



ARBITRATION AWARD

Case No: PSHS313-21/22

Commissioner: Allan Kayne

Date of award: 12 October 2022

In the matter between:

PSA OBO BOIKANYO MOKAKALE

APPLICANT

and

DEPARTMENT OF HEALTH – NORTH WEST

RESPONDENT

DETAILS OF THE HEARING AND REPRESENTATION

1. The Public Servants Association (“the PSA”) referred an unfair labour practice dispute on behalf of the applicant to the Public Health and Social Development Sectoral Bargaining Council (“the Council” or “the PHSDSBC”), in terms of section 182(2)(b) of the Labour Relations Act, 66 of 1995 (“the LRA”).
2. The arbitration proceedings took place on 10 October 2022 at the respondent’s Taung Hospital. The applicant was present and represented by a PSA union official, Mogomotsi Mosheshe, while Tebogo Bolehelwang appeared for the respondent.
3. Only the applicant submitted a bundle of documents to be used during the arbitration proceedings.
4. The proceedings, conducted in English, were digitally recorded, and the record was filed with the Council’s administration.

5. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his outcome.

APPLICATION FOR POSTPONEMENT

6. At the commencement of the proceedings, Mr Bolehelwang brought an application for postponement as the respondent's main witness, who was suspended, could not be located. They had been unsuccessful in contacting him from the previous week, and since he was the only witness that they had scheduled to appear on 10 October 2022, they were unable to proceed as their second witness was just not available.
7. Mr Mosheshe did not oppose the application but pointed out that the matter was already protracted. Although not averse to postponing, he insisted that no further postponements should be considered and that the case be finalised.
8. Noting that the applicant's dispute was referred to conciliation on 28 June 2021 and to arbitration on 25 August 2021, more than a year ago, I was not persuaded by the respondent's reasons to postpone, given that they were already aware of their key witness' absence the week prior and had made no attempt to engage with the Council and applicant regarding their dilemma. They had further made no attempt to secure the attendance of their second witness, based on the assumption that their request to postpone was a *fait accompli*. This was supported by the respondent not having any bundles of documents available to use during the proceedings. According to the file, the respondent had brought a successful application for postponement at the sitting of 07 June 2022 on the basis that the applicant's referral was not clear enough. The presiding panellist agreed to postpone the proceedings as an indulgence to the respondent to secure the necessary witnesses.
9. Accordingly, I dismissed the postponement application and directed that the arbitration proceedings continue. Although Mr Bolehelwang indicated that he was unwilling to participate in the proceedings, I advised him that, given his presence, I would still extend an opportunity to participate at each step of the proceedings.

BACKGROUND

10. The alleged misconduct perpetrated by the applicant occurred between April and November 2017.
11. The respondent charged the applicant with misconduct in November 2018.

12. The applicant's disciplinary hearing commenced on 17 January 2019, and its outcome was on 18 June 2019, which resulted in the respondent dismissing him.
13. The applicant subsequently appealed the outcome of his disciplinary hearing. That outcome was released on 25 May 2021, in which the sanction of dismissal was commuted to one of three months unpaid suspension.

ISSUE/S TO BE DECIDED

14. I must determine whether the applicant's suspension was fair and, if not, what the appropriate relief should be. The applicant seeks to be reimbursed in full for the three months suspension, during which he received no remuneration. He quantified the amount to be R59,261.25 (R19,753.75 x 3 months). The respondent could not confirm the correctness of this calculation when asked.

SURVEY OF EVIDENCE AND ARGUMENT

15. The following constitutes a summarised version of the parties' respective, relevant evidence and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not considered it. My findings are accordingly within the context of all the evidence tendered.

APPLICANT'S EVIDENCE

Boikanyo Mokakale ("Mokakale")

16. The applicant testified under oath that he was an electrical artisan based at the respondent's Taung sub-district office and worked for the respondent for approximately ten years. He was also a PSA shop steward since 2016.
17. The respondent preferred the following charges against him:

17.1. Gross dishonesty – On or around the 15th November 2017, you committed an act of misconduct when you knowingly and deliberately told SCM that you uninstalled submersible motor pump (Tesla) instead of Franklin Borehole pump and motor that was initially installed by CPac Pumps and valves at Reivilo CHC¹ thereby contravening Annexure A of PSCBC Resolution 1 of 2003.

¹ Community Health Centre

- 17.2. *Theft – Between the 04th of April 2017 and the 15th of November 2017, you committed an act of misconduct when you knowingly and deliberately took the Franklin Borehole pump from Reivilo CHS and return the Faulty Tesla pump thereby contravening Annexure A of PSCBC Resolution 1 of 2003.*
- 17.3. *Fraud – On or around the 15th of November 2017 you committed an act of misconduct when you knowingly and deliberately deceived the employer by submitting the wrong submersible pump to Greater Taung Sub – District SCM that was not originally installed at Reivilo CHC by CPaC pump and valves thereby contravening Annexure A of PSCBC Resolution 1 of 2003.*
- 17.4. *Unethical Conduct – Between the 04th of April 2017 and 15th of November 2017 you committed an act of misconduct when you knowingly and deliberately act unethically by uninstalling the submersible pump and failed to do the tests on time as promised until you were reminded to return the pump thereby contravening Annexure A of PSCBC Resolution 1 of 2003. (sic)*
18. The applicant denied any wrongdoing pertaining to the clinic's pump motor, as outlined in the allegations. He testified that, on 04 April 2017, his supervisor, Robert Mokakale, instructed him to attend to a water issue at the Reivilo CHC. He recalled going to the clinic on a Sunday to test the pump and returning there the following day with Mr Lesetadi to remove the pump motor. This was done in the presence of two of the clinic's groundsmen. He took only the pump motor to the sub-district offices and left it to dry. After two days, he retested it, but it was still faulty. He advised his supervisor that it needed replacing. However, his supervisor advised that no funds were available and that he would need to implement remedial action. This was in the form of organising a water tanker for the CHC to use until such time that the respondent could replace the pump motor. He and Mr Lesetadi offloaded the old pump motor at the sub-district office where it remained.
19. Around July/August 2017, Mr Letswalo transferred into the sub-district from Klerksdorp. There were no further questions about the pump. Some months after the applicant's supervisor was replaced by Mr Modirapula, around November 2017, the new supervisor asked him what had happened with the pump motor. The applicant retrieved it and provided it to him. The next day, the applicant asked Mr Modirapula for some written confirmation to show that he had received the pump motor, which was when he learned that rumours were abounding regarding the pump. Mr Modirapula instructed the applicant to return the pump motor to Supply Chain Management ("SCM"), which he did,

providing it to Ms Kgoshe. He believed that the subsequent disciplinary action resulted from the poor relationship between him and Mr Letswalo, and the decision by the respondent was based on misinformation.

20. The applicant added that the circumstances in which he was required to perform his duties were terrible and that Mr Modirapula treated him unfairly and harassed him. He was also denied access to material and required to remain at the office, unlike Mr Letswalo, who was provided with the necessary material to perform his work. He was excluded from assisting at the Pudumong CHC, largely because of his bad relationship with Mr Letswalo.

Cross-Examination

21. Under cross-examination, the applicant testified that Reivilo CHC obtained its water from two boreholes; one feeding an old tank, which supplied the clinic, and the second from an open water tank, used for irrigation.
22. He confirmed that he had been a shop steward since 2016 and that this was advised to the presiding officer of the disciplinary hearing in writing but that he did not have a copy of that document readily available. At the same time, he also raised the excessive delay in subjecting him to disciplinary action despite his appeal outcome noting that he had not done so during his disciplinary hearing.
23. Non-functioning equipment, such as pumps, were usually brought to the office to be tested. They often repeated tests as the original tests may have failed due to the presence of water. It also provided a learning opportunity for them. This is what occurred with the Reivilo pump, and he notified his supervisor on 05 April 2017 that it required replacing. As there were no available funds, the remedial action was to organise a 2.5kl tanker for the clinic.
24. The applicant testified that he complained to his supervisor and formally lodged grievances regarding his ill-treatment at work, but the employer never resolved them.

RESPONDENT'S EVIDENCE

25. Neither of the respondent's two witnesses were in attendance.

ANALYSIS OF EVIDENCE AND ARGUMENT

26. Section 185(b) of the LRA provides that *"every employee has the right not to be subjected to an unfair labour practice"*, and section 186(2)(b) defines such an unfair labour practice to include *"any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee."*
27. Given the absence of any respondent witnesses to refute the evidence of the applicant, unless the respondent has, through its cross-examination of Mr Mokakale, shown his evidence to be improbable, incredible or unreliable, I must accept that which was presented to me under oath by the applicant.
28. In his testimony, the applicant emphatically denied committing the acts of misconduct alleged by the respondent, including dishonesty, theft, fraud and unethical conduct. He explained the events that transpired from when he was dispatched to check the clinic's pump to him and Mr Lesetadi removing the pump motor and taking it to the sub-district office for further testing. He testified that the pump motor was irreparable and required replacing, which the respondent was, at that stage, unable to fund. To ameliorate the situation, he arranged the use of a 2.5kl water tanker for the clinic. He attributed the respondent's decision to discipline him to be based on his poor relationship with Mr Letswalo but provided no evidence to support this claim. He further claimed that Mr Modirapula had treated him unfairly and harassed him, but this, too, was unsupported, and he was unable to present any evidence to demonstrate how he addressed that situation, such as grievance documents or complaint letters. His claims that his rights were infringed by the respondent, who only finalised its disciplinary action more than two years after the alleged misconduct had taken place and ignored his position as shop steward, were unsupported with reference to the documentation in the bundle and were contradicted in his appeal outcome, which was read into the record.
29. Given that an arbitration hearing is one conducted *de novo*, the parties are expected to present reasonable evidence to convince the arbitrator of their case on the balance of probability. In the matter to hand, after the applicant presented his evidence, in which he denied any wrongdoing on his part, the respondent failed to call any witnesses to offer an alternate version to that of the applicant. Cross-examination of the applicant by the respondent demonstrated no discrepancies in his version regarding the pump motor. The only evidence presented by the respondent, which directly contradicted that of the applicant, related to whether or not he expressed concern at his disciplinary hearing



regarding the protracted nature of the matter. However, in my view, this minor contradiction adds no value to what I am required to determine, which is the fairness or otherwise of his suspension.

30. Effectively, I am left with only the applicant's version, denying the misconduct, which resulted in him being sanctioned with a three-month unpaid suspension. This is the only version before me and must be accepted.
31. Accordingly, the applicant discharged the onus required of him in demonstrating the unfairness of his unpaid suspension
32. The applicant's prayer is that he be reimbursed the remuneration withheld from him by the respondent during his suspension. Given that the respondent was unable to confirm the value, I must accept the amount advised by the applicant, amounting to R59,261.25, which took into account his monthly remuneration of R19,753.75.

AWARD

33. The respondent subjected the applicant to an unfair labour practice as contemplated in section 186(2)(b) of the LRA.
34. The respondent, Department of Health – North West, is ordered to pay the applicant, Boikanyo Mokakale, the remuneration to which he was entitled during his three-month suspension period amounting to R59,261.25 by 15 December 2022.



Allan Kayne