ARBITRATION AWARD

PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS872-18/19**

Commissioner: **W.R. PRETORIUS**

Date of award: **2 MAY 2019**

In the matter between:

NEHAWU obo NYATHI, T.E. & 3 0THERS APPLICANTS

and

DEPARTMENT OF HEALTH- EASTERN CAPE RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for arbitration in terms of section 191(5)(a)(i) of the Labour Relations Act 66 of 1995 as amended (the LRA), i.e. dismissal related to misconduct. It came before me on 15 February 2019 and was finalised on 30 April 2019 at the Nelson Mandela Central Academic Hospital in Mthatha, Eastern Cape.

2. Mr. Ngejane from the National Education, Health and Allied Workers' Union (NEHAWU) represented the Applicants, Mesdames Thembeka Nyathi, Nosandiso Mtshakaza and Messrs Mongameli Majokweni and Phumzile Malobola. On the other side, Ms. Jubase, Manager from the Labour Relations

Section, appeared on behalf of the Respondent, Department of Health- Eastern Cape.

3. The proceedings were digitally recorded. Handwritten notes were also taken.

ISSUE TO BE DECIDED

4. I am required to determine whether the dismissal of the Applicants was substantively fair, and if not, to determine the appropriate relief. In this regard, the appropriateness of the sanction is the only issue in dispute. Procedural fairness is not in dispute.

BACKGROUND TO THE DISPUTE

5. The Respondent employed the Applicants as porters at the Nelson Mandela Central Academic Hospital in Mthatha. They earned approximately R11 436.75 per month at the time of their dismissal on 31 October 2018.

6. The Applicants faced three charges, namely (1) *gross dereliction of duty*; (2) *refusal to comply with a lawful and reasonable instruction which tantamount to insubordination* and (3) *conduct that prejudiced the administration, discipline or efficiency of the Department, office or institution of the State*.

7. The Applicants were dismissed after they walked out of their disciplinary hearing which was held on or about 22 June 2017 following an incident that happened on 17 May 2017.

8. In challenging the appropriateness of the sanction, the Applicants are seeking reinstatement.

SURVEY OF EVIDENCE AND ARGUMENT

9. Mr. Ngejane, at the outset of these proceedings, indicated that the Applicants are pleading guilty to all three charges of misconduct. Both representatives agreed to make oral submissions regarding mitigating and aggravating circumstances.

10. This award is considered and rendered as provided for in section 138 of the LRA. It only reflects relevant evidence and argument heard and considered in deciding this matter.

THE APPLICANTS' CASE

11. Mr. Ngejane submitted the following matters for consideration:

11.1 The representative of the Applicants during their disciplinary hearing was not in sound mental state which resulted in him instructing the Applicants to walk out of the disciplinary proceedings In so doing the Applicants were denied the right to make representation. It is submitted that if the Applicants had stated their case during the disciplinary proceedings, the outcome might have been different.

11.2 The Applicants are pleading guilty to all the charges with the view not to waste the time of these proceedings. In so doing, the Applicants are extremely remorseful and apologetic for their conduct regarding the incident that took place during 2017.

11.3 All the Applicants have unblemished disciplinary records and were good employees. It is submitted that the trust relationship has not been irretrievable broken and that the parties are able to work together should the Applicants be afforded an opportunity.

11.4 The Applicants had been unemployed for a period of approximately six months which had seriously affected their family support structures, because they were the breadwinners.

11.5 The Applicants are praying for reinstatement and is not seeking back pay.

THE RESPONDENT'S CASE

12. Ms. Jubase raised the following salient points:

12.1 The Respondent viewed the Applicants' conduct during their disciplinary hearing in a serious light and thought that they were not serious about their future employment when they walked out of the proceedings. The Applicants acted on the instructions of their union representative which unfortunately made their case worse. However, it is confirmed that the Applicants' representative at the time was not mentally stable and he has since been referred for professional help.

12.2 The Applicants rendered excellence service with high levels of performance. It is common cause that the Union had also engaged the CEO of the hospital with the view to resolve this matter. The trust relationship between the parties had not been severed. It is therefore reasonable to give the Applicants a second chance. The positions the Applicants held prior their dismissal are still available.

ANALYSIS OF EVIDENCE AND ARGUMENT

13. The Court in ***South African Fibre Yarn Rugs Limited v Commission for Conciliation, Mediation and Arbitration and Others*** **(D 577/2003) [2005] ZALC 66 (20 April 2005)** held that where an employee pleaded guilty, the only issue to be determined there after was the appropriateness of the sanction.

14. In terms of section 188 of the LRA, every employee has the right not to be unfairly dismissed. I have further regard for the provisions of Schedule 8, Item 3(4), (5) and (6) of the Code of Good Practice: Dismissal (the Code).

15. Determining whether dismissal was an appropriate sanction involves three inquiries: (1) an inquiry into the gravity of the contravention of the disciplinary rule, (2) an inquiry into the consistency of application of the rule and sanction

and (3) an inquiry into factors that may justify a different sanction, i.e. referred to as factors in mitigating and aggravating.

Gravity of the contravention of the disciplinary rule

16. Gross dereliction of duty and insubordination are regarded as serious misconduct and may warrant dismissal for first-time offenders. However, each case must be decided on its own merits and circumstances. Item 3(4) of the Code states that *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 a continued employment relationship intolerable*.

17. I find that the gravity of the contravention of the rule referred to above is serious; however, there are compelling circumstances that warrant a lessor sanction as discussed below.

Consistency of application of the rule and sanction

18. This matter is not in dispute and the parties have made no reference to it.

Factors that may justify a different sanction

19. The Applicants have pleaded guilty, which is a sign of remorse[1]. The Applicants also had unblemished employment records at the time of their dismissal. It is common cause that they have served the Respondent with diligence and commitment prior the incident in 2017.

20. There is no evidence before me that militates against the restoration of the employment relationship between the parties. To the contrary, and most importantly, the Respondent is of the view that the trust relationship had not been severed by conduct of the Applicants[2]. When, as in this case, there is still a

[1] *De Beers Consolidated Mines Ltd v CCMA & others* (2000) 21 *ILJ* 1051 (LAC).
[2] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC); *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 *ILJ* 573 (LAC).

flickering of trust and confidence between the parties – the relationship should be given another opportunity to prosper. There is no reason for me to doubt the *bona fides* of the Applicants. I am of the view that they have learnt valuable lessons and that they will not repeat the same conduct in future.

21. I find that the sanction of dismissal was too harsh in the circumstances referred to above.

22. Section 193 of the LRA provides the remedies for unfair dismissals and unfair labour practices. In this regard, the Applicants prayed for reinstatement without back pay.

23. I find that the Applicants' prayer is reasonable given the fact that they pleaded guilty to all the charges and that the trust relationship had not been severed as referred to above. However, I find, it necessary and reasonable that the Applicants be issued with Final Written Warnings as provided for in the Disciplinary Code of the Respondent. I say this, because the charges against the Applicants are serious.

24. I, accordingly, make the following award and order:

AWARD

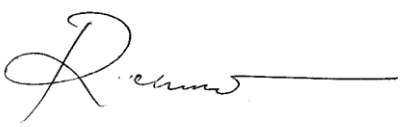
25. The dismissal of the Applicants, **Thembeka Nyathi, Nosandiso Mtshakaza, Mongameli Majokweni and Phumzile Malobola**, by the Respondent, **Department of Health – Eastern Cape,** is substantively unfair.

26. The Respondent, **Department of Health – Eastern Cape,** is hereby ordered to re-instate the Applicants, **Thembeka Nyathi, Nosandiso Mtshakaza, Mongameli Majokweni and Phumzile Malobola**, in its employ on terms and conditions no less favourable to them than those that governed the employment relationship immediately prior to their dismissal.

27. The reinstatement referred to in paragraph 26 above is to operate with effect from the date of issuing this award but the respondent is not expected to pay the Applicants back pay for the period between the date of the dismissal and the date of the reinstatement.

28. The Applicants, **Thembeka Nyathi, Nosandiso Mtshakaza, Mongameli Majokweni and Phumzile Malobola**, are to tender their services to the Respondent, **Department of Health – Eastern Cape,** on Monday 6 May 2019.

29. The Respondent, **Department of Health – Eastern Cape,** is further ordered to issue each of the Applicants with a Final Written Warning in terms of the provisions of its Disciplinary Code as contained in PSCBC Resolution 1 of 2003 as amended. Such Final Written Warnings must be issued on the day when the Applicants report for duty.



WILLIAM RICHARD PRETORIUS