



Commissioner: ANAND DORASAMY

Case No.: PSCB 421-08/09

Issued: 7 JUNE 2010

In the ARBITRATION between:

PSA O.B.O. KHOZA K I

APPLICANT

and

DEPARTMENT OF HEALTH -KZN

RESPONDENT

Applicant's representative

: MR D GOVENDER

Applicant's address

P.O.BOX 4011

DURBAN

Telephone

: 031 310 3600

Telefax

: 031 310 3615

Respondent's representative

: MR S KUNENE

PRIVATE BAG X 9051

PIETERMARITZBURG

Telephone

: 033 395 2111

Fax

: 033 395 3220 / 846 7278

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration hearing commenced on the 19 April 2010 at Ulundi and concluded on the 21 May 2010 at the Primary Health Care Centre Boardroom, Vryheid. Mr D Govender of the PSA represented the applicant. Mr S Kunene represented the respondent.

BACKGROUND TO THE DISPUTE

2. The applicant was dismissed on the 26 August 2008 and appealed against the sanction. She was dismissed for using a fraudulent standard 10 certificate in her application for an advertised post. The matter was conciliated on the 2 March 2009. The matter was set down for arbitration before commissioner Lyster on the 20th October 2009 and was dismissed because the applicant did not attend the hearing. Thereafter an application for the rescission of the dismissal ruling was granted.
3. According to the applicant the appeal decision was subsequently accepted and the decision was handed down on the 30 March 2009.

The applicant referred a dispute challenging the employer's interpretation and application of clause 7.4. (c) of Resolution 1 of 2003 read as follows:

“The employer shall not implement the sanction during an appeal by the employee.”

The applicant seeks to be paid from the date of dismissal (26 August 2008) until the date of the finalisation of the appeal (30 March 2009).

SUMMARY OF THE EVIDENCE

APPLICANT'S OPENING STATEMENT

4. In terms of the collective agreement, resolution 1 of 2003 and it is common cause that when an employee is dismissed from the Public Service he/she has

the right to appeal and whilst the appeal is pending the status quo remains and the employee is to be paid.

5. The applicant was dismissed on the 26 August 2008 and she appealed timeously and her salary was stopped in September 2008 despite numerous requests to the employer to rectify the matter.
6. She has not been given a reason for the employer not complying with the provisions of the resolution.
7. She seeks that she be paid from September 2008 to the 29 May 2009 when she was officially informed by letter that her appeal was processed. Her salary at the date of dismissal was R 5 367.50.

RESPONDENT'S OPENING STATEMENT

8. The respondent does not owe the applicant any money. During that period she was on leave without pay as her salary was frozen because she did not attend duties because she refused to report for work.
9. The respondent prays for the matter to be dismissed.

ISSUE TO BE DECIDED

10. Whether the respondent had interpreted and applied section 7.4. (c) read as follows:

“The employer shall not implement the sanction during an appeal by the employee.” Should my finding favour the applicant what relief may be appropriate in the circumstances.

SURVEY OF THE EVIDENCE

APPLICANT'S EVIDENCE

KHETHIWE KHOZA

The salient aspects of Ms Khoza's evidence are as follows:

11. She was employed by EMRS at Pongola and was given her letter of dismissal but no appeal form was attached to it. She appealed and her salary was stopped in September 2009.
12. Her job was an ambulance assistant and she had to wear a uniform. When she was suspended Mr Kunene took her uniform from her home. After she got her letter of dismissal nobody told her to return to work.

Under cross-examination she stated:

13. On the 22 August 2008 the date of the hearing she was sick and explained it to her union and when Mr Kunene telephoned her she referred him to her union.
14. She was represented by lawyers in respect of her criminal case. Her disciplinary hearing continued in her absence.
15. After September 2008 until March 2009 she did not report for duty because her uniform was taken away and her supervisor told her that she must not report for work. She remained at home.

RESPONDENT'S EVIDENCE

PHUMLANI JABULANI ERIC KHUMALO

The salient aspects of Mr Khumalo's evidence are as follows:

16. He is the company's HR practitioner and he is in charge of staff salaries. The applicant's salary was stopped because she did not attend to her duties.

THOMAS MUSA DLAMINI

The salient aspects of Mr Dlamini's evidence are as follows:

17. EMRS policy in respect of staff that do not attend work is "no work, no pay" and this policy is known to the staff as this policy is constantly applied to all staff. The uniform given to staff is for their duty purpose only.

SPECIAL NOTE

18. The matter was adjourned on the 19 April to the 21 May 2010 with the respondent tendering the wasted costs to afford it an opportunity to secure its witness and the matter was moved to Vryheid to be close to the respondent's witness.
19. On the 21 May 2010 the respondent stated that its envisaged witnesses would not testify as they were in the employ of the attorneys representing the applicant in the criminal matter and there may be a perception of a conflict of interests.

CLOSING ARGUMENTS

SPECIAL NOTE:

20. The respondent submitted written closing arguments on the 28 May 2010.

APPLICANT'S CLOSING ARGUMENTS

The applicant's written submission is copied verbatim and is followed by the applicant's supplementary submission.

21. BACKGROUND:

I find it necessary to provide some background information to this matter.

22. Applicant was employed by the Department of Health (EMRS) Pongola. A Disciplinary Hearing was convened in her absence. Three (3) days later, on the 28th August 2008 she was informed that she was found guilty as charged. The sanction was dismissal. I pause to mention that prior to the disciplinary hearing she was placed on precautionary suspension pending the outcome of the disciplinary hearing.
23. The letter informing her of the sanction afforded her the right to appeal which she accordingly exercised, save, there was some delay in transmitting the

appeal due to the given fax number of the department being out of order. She thereafter posted the appeal to the given address.

24. It then transpires that on the 4th September 2008, some 8 days after receiving a notification informing her of her dismissal and right to appeal her salary was stopped. Her union the PSA raised the matter with the Department of Health. No reason was given nor was the salary reinstated.
25. A dispute in terms of 24 (2) 24 (5) Interpretation and Application of a Collective Agreement was lodged with the PSCBC. The matter was conciliated after which there was a pre-arb. Even up to this stage of pre-arb no tangible reasons was afforded to the applicant or her union as to why the salary was stopped.
26. All these pertinent issues are common cause.

ISSUE

27. This matter concerns the Interpretation of a Collective Agreement being Resolution 1 of 2003, specifically that clause in the agreement being 7.4 (c) - the employer shall not implement the sanction during an appeal by an employee (the status quo remains).
28. The applicant submitted a bundle of documents and no objections were raised and you are therefore compelled to consider the contents as part of the evidence placed before you - *ARRIES vs. CCMA AND OTHERS (2006) 11 BLLR - 1062 (L C)*.

EVIDENCE

29. The respondent in its opening statement indicated that the applicant's salary was frozen since she failed to return to work when she was instructed to do so, thus the no work no pay rule applied.
30. Applicant refuted this allegation saying that she received no such instruction to return to work. She stated that the respondent representative called on her to collect her uniform. This fortified her belief that she was dismissed. He

mentioned nothing else to her, she denied having said to the respondents representative that he must communicate all correspondence in respect of herself to her lawyers namely Abdul and Jordan. She avers that such an advice was in respect of the criminal charges she is facing in respect of misrepresentation of a false matric certificate and not this process that relates to her appeal.

31. She was not told by her lawyers to return to work. I respectfully ask you Mr. Arbitrator who in their correct minds will not return to work when requested to do so, considering the circumstances of this case.

32. The Respondent called two (2) witnesses

Mr. PJ Khumalo: he is an HR Practitioner that works under supervision.

(I) Could not provide submission for the freezing of the salary.

(II) Knows the abscondment procedure

(III) Knows Resolution 1 of 2003.

He could not say why the abscondment procedure was not adhered to nor was Resolution 1 of 2003 adhered to.

33. Thomas Musa Dlamini: all he could say was that the Policy of the EMRS is no work no pay and that staff leaving the department must return their uniforms.

34. These two witnesses contributed absolutely nothing to strengthen the respondent's case. In my view their evidence lends credence to the applicants' case in that Khumalo knows and understands the abscondment procedure of the Department of Health and he knows and understands the provisions of Resolution 1 of 2003. Having known this he just froze the salary with no submissions as to why the salary was frozen and then Musa Dlamini said that the uniform must be returned when leaving the service. This in itself fortifies and re-enforces the Applicants belief that she was dismissed when the respondent called her personally to pick up her uniform.

SUBMISSIONS:

35. Applicant was placed on a pre-cautionary suspension pending the outcome of her disciplinary hearing. The moment the hearing was over the applicant for all intents and purposes was dismissed and since she appealed the status quo remains (salary in place).
36. It is absurd and ludicrous to say that she was requested to return to work when in the first place the precautionary suspension was not lifted.
37. It is nonsense that she could not be found. Z83 Application form for employment reflects particulars which includes residential address. The respondent cannot produce a single letter written to her to return to work more so the abscondment procedure which spells out the processes to be followed when an Employee cannot be found fails to return to work. Then here is Section 17 (b) of the Public Service Act, which is the deeming provision to dismiss after 30 days of continued absence.

38. SUPPLEMENTARY SUBMISSION

The respondent indicated that the appeal was in time. It is common cause that the applicant is criminally charged and is out on bail and there bail conditions for her not to communicate with witnesses and not to go to the workplace.

The applicant urges the arbitrator to consider the wasted time and grant costs against the respondent.

RESPONDENT'S CLOSING ARGUMENTS

The respondent's closing arguments are copied verbatim.

INTRODUCTION

39. This response is closing arguments for the Respondent in the matter of alleged implementation of sanction whilst awaiting appeal outcome, hence Interpretation of Resolution 1 of 2003.

40. This dispute arise out of a sanction of dismissal where the applicant was found guilty of Misrepresentation and Fraudulent qualifications used to gain employment in the Department of Health , EMRS component , Zululand District. This matter was also referred to criminal court and will probably be finalized on the 13th of July 2010, where the department is looking for amongst other things **restitution**.

ISSUE TO BE DECIDED

41. Whether the respondent implemented sanction whilst appeal was pending.

RESPONDENT'S CASE

42. 1ST WITNESS : MR. PHUMLANI KHUMALO ; HUMAN RESOURCE PRACTITIONER , EMRS ZULULAND.

He testified that the salary of the applicant was frozen as a result of her failure to resume duties after the finalization of her inquiry on the 22nd of August 2008. He produced a document to that effect, which was marked Annexure C.

43. 2ND WITNESS: MR. THOMAS MUSA DLAMINI, OPERATIONS MANAGER, EMRS ZULULAND.

He testified that the Department of Health has got a no work no pay policy and accordingly the applicant was treated in the same way. Therefore the action of freezing her salary is justified.

ARGUMENT

44. It is submitted that the evidence led by the respondent's witnesses be accepted as true. Evidence of these two witnesses was at no stage challenged to a point of total evaporation. Witnesses called by the respondent were both credible and honest whilst giving their evidence.

On the other hand the applicant failed through cross-examination to discredit their evidence.

PRAYER

45. It is the respondent's prayer that the applicant's case be dismissed with costs.

ANALYSIS OF EVIDENCE AND ARGUMENT

46. In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provision of the applicable resolution has been read with the applicable documentary evidence.
47. In this matter the employee seeks a determination on whether the employer interpreted and applied the provisions of section 7.4.(c) read as follows:
- “The employer shall not implement the sanction during an appeal by the employee.” fairly alternatively correctly.
48. The applicant seeks to be paid from the date of dismissal up to the finalisation of the appeal.
49. In interpreting and applying the terms and conditions of the above-mentioned clause I have taken into account the rules applicable to the interpretation of statutes and have been guided by the grounding principles such as the ordinary, plain meaning of words should be used. Further I have desisted from adopting a piecemeal approach but favoured a holistic or all embracing approach.
50. I do not intend to prolong what seems to be a simple matter and record the following that
- 50.1. The applicant had not contested that she did not possess a valid matriculation certificate. In fact she is facing criminal prosecution in this regard. She could have cured the issue by submitting the certificate that she is a lawful holder of such a certificate.
- 50.2. A disciplinary hearing was convened but she did not attend but lodged an appeal. I have not been appraised of whether she offered the valid

certificate to justify her relief. In the absence of the certificate then the respondent was correct to dismiss her appeal.

50.3. The applicant seeks the shield of section 7.4. (c) read as follows:

“The employer shall not implement the sanction during an appeal by the employee.” Clearly this provision is applicable to legitimate employees and I believe that the applicant did not enter the employment relationship with clean hands. Presently in our country the scourge of fraudulent production of certificates is rampant and if not checked it would lead to chaos and anarchy and the respect accorded to diligent and hardworking citizens would be dissipated.

50.4. The fact that the employer is persisting and pursuing criminal charges against the applicant ought to have dissuaded her from pursuing her dispute.

50.5. The following crystallizes and clears the dilemma facing arbitrators that have to deal with fraudulent misrepresentation in respect of certificates. This is a recent Labour Court decision by De Swart AJ in *Boss Logistics v Phopi & Others* (2009) 18 LC 1.11.4

“If an applicant for a position misrepresents his experience and / or qualifications and is appointed to a position on the basis of such a misrepresentation, there is, in my view, no duty on the employer to provide such an employee with counseling, training or assistance. An employee who misrepresents his/her qualifications or experience is dishonest and is not entitled to be appointed to a position in the first place. An employment relationship is based on mutual trust and deceit is incompatible with, as well as destructive of, trust. Moreover, if an employer would in such circumstances, be required to provide counseling, assistance and or/ training to a deceitful employee, it would

mean that the employee would in fact be rewarded for his/her dishonesty or deceit while the employer would be penalized.”

50.6. The applicant’s misrepresentation goes to the heart of the matter and her conduct ought not to be rewarded with a technical interpretation in her favour. In fact the collective agreement or resolution was struck on the basis one is dealing with bona fide employees, which clearly do not apply, to the applicant.

50.7. As a consequence of the above I deem it unfair to reward the applicant for an act of dishonesty. Therefore the application matter is dismissed and the applicant is not entitled to any relief.

51. In the normal course I would have made an order of costs in the light that costs should follow the result and although the respondent did apply for costs I make no order as to costs. In respect of the adjournment of the 19 April 2010, the respondent is to pay the wasted costs of the Council.

AWARD

52. The applicant’s claim is dismissed.

53. The respondent is to pay the wasted costs of the 19 April 2010.

54. There are no further orders as to costs.

.....

PSCBC Panelists: ANAND DORASAMY

7 JUNE 2010

(AWARD KHOZA)