



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

ARBITRATION AWARD

Panellist/s: J.J.ERASMUS
Case No.: GPBC 1249/2016
Date of Award: 17 February 2017

In the ARBITRATION between:

W. CHIKANYA
(Union / Applicant)

and

DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT
(Respondent)

Union/Applicant's representative: Mr. D. Jansen

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative: Mr. P. Podile

Respondent's address:

Telephone:

Telefax:

PREAMBLE

- [1] This is an arbitration award issued in terms of Section 138 of the Labour Relations Act 66 of 1995 (as amended) and herein after referred to as the LRA.
- [2] This award is not intended to be a verbatim transcript of the evidence led at the arbitration hearing but rather a determination with brief reasons for such determination.
- [3] Evidence relevant to the determination or to support any of the elements of fairness as required may be referred to. This however does not mean that I failed to consider other evidence or ignored such evidence in coming to my decision.

DETAILS OF HEARING AND REPRESENTATION

- [4] The arbitration was scheduled for arbitration on the 2nd of February 2017 at the GPSSBC offices in Centurion, Pretoria after an attempt to resolve the dispute was unsuccessful. The Applicant was represented by Mr. Jansen, an attorney from the firm Jansen Attorneys while the Respondent was represented by Mr. Podile, an employee of the Department.
- [5] The proceedings were conducted in English, digital recordings were made and I also kept handwritten notes.
- [6] After hearing the evidence of both parties, the parties agreed presented their closing arguments in writing on/before 9 February 2017. I duly received and considered both parties arguments before coming to my decision.

BACKGROUND TO THE ISSUE

- [6] The Applicant was initially employed as a Civil Engineer since 1 March 2009 but was acting as the Resident Engineer at Charlotte Maxeke Hospital since October 2013 . At the time of his dismissal he was earning an annual salary of R786 231.00.
- [7] Following an incident on the 11th of January 2016, where the generator failed to start up during a power failure, he was charged and dismissed on the 2nd of February 2016 for gross negligence.

- [8] Believing that his dismissal was unfair, the Applicant then referred a dispute to the GPSSBC which remained unresolved after conciliation. The matter was then referred for arbitration where the parties initially agreed in principle to resolve the dispute. The Respondent's representative however indicated that he could not get a mandate from his seniors to settle and that the arbitration therefore had to continue.

ISSUE TO BE DECIDED

- [9] I am required to decide whether the Applicant's dismissal was procedurally and substantively fair. Under procedural fairness I have to decide whether the fact that he was not notified and that no hearing in fact took place before his dismissal, made it unfair. Under substantive fairness I specifically have to decide whether the Applicant did in fact contravene the rule and whether the Respondent acted consistently with reference to Abel Mabaso.

SURVEY OF EVIDENCE AND ARGUMENT

- [10] In addition to the facts mentioned under the background, parties agreed that the following issues were also common cause:

[10.1] That the rule exist and is valid and reasonable.

[10.2] That the Applicant was aware of these rules.

[10.3] That dismissal was the appropriate sanction for contravention of the rule.

[10.4] That patients had to be transported to other hospitals on the day of the incident.

[10.5] That the Applicant had a fixed term contract which would have expired on the 31st of March 2016.

[10.6] That no notification of the disciplinary hearing was given to the Applicant and that no hearing was in fact held before he was dismissed.

[11] The Respondent also submitted a bundle of documents marked Bundle R – 12 pages.

Respondent's case

The Respondent called two witnesses whose evidence was briefly as follows:

[12] Respondent's Witness 1 – Mbongani Mkhaliphi

[12.1] He is a Senior Labour Relations Officer in the Department for the past 2 years and has been in the Public Service since 2002.

[12.2] He explained that there is a Disciplinary Code which guides discipline in the Department. It explains what should be done once the employer becomes aware of misconduct (charges be leveled, notice be given, hearing be held, sanction to be provided by the Chair, right to appeal, etc).

[12.3] In the same Code, it is stipulated that the Code of Good Practice: Dismissal (Schedule 8 to the LRA) forms part of the Disciplinary Code. In terms of this if an employer cannot dispense with a hearing, they can dismiss an employee without a hearing. This is normally where the circumstances are exceptional such as where the lives of people are put in danger, where there is an assault and where there was gross insubordination.

[12.4] In the light of this he would not say that the dismissal of the Applicant was unfair as the disciplinary code is a collective agreement where the employer is given the right to use the Code of Good Practice: Dismissal. If he was asked for his advice, he would have agreed that a disciplinary hearing was not necessary.

[12.5] Under cross examination, he was not able to say if anyone else was dismissed in this way during the past 2 years. He was aware of many other cases where people endangered the lives of people but could not vouch for the names of these people.

[13] *Respondent's Witness 2 – Khanchane Leteba*

[13.1] He is a Technical Director responsible for all hospitals. His duties include to ensure that all equipment are compliant with the OHS Act and are safe to work with.

[13.2] He knew the Applicant, who was the person responsible for Charlotte Maxeke Hospital. As the most senior person, the Applicant was responsible for all equipment and for the safe working of all such equipment including the generators. The Chief Artisans reported to him and Abel Mabaso was responsible for all electrical equipment/ installations.

[13.3] What led to the Applicant's dismissal was the fact that people's lives were endangered by his conduct. The problems with the generator were brought to the attention of the Applicant on the 8th of January 2016 by his subordinates. He did not act on this and did nothing to correct the situation. He therefore failed in his responsibilities.

[13.4] The Applicant was supposed to give instruction to the contractor to do the work and to write what exactly he had to do. There was a book in which this instructions are written or alternatively an e-mail can be done or any way of doing this in writing. He only called the contractor after the incident on the 11th of January 2016 whilst he knew that the valve was critical for operating the generator.

[13.5] He investigated the incident and had discussion with the Applicant and the contractor after the incident to get the details. He realized that operations had to be done, babies were on live support, etc. The Applicant almost caused havoc or killed people and the cost of transporting the patients to other hospitals were estimated to be ±R670 000.00. During the discussions with the Applicant, he apologized for not doing what he was supposed to do.

[13.6] He discussed the evidence with his team and the Applicant (who was present in the meeting) afterwards accused him that he had let him dry. There was no evidence that the Applicant did inform the contractor and he did not see any document to this effect. The problem with the generator was that the changeover panel had to be fixed. The valves were also not working, it was not serviced as required by law and no instruction was given to fix these problems.

- [13.7] In cross examination he indicated that the contractor is responsible to repair, service and maintain the generator and if something needs to be fixed, he must speak to the Engineer. The Chief Engineer is responsible to ensure that the equipment is working, is safe and will not hurt individuals.
- [13.8] No action was taken against Mabaso as he did everything in his power to bring this to the attention of the Applicant and did nothing wrong.
- [13.9] He expected of the Applicant to inform him of any threats/ challenges/ problems. He was however not aware that the necessary parts were not available or of any interim measures that were put in place.
- [13.10] The writing on Bundle R – page 13 was Mabaso writing to his boss (Chikanye) , they then both signed with Khubeka as witness. The Applicant was then supposed to issue an instruction.

Applicant's Case

The Applicant only testified himself and did not call any other witnesses. His evidence was in essence as follows:

[14] Applicant – Wonder Chikanya

- [14.1] He explained that on the 8th of January 2016, he got a call from the hospital to come back. He saw that the generator was not running and there was no power. He then called Mabaso and the contractor to the site and they resolved the problem. They managed to reset the switch and an instruction was given to the contractor to fix the problem.
- [14.2] He noticed that there were problems with the compressor of the generator and realized that if the power goes off again, the generator would not start. As it was over the weekend, they agreed to use the smaller mobile compressor.
- [14.3] On the Monday morning, there was a power failure again. There are 7 generators in the hospital and they are all supported by one main generator. When this main generator failed all the other generators also failed. They tried to get other compressors but it did not work.
- [14.4] The instruction was written in the logbook (as per Page 13- Bundle R) and the agreement was that the contractor will fix everything and afterwards just send an invoice. He just had to inform the contractor as he had done on the 8th of January 2016. Previously instruction between him and the contractor were done in writing, per telephone or by e-mail.
- [14.5] On the 11th of January 2016, the MEC of Health called a meeting where they had to explain what had happened. The Director at this meeting said that he had not done anything to repair the generator. He questioned him afterwards on why he did this. The discussions between him and the Director were informal whilst they were trying

to fix the generator. There was no further communication after the 11th of January 2016 and he had no opportunity to add or explain anything.

[14.6] According to him there was no urgency or extreme circumstances that prevented the Department from holding a proper disciplinary hearing.

[14.7] In cross examination he admitted that he was responsible to ensure that everything was fine at Charlotte Maxexe Hospital and also agreed that patients' lives were in danger as a result of the problem with the generator. He further agreed that he was aware of the problem since the 8th of January 2016 but that there was an interim measure in place (on which all three of them decided). He did not inform his supervisor of the interim measures. He felt that he did not have the competency to act in this position but was not forced to act. He did what was necessary, he informed the contractor and implemented interim measures.

[14.8] He also stated that on the Monday (the day of the incident) the compressor did not start. They did not previously test it on the Friday. They had used it previously and thought that it would work again. He admitted that they were supposed to have checked it.

ANALYSIS OF EVIDENCE AND ARGUMENT

[15] In terms of Section 188 of the Labour Relations Act, 1995 (LRA) a dismissal that is not automatically unfair, will be unfair if the employer fails to prove that

(a) the reason for the dismissal is a fair reason and

(b) that the dismissal was effected in accordance with a fair procedure.

[16] Where dismissal is proven or agreed, the onus to prove the fairness of a dismissal (on a balance of probabilities) rest with the Respondent party in terms of Section 192(2) of the LRA. The parties in this matter had, with my assistance, agreed that only certain specific issues were in dispute under procedural and substantive fairness. I will therefore only deal with these issues.

[17] *Procedural fairness – Did the fact that the Applicant was dismissed without a formal hearing, make his dismissal procedurally unfair?*

[17.1] It was common cause that the Applicant was never formally charged with misconduct and that no formal hearing took place prior to the decision to dismiss him. There was merely an informal discussion with him shortly after the incident where he was asked what went wrong. He was subsequently dismissed as the employer was of the view that he endangered the lives of patients and as such there were exceptional circumstances which allowed them to dismiss him with immediate effect (and without a formal hearing).

[17.2] The Respondent relied on Item 4(4) of the Code of Good Practice which determine as follows:

“In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.”

[17.3] In terms of the rules of natural justice and especially the maxim audi et alteram partem, an employer cannot take disciplinary action against (or dismiss) an employee without affording them a fair hearing or an opportunity to be heard before a decision is taken that negatively affects them.

[17.4] According to **Grogan (Dismissal, Discrimination and Unfair Labour Practices)** the “exceptional circumstances” mentioned above (Item 4(4) of the Code) fall into two classes. Firstly where the circumstances are objectively speaking as such that the employer cannot reasonably be expected to hold a hearing for the employee (such as when the employer is compelled to act to protect lives and property) and secondly where the employee have through his conduct waived his right to a hearing.

[17.5] In this case, it was common cause that the problem with the generator was discovered shortly after the incident and was immediately addressed and corrected. There was as such no longer any immediate threat to the patients of Charlotte Maxexe or an urgent need to protect the property of the hospital/department. In addition the Applicant was only dismissed on the 2nd of February 2016 which left the Respondent with more than enough time to notify the Applicant of the allegations against him and to convene a hearing to deal with these charges before making a decision to dismiss him.

[17.6] I am therefore of the view that there was no rationale for the employer to deprive the Applicant of the right to be heard before a decision was taken to dismiss him. To simply informally enquire from him what went wrong and to then dismiss him by handing him a letter is in my view clearly against the principle of “hear the other side” and as such grossly unfair.

[17.7] I therefore find that the Applicant’s dismissal was procedurally unfair.

[18] *Substantive fairness – Did the Applicant contravene the rule that he was charged with (gross negligence)?*

[18.1] The Applicant was dismissed for Gross Negligence in that:

“On 11 January 2016 at Charlotte Maxexe Johannesburg Academic Hospital [he] failed to take necessary steps/actions to ensure that the generator will start up during power failure.”

[18.2] Negligence can loosely be defined as the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person. The test according to **Grogan** is whether a reasonable person in the position of the employee (the Applicant in this case) would have foreseen the possible harm resulting from his acts or omissions and would have taken steps to guard against that harm.

[18.3] To warrant dismissal, the following requirements must be met:

- The Applicant should have failed to exercise the standard of care and skill that can reasonably be expected of an employee with his degree of skill and experience.
- The lack of care and skill should have manifested itself in an act or omission that caused loss to the employer.
- The loss to the employer should have resulted from the Applicant's negligent act or omission.
- The negligence should have been gross.

[18.4] The Applicant was qualified as a Civil Engineer and employed as such since 1 March 2009 and was also acting as the Resident Engineer at Charlotte Maxeke Hospital since October 2013 (for almost 3 years before the incident). As a result I am of the view that he was properly qualified and skilled to know exactly what to do and what the impact would have been if the generator did not properly work in the case of a power outage.

[18.5] It was common cause that a few days prior to the incident (on the 11th of January 2016) it was brought to the Applicant's attention (by Mabaso) that there are certain problems with the generator. He, Mabaso and the contractor then decided on certain interim measures (such as using the smaller mobile compressor). It was common cause that they did not test whether this compressor was working properly and that they thought that it would work again as they had previously used it. The Applicant openly admitted that they were supposed to have checked it but did not.

[18.6] As the Acting Resident Engineer, the Applicant should have known that the proper operation of this generator was critical for the hospital (and specifically for the well being of all its patients). He had a duty to make double sure that in the case of a power outage, that the generator will start up and assist with all life support systems, etc. He however did not personally check that the compressor (and generator) was working properly and simply hoped/trusted that it would as it worked previously.

[18.7] This lack of care and skill by the Applicant (as the most senior person responsible) led to the incident where the generator then failed to start up when there was a power outage and patients had to be transported to other hospital at great cost to

the Department. If he simply double checked the compressor and generator none of this would have happened.

[18.8] Such failure to simply check whether the interim measure implemented is properly working and will prevent any dangerous situation, is in my view indeed constitute gross negligence.

[19] *Substantive fairness – Did the Respondent act consistently with reference to Abel Mabaso?*

[19.1] The Applicant argued that the Respondent should also have taken action against Mabaso as he was also involved with the incident that took place. As I understood the consistency challenge is related to contemporaneous inconsistency (where two employees engage in the same/similar misconduct but only one of them is disciplined).

[19.2] I firstly noted that Mabaso was a Chief Artisan and the subordinate of the Applicant. It was also not disputed that he was the one who made the Applicant aware of the problems with the generator.

[19.3] I agree that he was involved with implementing the interim measures on the 8th of January 2016 but can (in the absence of further evidence) not speculate as to whether he also failed to check whether the compressor was working properly and would start up during a power outage.

[19.4] The fact however remain that he identified the problems with the generator and brought it to the attention of his senior (the Applicant) so that his senior could take the necessary action (such as instructing the contractor to fix the problems, ensuring that it is done immediately and if not to implement adequate interim measures).

[19.5] I therefore fail to see or understand in what way he (Mabaso) can be accused of also acting grossly negligent (or of any other form of misconduct).

[20] Based on the abovementioned reasons I find that the Applicant's dismissal was substantively fair.

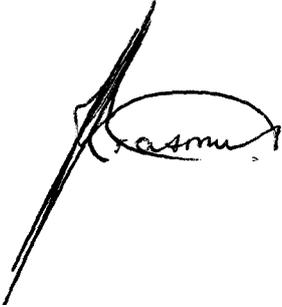
AWARD

[21] The Applicants dismissal was procedurally unfair but substantively fair.

[22] Due to the procedural unfairness of the Applicant's dismissal, the Respondent is ordered to pay to the Applicant compensation equal to two months remuneration which is calculated as follows:

$$\mathbf{R786\ 231.00 / 12 = R65\ 519.25 \times 2\ months = R131\ 038.50}$$

- [23] The abovementioned payment must be made to the Applicant on/before 22 March 2017 after which it will earn interest in terms of Section 143 of the LRA.

A handwritten signature in black ink, appearing to read "Erasmus", is written over a horizontal line. A long, diagonal stroke extends upwards and to the left from the start of the signature.

Panellist/s: J.J. ERASMUS