



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS994-15/16

Commissioner: Samuel Baron

Date of award: 10 April 2017

In the matter between:

GALA BAXOLILE MTUTUZELI

(Union/Applicant)

and

DEPARTMENT OF HEALTH- EASTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration, set down under the auspices of the Public Health and Social Development Sectoral Bargaining Council ("the Council"), was finalized on 23 March 2017 at the Lilitha Nursing College in Bhisho. The parties requested and were granted 7 days in which to submit written closing arguments and they duly obliged.
2. The dispute concerns an alleged unfair labour practice relating to disciplinary action short of dismissal in terms of section 186 (2) (b) of the Labour Relations Act 66 of 1995, as amended.
3. The Applicant, Dr. Masixole Gala, was present at all times and was represented by Adv. Mxolisi Nduzulwana, instructed by Dika attorneys.
4. The Respondent, the Department of Health: Eastern Cape, was represented by Mr. Bongani Lose, its Deputy Director: Labour Relations.

5. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

6. I am required to determine whether the Respondent committed an unfair labour practice by issuing the Applicant with a 3 months' suspension without pay for alleged acts of misconduct. In making such determination, I have to decide whether the Respondent acted procedurally and substantively fair.
7. In the event that I find that the Respondent committed an unfair labour practice, I have to determine compensation that I deem reasonable under the circumstances.

BACKGROUND TO THE DISPUTE

8. The Applicant was found guilty of the following charges:

1. *Absented or repeatedly absented yourself from duty without reason or permission in that on or about March, May, June, August and September you failed to report for duty. Your absence from work was not authorized.*
2. *Gross dereliction of duty in that on or about the 2nd of February 2015 you allegedly refused to assist patients or arrange for them to be assisted.*

9. It was agreed between the parties that the date of the alleged misconduct should be altered to reflect 11 February 2015 instead of the 2nd. The sanction imposed by the chairperson of the disciplinary enquiry was that the Applicant be suspended without pay for a period of three months.

10. The Applicant appealed his sanction and not only did it fail, but a final written warning was added to the sanction by the Executive Authority (to whom he made the appeal). This added warning was challenged by the Applicant as a procedural issue which I will deal with later in my award.

Applicant's case

11. **The Applicant** testified that he was the Clinical Manager and his duties included managing the provision of clinical services. His gross salary was R98856.85 as at the end of June 2016.

12. In terms of the allegations contained in Charge 1, the Applicant testified that he was alerted to a course for managers called the Advanced Diploma in District Health Management and Leadership. He was alerted to this course by Ms. Chirwa, who was the acting hospital manager at the time.
13. He mentioned that he then informed Ms. Chirwa that he will register for the course and she told him to go ahead and register. He further informed her that he will be attending the course for one week every month. As such, he handed her a schedule of the dates of the periods that he would be attending. He thus denied that he was aware of any policy regulating his study leave.
14. The Applicant testified further that the Chairperson of the disciplinary enquiry recorded that Mr. L. Gwangqala testified that other managers, namely Maliti, Nyande and Chirwa had attended a training course and that he (Mr. Gwangqala) had not seen memo or leave forms either. He mentioned that it was new to him that he needed an authorization letter. He was not aware that other managers who followed the same route (in not having authorization letters) were charged in the same way as he was, which points to inconsistency.
15. The Applicant stated further that Ms. Chirwa did not refuse him attending the course during the stipulated periods. She was the one who alerted him to the course and the course brought value to the Respondent. If he was aware of such, he would have followed the procedure to apply for study leave.
16. With regards to Charge 2, the Applicant testified that he was alerted on the day in question by nurses in a certain ward that they required a doctor to do the rounds in that ward. He was shocked because he knew that there was a doctor Udeagha in that ward. It was discovered that in fact Dr. Udeagha had left and that he did so without the Applicant's knowledge. Dr. Udeagha's release was approved by the two district managers.
17. According to the Applicant, he now also had to do the rounds in the wards usually done by Dr. Udeagha. He would normally start with the ARV's and then do the rounds and due to that, he was not able to go the outpatients department (OPD) in the afternoon.
18. On the day in question, the Social Worker, with whom it was agreed that she would bring children to be assessed for possible placement in homes, brought 3 children that had to be fully assessed. So after he did his rounds at around 13H30, he went to attend to the Social Worker, doing the full examination. In doing so he did not take any lunch.

19. At around three o'clock, so the Applicant testified, he was told by the assistant quality controller that the community wanted to see him. He then went to the OPD and he was asked why they were not yet attended to by a doctor. He informed them that the doctors have left and that the Department was aware of this. He informed them that the sick patients will be prioritized after lunch and if by knock-off time there are still some sick patients, they must go to casualty and the rest should come back the next day.
20. The Applicant also stated after he had the discussions with the patients and he returned to the Social Worker to complete the assessment. He finished with the Social Worker at around 15H30, where after he went to the pharmacy and then he left work at 16H40.
21. The Applicant mentioned further that Mr. Tunzi, who acted as initiator in his internal disciplinary enquiry, was his junior. Mr. Tunzi was on Salary level 7 whereas he was on Salary Level 12. He stated further that it took the Respondent 75 days to finalize the appeal. He also requested the tape recordings of the disciplinary hearing, but this was never handed to him for purposes of supplementing his submissions on appeal.
22. Under cross-examination the Applicant reiterated that he was not aware of the study leave policy so he would not be in a position to dispute whether there is such a policy. He however disputed that the other managers who also went for courses did so over weekends only and therefore did not require authority to attend such.
23. He stated that he did not see Ms. Chirwa at all on the day in question. He received a call from a Ms. Ndlovu who wanted to know why the patients were not sorted out. He was still in King Williams Town en route to his home in East London. He also mentioned that the doctors had their rosters and they were working according to their rosters.

Respondent's case

24. Ms. Piliswa Chirwa testified that she was the nursing service manager at Grey Hospital. There was no CEO at the time and she was requested to act as such. She testified further that the Applicant approached her to inform her that he will be attending the course in question, but the Applicant mentioned that he will confirm when it will start. She then waited for him to give her a leave form. She also mentioned that the Applicant did not report directly to her. She thought that he would follow the procedure in terms of the study leave policy and her role would have been only to recommend. The study leave would have to be approved by Dr Nkohla.

25. Ms. Chirwa testified further that a committee sits each year to approve the study leave of employees and this committee would then approve such leave. In the Applicant's case, she was not aware whether his leave was approved or not.
26. She testified further that she was on leave the day of the incident that led to the second charge. The hospital was run by Ms. Maliti, who gave her a call on the day at around 15H00 and Ms. Maliti asked her come to the hospital because there was a crisis at the OPD. She then went to the hospital and found Ms. Maliti addressing the patients. The patients were very angry and said that they were left by the doctors. She then quickly arranged for the patients to be assisted and asked for the dispensary staff to keep open until 20H00.
27. Ms. Chirwa stated that she phoned the Applicant at around 16H30 and she asked him when he left. He said to her that there were still some patients left at the hospital. In her view, the head of the clinic (the Applicant) left the patients unseen on that day. She arrived at around 15H30 and left at around 20H00. Some of the patients were unseen and had to come back the next day.
28. With regards to hospital protocol, she testified that in the event it is getting late and patients are not seen by a doctor, they get taken to the casualty to be seen by the doctor that arrives at 17H00. On that day, some patients were taken to casualty, others were given medicine and others opted to go home and come the next day.
29. Ms. Chirwa came under intense cross-examination and I certainly do not wish to record each and every detail thereof, suffice to say that I will refer to most of it during my analysis. I do want to mention however that the study leave policy was not submitted at this arbitration although Ms. Chirwa testified that such policy actually exists and that it is "all over the facility". It was put to her that the Chairperson of the internal disciplinary enquiry recorded that she conceded that she actually approved the Applicant's leave., but she mentioned that perhaps he captured her evidence incorrectly.
30. She also stated that it was not her responsibility to explain to the Applicant how the leave policy worked. She however conceded that the Applicant did produce the timetable of the course he was attending, but she was unable to interpret it. She however did not ask him to explain the timetable.
31. Ms. Chirwa further agreed that even if the Applicant started treating the patients that were unseen on the day in question, he would in any event not have finished and some would have had to come back the next day.

32. Ms. Nolisa Maliti testified that she works at Grey Hospital as an Assistant Manager: Nursing. She was on duty on the day in question. A certain Mr. Nogala came to her office to inform her that he brought his mother to the hospital and she was not yet seen by a doctor. She then went to the OPD where patients were waiting. She met the person from Quality Assurance and she told her to call Ms. Chirwa. When she got to OPD, the Applicant was addressing the patients and she overheard him saying that he is no longer in power.
33. She testified further that there were Community Service doctors on duty that day, but the movement was slow and about 57 patients were unseen at the time she visited the OPD when she got there.
34. Ms. Maliti stated that in terms of the hospital protocol, no patient must go home unseen by a doctor. Someone responsible for the doctors must see to it that they are attended to. This was the Applicant's responsibility. She did not speak to the Applicant on the day because he was in a rush.
35. Ms. Maliti confirmed that the Community Services doctors were at the hospital until 16H30 on the day in question. She was not aware of any action taken against the Community Services doctors who were not attending to the remaining 57 patients that day. As far as she knew, they were only asked to submit statements. She was unable to dispute that there was a shortage of doctors at the hospital.

ANALYSIS OF EVIDENCE AND ARGUMENT

36. Section 186 (2) (b) of the Act prohibits any unfair disciplinary action short of dismissal. The disciplinary action complained of must be disciplinary both in nature and intent. The suspension without pay for 3 months falls squarely within the provision of the above section of the Act. I am therefore required to determine whether the Applicant was indeed guilty of the misconduct levelled against him and if so, whether the sanction meted out, was appropriate. The procedures that an employer follows prior to issuing any disciplinary action should also be scrutinized. I will deal with that issue first.
37. The first attack on the procedural fairness by the Applicant is the contention that the initiator of the internal disciplinary enquiry was junior to the Applicant. That was indeed the case. The question is whether this situation is prohibited by Resolution 1 of 2003. The Applicant, in launching his attack, relies on Clause 6 of the Resolution which provides as follows: *"If the alleged misconduct justifies a more serious form of disciplinary action than provided in paragraph 5, the employer may initiate a disciplinary enquiry. The employer must appoint an employee as a representative, who as far as possible should be the manager for the employee, to initiate the enquiry"*.

38. It is clear from the wording above that the Respondent was not compelled to appoint an initiator on a level higher than the Applicant. It merely states that the initiator has to be the manager of the Applicant "as far as possible". It is not peremptory. The Respondent was not in breach of the Resolution because the initiator was not the manager of the Applicant and / or not of a rank higher than that of the Applicant. The Applicant suffered no prejudice as a result of the rank of the initiator. That point thus is rejected.

39. The other procedural issue in dispute is the fact that the MEC for Health: Eastern Cape increased the sanction of 3 months' suspension - she added a final written warning. Clause 8.6 of the Resolution provides as follows:

The appeal authority may

a. uphold the appeal and / or

b. reduce the sanction to any lesser sanction in terms of clause 7.4 a of the Code, or

c. confirm the outcome of the disciplinary proceeding

40. There is clearly no provision for the MEC to increase the sanction of the disciplinary chairperson. I thus agree with the Applicant that the MEC exceeded her powers in adding the final written warning and the warning must thus fall away. Although the operation of the final written warning has come and gone, it is appropriate to order that such warning be removed from the Applicant's personnel file. Procedural unfairness was thus visited upon the Applicant in that regard.

41. This brings me to the issue of whether the Applicant was guilty of the charges. I will start with Charge 1. It is not in dispute that the Applicant provided Ms. Chirwa with the schedule of the course program. She was therefore aware that the Applicant attended the course. It cannot be said that the Applicant absented himself without reason. The reason for his absence was that he attended the course at the University of Fort Hare.

42. The further question to be answered is whether the Applicant had permission and / or authorization to attend the course. Ms. Chirwa stated that the Respondent has a leave policy and that the Applicant was required to complete the necessary leave forms which she would then made a recommendation on. The Applicant on the other hand, stated that he was not aware of such a policy.

43. It would be highly unlikely that the Respondent, as big an employer as it is, would not have a study leave policy. I understand the Applicant to argue that I cannot make such a finding in the absence of the policy being placed into evidence before me or a witness leading specific evidence in that regard. My simple view on that score is that the Respondent did not have to call the same witness it utilized in the internal disciplinary hearing to lead such evidence. Ms. Chirwa alluded to the fact that there is such a policy. And on the balance

of probability, which is the standard of proof in arbitrations of this nature, I find that the Respondent does have a study leave policy.

44. However, my assessment of the evidence led was that the Applicant was not aware of such a policy. He informed Ms. Chirwa that he would be attending the course and he handed her the course program. She never objected to him attending the course and she never requested a leave form from him. In fact, she was the one who actually alerted the Applicant to this course. The reason she never requested a leave form is because Ms. Chirwa and other managers also never completed such study leave application forms. To hold the Applicant to a standard they were never beholden to, is simply unfair.
45. The Applicant, by informing the hospital manager of the fact that he will be attending the course and providing her with the program, was of the view, rightly or wrongly, that he complied with what was required of him. There was no deliberate attempt by him to circumvent the study leave policy; he was not aware of it.
46. Ms. Chirwa's silence in the matter did not help either. I find it rather bizarre that she observed for such a long time that the Applicant is not at work due to the course he is attending and she would not raise it with him. If she was aware of the policy and she thought he was in breach thereof, it would have made sense to approach him and request him to do the necessary.
47. It was put to Ms. Chirwa that the chairperson of the hearing recorded that she testified that she actually gave the Applicant permission for the study leave. She responded that the chairperson might made a mistake in coming to that conclusion. However, the Applicant was of the view that he already permission from her. He approached her and she did not say anything. She accepted the roster for the course and noted his absence. It is more probable that she gave the Applicant permission to go on study leave. I thus find the Applicant not guilty of Charge 1.
48. If my assessment of the evidence surrounding the leave issue is wrong, I am in any event of the view that the Respondent did not apply its rule on that issue consistently. It cannot discipline the Applicant for the same alleged misconduct and not others. The evidence is clear that other managers also did not complete leave forms prior to going on study leave. It cannot be that the policy should only apply to the Applicant and not to others.
49. Charged 2 involve the allegation that the Applicant was in gross dereliction of his duties. Dereliction of duties refers to a deliberate and wilful act by an employee to neglect his / her contractual obligation towards his / her employer. It points to an abandonment by the employee of doing the work he / she was employed for. If an employee is found guilty of such an offence, it may very well lead to his / her dismissal due to the

seriousness thereof. The dereliction in the current matter, so the Respondent alleges, stems from the Applicant's alleged refusal to assist patients, and / or to arrange for the patients to be assisted

50. It is not in dispute that some of the patients were not seen on the 11th of February 2015. The question is why that was the case. The evidence point to a shortage of doctors, not only on that day, but for a period even before that. It cannot be disputed that the Applicant was extremely busy on that day, in part, due to that shortage. The Respondent released one of the doctors that the Applicant had supervision over without his input and the Applicant as a result had to fill in for that doctor over and above attending to his own duties. It was further not disputed that there were community service doctors attending to the patients on the day.
51. The Respondent did not argue that the Applicant was specifically appointed to deal with patients at the OPD. If it was proven that his sole responsibility was to deal with those patients and he deliberately neglected to do so, it might have had a point. As it is, the Applicant had other duties to perform and two other doctors attended to the patients at OPD.
52. Also, there was a protocol in place that dictated that the very sick patients be stabilized and if not seen, had to go to casualty to be seen by the doctor who would commence duty at 17H00. Only Ms. Maliti testified that no patient had to go unseen on a particular day. However, it appears that she had a different tune at the disciplinary enquiry. Ms. Maliti was a poor witness. She failed to answer difficult question openly and honestly and simply declined to answer others. At times she would simply stare at the Applicant's representative. I thus rejects her version on this issue.
53. In all likelihood, it was protocol that the patients not seen, would have had to come back the following day. The Applicant addressed the patients at OPD and informed them of the shortage of the doctors. He was aware of the patients' frustrations and he tried to appease them. Ms. Maliti overheard him speaking to the patients. After speaking to the patients, he returned to his duties. It can hardly be alleged that the Applicant abandoned his duties under these circumstances. I thus find the Applicant also not guilty of Charge 2.
54. This brings me to the issue of relief. Section 194 (4) of the Act empowers me to determine compensation that is reasonable under the circumstances. The Applicant was suspended without pay for a three month period. The Applicant's remuneration for these months should be paid back to him. I take into account that the Applicant, prior to the sanction becoming effective, was on paid precautionary suspension which was uplifted sometime in August 2015.
55. The Applicant requested compensation of 12 months to be paid as *solatium* for the loss of the right to a procedurally fair hearing. This is not reasonable in my view. I agree that the disciplinary enquiry as well as

the outcome of the appeal took much longer than the Resolution prescribes, resulting in procedural unfairness. But the Applicant received his salary throughout this period. Therefore no huge financial loss and / or prejudice was suffered by the Applicant. I took note of the argument that he has lost some of his benefits; for instance the Respondent's contribution to his provident fund etc. The payment of compensation of 4 months' salary, calculated at his current salary, is reasonable in my view given the circumstances.

56. In the premise therefore, I make the following award:

AWARD

57. The Respondent, the Department of Health- Eastern Cape, committed an unfair labour practice by issuing the Applicant, Dr. Masixole Gala with a final written warning and to suspend him without pay for three months.

58. The final written warning issued to the Applicant is declared of no force or effect and the Respondent is therefore ordered to remove it from the Applicant's personnel file.

59. The Respondent is further ordered to pay the Applicant compensation of R430 861.08 (R107 715.27 x 4 months) less statutory deductions, by no later than 31 May 2017.

Signature:



Commissioner: **Samuel Baron**

Sector: **Public Health**
