



ARBITRATION AWARD

Case No: **PSHS246-19/20**

Commissioner: **Siggibo Colin Rani**

Date of award: **25 September 2019**

In the matter between:

PSA obo Pierre Theart

(Union/ Applicant)

and

Department of Health- Western Cape

(Respondent)

Details of hearing and representation

1. This matter was referred for arbitration to the PHSDSBC in terms of section 191(5)(a)(iii) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard in the offices of the EMS-Department of Health Worcester on 31 July 2019 and 5 September 2019. The parties submitted their closing arguments on 16 September 2019.
2. The applicant Mr. Pierre Theart was represented by Mr. Brendon Jacobs from PSA. Mr. Ayanda Mniki represented the respondent, Department of Health- Western Cape. The arbitration proceedings were digitally recorded.

Issue to be decided

3. I must decide whether the dismissal of the applicant was procedurally and substantively fair.

Background

4. The applicant worked as the Emergence Care Officer in Cape Winelands District for the respondent. He was charged for repudiation of his contract of employment in that he failed to submit a valid proof of a valid HPCA registration to the respondent. His employment contract was terminated on 11 April 2019. The applicant contends that the respondent dismissed him unfairly.
5. It was common cause that on 27 February 2019 the applicant's supervisor Mr. Fadeel Ebrahim found out that the applicant registration with the HPCA was suspended for failing to pay his annual subscription on time. Mr. Ebrahim had a discussion with the applicant regarding this omission. The content of their discussion will be ventilated in the of body evidence.
6. It was common cause that the applicant was issued with *audi alteram partem* letter on 19 March 2019 for failing to meet the inherent requirements of the job (HPSA Registration). The respondent contends that the PHSDSBC does not have the jurisdiction because the applicant was not dismissed, he repudiated his employment contract. The respondent cited Circular H46/2014 to support its assertion that the PHSDSBC lacks jurisdiction.

Survey of evidence

7. The parties submitted a bundle of documents. The respondent's bundle was marked bundle "A", and the applicant's bundle was marked bundle "B". The bundles included a Circular H46/2014 (Non-compliance with the inherent requirements of membership/registration with professional bodies and the employment contract). The validity of the documents is not in dispute.

Respondent's case

8. Mr. Fadeel Ebrahim who works as Sub District Manager in Emergency Medical Services (EMS) for the respondent testified that on 27 February 2019 he conducted the usual inspection on the Health Professions Council of South Africa (HPCSA) and Public Driving Permit (PDP) cards. He found out the applicant's registrations with HPCSA was not up to date. He immediately with the consent of the applicant log in to the HPCSA website and they found out that the applicant's registration was suspended due to the outstanding registration fee. He instructed the applicant to pay the outstanding amounts that were due. The applicant undertook to pay the outstanding amount of R4006.00 before 1 April 2019.
9. Mr. Ebrahim testified that every person working his department is required to register with the HPCSA and registration fee in accordance to his or her qualification. He stated that HPCSA annual subscriptions are paid before 1 April of each year. He advised the applicant to pay the outstanding amount before 1 April 2019. He found out from the HPCSA that if the outstanding amount is fully paid, it takes 21 days to restore the registration. He also testified that the applicant paid the registration outstanding fee on 27 March 2019.
10. Mr. Werner Breuninger who works as the Assistant Director in Labour Relations-EMS testified that the applicant's services were terminated 11 April 2019 because his registration with HPCSA was not valid. On 19 March 2019 the applicant was issued with an *audi alteram partem* letter notifying him that he was not in possession of the required proof of annual registration with HPCSA in order to meet the inherent requirements of his job. He was given 5 working days to submit proof of a valid HPCSA registration for 2018/2019. On 11 April 2019, the applicant's employment contract was terminated because he failed to submit proof of valid HPCSA, and his registration was still suspended.
11. During the cross-examination Mr. Breuninger confirmed that on 8 March 2019, Mr. F Ebrahim made his department aware that the applicant's registration with the HPCSA was suspended. He stated that when the decision to terminate the applicant's

employment contract on 11 April 2019, they were not in position of the HPCSA dated 18 June 2019 which restored the applicant's registration as from 27 March 2019 and entitled him to practise his profession.

Arguments

12. Mr. Mniki argued that according to clause 5.1.3.5 of applicant's employment contract he must all times uphold his registration status with the relevant Statutory Professional Council(s). Failure to renew or uphold his registration status may lead to the termination of contract of employment.

13. Mr. Mniki further argued that the termination of the services of the applicant was as a result of a breach of contract by the applicant. The respondent exercised its right of terminating the contract upon the breach by the applicant. It is for this reason that the respondent argues that the PHSDSBC does not have jurisdiction to listen to a contractual dispute, but rather the courts.

14. Mr. Mniki cited clause 42 of the Health Professions Act of 2007 which states that: "every person who has been suspended or whose name has been removed from the register in terms of section 42 of the act shall, if his or her profession is one which, under this Act, cannot be lawfully practiced by an unregistered person, be disqualified from practicing his or her profession and his or her registration certificate shall be deemed to be cancelled until the period of suspension has expired or until his or her name has been restored to the register by the professional board."

Applicant's case

15. The applicant testified that on 27 February 2019 he saw his colleagues with their HPCSA registration cards. He went to manager Mr. F Ebrahim to enquire to how he can also get the registration card. He gave Mr. F Ebrahim his log in details to the HPCSA site. They found out that his registration was suspended due to outstanding registration. He said that Mr. F Ebrahim advised him to pay the outstanding fees before 1 April 2019. At the time he had no money. However, he tried to borrow the money to

get his registration update. He testified that he paid the outstanding of R4006.00 to the HPCSA on 27 March 2019.

16. The applicant stated that he found out that he had outstanding fees to pay because he made late payments. He was not aware that his registration was suspended. When he became aware of the omission, he tried to pay the outstanding amount. At the time he received the *audi alteram partem* letter on 19 March 2019 he had already sent the respondent a proof of payment of HPCSA outstanding fees. He did not know that there were other submissions he needed to make. He was shocked when his services were terminated on 11 April 2019 because he had paid the outstanding fees and in terms of the invoice, he received from HPCSA, his registration is valid from 1 April 2019 until 31 May 2020.

Analysis of evidence and argument

Jurisdictional Point

17. The respondent is challenging the PHSDSBC jurisdiction. The respondent relies on the assertion that the applicant breached his employment contract by not ensuring that his registration with HPCSA is always valid. The respondent considers this as the repudiation of the contract of employment and it was in right to terminate the employment services accordingly. On the contrary the applicant contends that he was unfair dismissed.

Repudiation of contract

18. It is trite that the repudiation of contract by a party does not itself terminate the contract, it merely gives the innocent party the choice of accepting it and bring the contract to end; or rejecting it and seeking an order for specific performance, which effectively declares the contract of full force and effect.

19. It is common cause that the applicant registration with HPCSA was at some point in 2018/19 suspended. Both the applicant and respondent became aware of this omission on 27 February 2019. The applicant's manager Mr. Ebrahim instructed the applicant to correct this omission before 1 April 2019. The applicant corrected this omission by paying the outstanding annual fees on 27 March 2019. Consequently, the HPCSA restored the applicant registration as from 27 March 2019.
20. It is undisputed fact that the applicant's registration with HPCSA is valid for 1 April 2019 -31 March 2020. On 19 March 2019, the respondent wanted the applicant to submit proof of a valid HPCSA registration 2018/2019 within five working days. Even though the applicant could not produce the proof within 5 working days, this omission could not be equated to repudiation of his contract of employment. Clause 42 of the Health Professions Act of 2007 states that: "every person who has been suspended or whose name has been removed from the register in terms of section 42 of the act shall, if his or her profession is one which, under this Act, cannot be lawfully practiced by an unregistered person, be disqualified from practicing his or her profession and his or her registration certificate shall be deemed to be cancelled until the period of suspension has expired or until his or her name has been restored to the register by the professional board." In the case, the applicant was restored to the HPCSA register.
21. In the Labour Appeal Court in *Fijen v CSIR* (1994) 8 BLLR 8 (LAC), the court first considered whether in fact the respondent had dismissed the appellant. In the court's view, the appellant at no stage, either by words or conduct, evidenced a clear and unambiguous intention not to continue with his contract of employment or further did not act in such a way to lead a reasonable person to such a conclusion. The court found that the respondent dismissed the appellant.
22. In this case, without rehashing the evidence already presented I find that the applicant was dismissed. Therefore, the PHSDSBC has the jurisdiction to hear the matter.

Dismissal

23. Section 186(a) of the Labour Relations Act defines a dismissal: an employer has terminated a contract with or without notice. In this case, the applicant was dismissed without notice.
24. In terms of section 188 of the Labour Relations Act, a dismissal will be unfair if the employer fails to prove that the reason for dismissal is a fair reason related to (a) employee's conduct, capacity and operational requirements (b) that the dismissal was effected in accordance to with a fair procedure.
25. The applicant testified that he was under impression that his registration was valid. When he became aware that his registration was suspended, he wasted no time to correcting the omission. His manager Mr. Ebrahim advised him to update his registration before 1 April 2019 which he did on 27 March 2019. The respondent was aware of the arrangement the applicant made with his manager in updating his registration and received the proof of payment of the applicant outstanding to HPCSA. It is common cause that the HPCSA restored the applicant's registration as from 27 February 2019.
26. For the respondent to terminate the applicant's services on 11 April 2019 without applying its mind on the time needed to update the registration in the HPCSA was unreasonable. Under the circumstances, the respondent could have opted to put the applicant on leave without pay as provided in paragraph 9 of Circular H46/2014.
27. In this case, the applicant's dismissal was substantively unfair. However, the applicant must take blame for failing to keep his registration up to date all the time. Therefore, his re-instatement is without backpay.

Award

28. The respondent, Department of Health- Western Cape, is ordered to re-instate the applicant, Mr. Pierre Theart, in its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal.
29. The reinstatement referred to in paragraph 28 is to operate with effect from 11 April 2019.
30. Mr. Pierre Theart is to render his services to the respondent by no later than 7 October 2019.



SIGQIBO COLIN RANI