

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO.

D1306/01

In the matter between:

DEPARTMENT OF HEALTH, KWAZULU NATAL
Applicant

and

AUBREY NGCOBO N.O. 1st

Respondent

PUBLIC HEALTH AND WELFARE BARGAINING COUNCIL 2nd

Respondent

G MILLS 3rd

Respondent

JUDGMENT

NDLOVU AJ

[1] This matter was presented to me this morning. It is a review

application in terms of section 145 of the Labour Relations Act 66 of 1995, seeking to review and set aside an arbitration award dated 1 August 2001.

- [2] The Applicant is the former employer of Mr G Mills (the Third Respondent herein) who was employed with the Applicant as Administration Officer, stationed at Addington Hospital, and who was dismissed by the Applicant on 28 June 1998 after a misconduct enquiry. The Third Respondent claimed that the dismissal was unfair and referred the matter to the Bargaining Council (the Second Respondent) for conciliation. The dispute remained unresolved, whereafter it was referred for arbitration by the First Respondent, who was appointed by the Second Respondent.
- [3] The First Respondent found that although the Third Respondent was guilty of misconduct, the sanction of dismissal was too harsh and called to be substituted. It appeared that the First Respondent would have ordered the reinstatement of the Third Respondent, but for the fact that the Third Respondent was then already employed elsewhere. He then felt that a compensatory award would be appropriate in the circumstances. Hence, the First Respondent ordered the Applicant (the Respondent in the arbitration hearing) to pay to the Third Respondent (the Applicant in the arbitration hearing) compensation in the sum of R18 000,00. It is against this award that the Applicant seeks an order by this Court to have it reviewed and set aside.
- [4] It is now settled law that the arbitration award is an administrative decision given by an arbitrator in his or her capacity as a public functionary by virtue of the public power

vested in him or her by the Act (**See: *Carephone vs Marcus N.O. and others* [1998] 19 ILJ 1425 (LAC) at 1431 H-I).**

- [5] In ***Pharmaceutical Manufacturers Association of SA and Others: in re: Ex parte Application of the President of the RSA and others* 2000(3) BCLR 241 (CC)** the Constitutional Court held that:

“ As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the public functionary’s decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision”. (**at 273/4, para 90).**

- [6] In ***Carephone*** the Labour Appeal Court (LAC) formulated the guideline which a review court must follow in determining whether or not the arbitration award is reviewable, which the LAC framed as follows:

“Is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?” (**at 1435, para 37).**

- [7] It is common cause that on 28 June 1998 the Third Respondent, whilst in the execution of his official duties, collected the sum of R50,00 from a patient, Mrs Khama, who had paid a medical visit to Addington Hospital and was tendering such money to the Third Respondent as hospital fees. The amount of fees chargeable

was R10,00, which meant that Mrs Khama was entitled to receive R40,00 change from the Third Respondent. However, the Third Respondent did not give Mrs Khama her R40,00 change. Mrs Khama went to report the matter to a Ms Scott, another hospital official. Ms Scott further reported the matter to a Mr Naidoo, a seemingly higher hospital official. As a result, the Third Respondent was charged with misconduct.

- [8] Before the misconduct enquiry was held, the Third Respondent was removed from the post of cashier and posted in the Medical Records section, where he would not be involved with any cash transactions. He worked in that section for approximately 18 months. According to the evidence led at the arbitration, on behalf of the Applicant, no further problems were encountered with the Third Respondent whilst posted at the Medical Records section.
- [9] Eventually the misconduct hearing was convened. The Third Respondent admitted having received from Mrs Khama the sum of R50,00 cash, from which he was to take R10,00 hospital fees and return R40,00 change to Mrs Khama. He admitted that he did not return the said change to Mrs Khama. In his defence he said he had first issued and given the R10,00 receipt to Mrs Khama, whereafter he attended to getting her the change from the till. He said that by the time he turned to give the change to Mrs Khama, she was already gone and disappeared in the long queue. He could not leave his post to search for her.
- [10] The Third Respondent further testified that on the following day (29/6/98) he had again seen Mrs Khama at the hospital. He said Mrs Khama merely waved to him and stated that she had come

to the hospital to collect her change. However, Mrs Khama had suddenly disappeared again and he (the Third Respondent) did not see her anymore; hence he could not give her the change.

[11] He further testified that he had told Mr Naidoo and Ms Scott that he had put Mrs Khama's R40,00 change in the till together with his float money. However, when Mr Naidoo and Ms Scott went to check the Third Respondent's float, no R40,00 surplus was found.

[12] The First Respondent dismissed the Third Respondent's defence completely. In his finding he held, *inter alia*, as follows:

"Based on the Applicant's own evidence, I find it difficult to accept his version of events relating to the manner in which he handed over the receipt without the change to the patient. Having been to the counter and witnessed how the cashiers operate, I find it difficult to accept that the patient would have disappeared so quickly without the Applicant observing her.

What I find even more difficult to accept is that on the following day the patient came back to the hospital, she told the Applicant that she was there to collect her change but then disappeared without her actually collecting the change. It must be considered that at this stage the Applicant had already been reported to Ms Scott and the patient had been to the SAPS to make a statement. It seems to me therefore highly incredible that a person such as Mrs Khama who had been so determined to obtain her change would, when she came back to the hospital for the very specific purpose of collecting this change, simply greet the Applicant and then walk away".

[13] The First Respondent found, accordingly, that the Third Respondent had deliberately withheld Mrs Khama's change. For that reason, he found that the Third Respondent was correctly convicted of the misconduct.

[14] What is remarkable in the First Respondent's award was that, as

a further ground for upholding the Third Respondent's conviction for misconduct, the First Respondent had made a further finding which read as follows:

"Even though the money belonged to the patient and not to the hospital the fact remains that in conducting himself as he did the Applicant brought the Respondent's institution into disrepute and disgrace as well as seriously undermining the relationship of trust between himself and the Third Respondent".

[15] To my mind, the finding that the Third Respondent's misconduct seriously undermined the relationship of trust between himself and the then Respondent (now the Applicant), was rather more relevant to the issue of determination of the appropriate sanction, than the issue of whether the Third Respondent was guilty or not of the misconduct charged. Where a relationship of trust between employer and employee has irretrievably broken down, as appears to be the case here, the sanction of dismissal is generally not inappropriate.

[16] The First Respondent further pointed out that the Third Respondent did not give any evidence in mitigation of sentence, at the misconduct enquiry. He appeared to shed some blame on the presiding officer of the enquiry, in that he (the presiding officer) had not sufficiently or properly canvassed factors that might have been relevant to the mitigation of sentence. In his own words he said: *"In the premises it seems to me that the presiding officer should have gone out of his way to establish from the Applicant via his representative whether he had indeed such mitigating factors and to consider them".*

[17] By the way, the Third Respondent was represented by an attorney at the misconduct hearing. It is, therefore, not clear to me what the First Respondent expected the presiding officer

(who was presumably not legally qualified and/or trained) to have done when the Third Respondent was duly represented by a qualified legal practitioner. In my view, this criticism of the presiding officer by the First Respondent was unfair.

[18] In my view, the nature and seriousness of the transgression which the Third Respondent was correctly convicted of (as so duly found by the First Respondent) was such as to have properly warranted a sanction of dismissal. Therefore, the dismissal of the Third Respondent was, to my mind, both substantively and procedurally fair.

[19] The First Respondent's award was, accordingly, not rationally justifiable in relation to the material presented before him and his reasons that he gave therefor.

[20] In consequence whereof, I make the following Order:

20.1 The arbitration award issued by Commissioner Aubrey Ngcobo (the First Respondent) on 1 August 2001 under Case Number PSHS 149 is hereby reviewed and set aside, and substituted therefor with the following:

"The dismissal of the Applicant was substantively and procedurally fair".

20.2 There is no order as to costs.

S K NDLOVU
ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 29 April 2003

Date of Judgment : 29 April 2003

Appearances:

For the Applicant : Adv. D P Crampton
Instructed by : Shepstone & Wylie
Tomlinson, Pietermaritzburg

For the Respondents : No appearance