



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS967-18/19**

Commissioner: **Arne Sjolund**

Date of award: **13 May 2019**

In the matter between:

Cynthia Mahlangu

(Applicant)

and

Department of Health- Gauteng

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for an arbitration hearing by the PHSDSBC and heard on 10 May 2019. The hearing took place at the Charlotte Maxeke Academic Hospital in Johannesburg.
2. Ms. Cynthia Mahlangu (hereinafter referred to as “the applicant”) appeared in person. Department of Health- Gauteng (hereinafter referred to as “the respondent”) was represented by Ms. Siphumelele Mabaso (“Mabaso”) employed as Employee Relations Officer in the employ of the respondent.
3. The hearing was conducted in English and electronically recorded.

ISSUE TO BE DECIDED

4. This matter is brought in terms of section 191 (5)(a)(iii) of the Labour Relations Act 66 of 1995, as amended (LRA) where the reason for the applicant's dispute is recorded as an alleged dismissal for unknown reasons. The respondent submitted that the applicant was not dismissed.
5. I am therefore tasked to determine whether the applicant was dismissed and should I find that she was dismissed, whether her dismissal was procedurally and substantively fair.

BACKGROUND TO THE ISSUE

6. The applicant was employed by the respondent on various limited duration contracts the last contract being from 01 March 2018 to 28 February 2019. The applicant was employed as a Sessional Nurse and was earning a salary of R276-00 per hour. She is seeking compensation as relief.
7. When narrowing of the issues the applicant submitted that she was dismissed on 26 August 2018 when Ms Tlhabele, an Assistant Director in the employ of the respondent told her to leave the respondent's premises. Mabaso submitted that the applicant was not dismissed by Tlhabele.

SURVEY OF EVIDENCE AND ARGUMENT

8. It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence that was placed before me even though all evidence and arguments were considered. I have summarised the evidence that I found to be the most relevant to make a determination in this dispute.

Applicant's case:

9. The applicant testified that she had reported the respondent to the MEC where after the relationship with the respondent deteriorated. During her employment she was also harassed and victimized. On 26 August 2018 whilst at work Tlhabele told her to leave the respondent's premises, she then

left and believed that she was dismissed. During cross-examination the applicant was asked when she was dismissed, she testified that Tlhabele dismissed her when she told her to leave, she then remained at home for a couple of weeks. The applicant testified that she had submitted a medical certificate for the time she was not at work. The applicant further testified that on her return to work after her illness she submitted a resignation letter.

Respondent's case:

10. Mr. S Masilela ("Masilela") testified that he was employed as a Director with the respondent. He testified that on 26 August 2018 he realized that more than 100 abortions were scheduled to take place. He then requested Tlhabele to go to the clinic where the applicant was working to stop the abortions from going ahead. When Tlhabele informed the applicant that the abortions would not go ahead the applicant left the clinic with the respondent's keys. He testified that Tlhabele could not and did not dismiss the applicant as they did not employ her. The applicant was merely told that the abortions would not go ahead on the day and left on her own accord.

ANALYSIS OF EVIDENCE AND HEADS OF ARGUMENT

11. It is the applicant's case that she was dismissed by Tlhabele on 26 August 2018. Section 192 of the LRA deals with the onus in dismissal disputes and states that, "(1) *In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal*", and "(2) *If the existence of the dismissal is established, the employer must prove that the dismissal is fair*". In other words, the onus of proving that an employee was dismissed for any reason whatsoever rests on the employee for the purposes of the LRA. As soon as the employee proves that dismissal did take place, the onus shifts to the employer to prove that there was a fair and recognised reason for the dismissal and that a fair and recognised process was followed. In this context "onus" means that, should the employer deny that the employee was dismissed, the employee must submit evidence to prove that he or she was indeed dismissed. Section 186 of the LRA states that dismissal means:

“(a) an employer has terminated a contract of employment with or without notice;

(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;

(c) an employer refused to allow an employee to resume work after she-

(i) took maternity leave in terms of any law, collective agreement or her contract of employment; or

(ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;

(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee”.

12. The applicant testified that Tlhabele informed her to leave on 26 August 2018. She left and stayed at home for a couple of weeks and submitted a medical certificate for the time she was not at work. She then when returning to work and submitted a resignation letter. The applicant therefore could not have believed that she was dismissed on 26 August 2018 when Tlhabele told her to leave. The testimony of Masilela was also not disputed Tlhabele could not dismiss the applicant.

13. The applicant failed to dispose of the onus to prove that she was dismissed in terms of section 192 (1) of the LRA. Accordingly, I order as follow:

AWARD

14. The applicant's claim for an unfair dismissal against the respondent is dismissed.



Arne Sjolund

Commissioner