016 you accepted payments for standby allowance, night duty, public holidays and Sundays for the duties that you never performed, thus prejudicing the administration of efficiency of the Department of Health.*

41. In the first instance it must be determined whether or not the rules existed. In the second instance, if the rule existed, it must be determined whether or not the Applicant

contravened it. The formulation of the disciplinary rule is the right and responsibility of the employer.

42. The Applicant had knowledge of the rules in that she signed a contract of employment which contains the Respondent's Code of Conduct and policies. She therefore was aware that the charges levelled against her constituted a disciplinary offence.
43. Once this is established the second issue is whether there was a contravention of the rule. Neither the Act nor the Code stipulate on what facts the employer may rely to prove contravention of the rule. In this particular case the Applicant is aware of the rule.
44. This matter essentially turns on this dispute of fact. The Labour Court has recently had occasion to remark on the appropriate manner for a commissioner to deal with such disputes. In *Sasol Mining (Pty) Ltd v Nggeleni and others* (Case No: JR 1595/08), Van Niekerk J highlighted that the duty of a commissioner is to assess the credibility of a witness, consider the inherent probability or improbability of the version that is proffered by the witness as well as an assessment of the probabilities of the irreconcilable versions before the commissioner.
45. Applying the version before me, it must be noted that two witnesses testified on behalf of the Respondent during the proceedings.
46. Both witnesses explaining the point up to when the Applicant's was dismissed.
47. The Applicant's version is that she received these monies from the IOD, due to an injury she obtained at work. She failed to explain the different payments received in her bank account.
48. In weighing the probabilities and improbabilities, I am of the view that the Respondent's witnesses were truthful in giving evidence and account of what happened.
49. The contents of the evidence of Mr. Nothlithi and Ms. Nelani made the Respondent's version more probable. The Applicant's evidence is not probable at all.

50. Therefore, then on a balance of probabilities the Respondent proved that the dismissal of the Applicant was procedurally and substantively fair. And the sanction was correct list in the Code of Conduct.

51. In the premise, I render the following award:

AWARD

52. The dismissal of the Applicant Ms. Thandiswa Matoti was procedurally and substantively fair.

53. The Applicant's case is dismissed.

54. There is no order as to costs.

Signature:



Commissioner: **Theresa Malgas-Senye**

Sector: Public Health
