



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: PSHS111-14/15

Commissioner: Theresa Malgas

Date of Award: 5 September 2014

In the arbitration between:

NEHAWU obo ZA Twana

Applicant

And

Department of Health- Eastern Cape

Respondent

Union/Applicant's representative: Mr.Gobana

Union/Applicant's address: Nehawu Regional Office

166 Govan Mbeki Avenue

10th Floor Mercator Chambers

Port Elizabeth

Telephone: 041-585 9215

Respondent's representative: Mr.Syce

Respondent's address: Department of Health

Port Elizabeth

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DETAILS OF HEARING

1. The arbitration was held at the Port Elizabeth Hospital Complex on 6 August 2014 and finalized on 19 August 2014 after it was part heard. The Applicants, Mr.Twana were represented by Mr.Gobana a NEHAWU representative. The Respondent, Department of Health- Eastern Cape, was represented by Mr. Syce from the Respondents Emergency Services Department (EMS).
2. The Applicant called four witnesses and the Respondents called six witnesses. The parties relied upon a common bundle of documents.

ISSUES TO BE DECIDED

3. I was required to determine whether the dismissal of the Applicant was substantively fair or not.

BACKGROUND INFORMATION

4. The Respondent is Department of Health in Eastern Cape and the Applicant is a paramedic who was in the employ of the Respondent at EMS Division.
5. The Applicant was charged and subjected to a disciplinary hearing for failure to execute a valid and reasonable instruction issued to him via the control room of the EMS Division in Patterson. The Applicant pleaded not guilty at a disciplinary hearing and was subsequently dismissed.
6. The Applicant pleaded not guilty at the arbitration proceedings and sought retrospective reinstatement. This was done when issues were narrowed down. The Applicant challenged substantive fairness.

SURVEY OF EVIDENCE

Respondent's evidence and submissions

7. Mr Nigel Petersen testified that he is a shift leader at present and has been working for the Respondent for 34 years. He stated that he is currently in charge of the control room and monitoring incoming and outgoing calls and he also deals with emergencies.

8. The evidence of Mr. Petersen started with an explanation that he has eight staff members under him and he is the coordinator of ambulances on duty. He submitted that the hours of work of all employees are 07h00am to 19h00pm or 19h00 pm to 07h00 pm and that they start to work 30 minutes earlier.

9. Mr. Smith testified that as long as an emergency is before 07h00am or 19h00 pm an employee must attend to that emergency and all employees was aware of that procedure. He stated that any employee that refuse to attend to a call before 07h00am or 19h00pm will be wrong. The employees are aware that they attend to a call after their shifts they will be paid overtime.

10. The witness testified that it was Standard Operation Procedure for employees to comply with the above.

11. During cross examination Mr. Petersen conceded that on the day of the incident of the Applicant he did not dispatch the Applicant to attend to a maternity case, but he gave the instruction for the Applicant to be dispatched. He stated under cross examination that he arrived on duty on the day at 6h30 and that the call for ambulance assistance was received around 6h02 or 6h12.

13. The witness maintained under cross examination that when a call was received by the control room to attend to a case, it must be attended to.

14. Further under cross examination the witnesses conceded that there was a rule amongst employees to leave at 5h30 long before their shifts ends and that this was illegal and unlawful. The witness further conceded that the dispatcher that dispatched the Applicant marked the call as a priority 2 that states that the call is not an urgent call.

15. He further conceded under cross examination when asked as to whether or not the person that dispatched the Applicant and knew the Applicant would not attend to the case was negligent that they don't manage the same as managers. The witness further stated under cross examination that he was unaware that the Applicant's child was sick on the day and he heard that for the first time at the arbitration.

16. The Respondent called Mr. Eric Ngalo who has been in the employ of the Respondent for 24 years. He stated that his duties are based in the control room and to ensure that ambulances are dispatched in time and that queries are being attended to.

17. He testified that he was on duty on 24 March 2013 doing night shift. He stated that the call taker gave him a requisition slip informing him about a maternity case. He then informed the controller to dispatch a vehicle. He

testified that he instructed Miss Rhawutini to call the Applicant and she reported that the Applicant said that he was not at the station and she must give the case to Mr. Klerk.

18. He further testified that Miss Rhawutini stated that the Applicant was at Blue Water Bay turn off in Port Elizabeth. The witnesses testified that he immediately informed the Applicant's immediate supervisor, Mr. Qhina. He stated that Applicant never mentioned that his child was sick. He further stated that he did not dispatch another ambulance as they were busy and that this case was the third case of the night.

19. The witness testified that everyone is aware that a maternity case is a priority case and that the dispatcher made a mistake marking it as priority 2. He stated that he was unaware of the rule that employees leave at 05h30 from a shift.

20. During cross examination the witness stated that he was aware of the practice that an ambulance needed to be cleaned before it get handed over to the next crew. He conceded that he does not know how long it takes to clean an ambulance, any time from 15 minutes to an hour.

21. He stated further under cross examination that every employee is aware that they work a 7 hour shift and they leave at 07h00 when the shift ends. The witness testified under cross examination that he had no knowledge of the rule that employees leave the station in Paterson at 05h30. He maintained under cross examination that employees must leave the station at the end of their shifts at 07h00.

22. Mr. Ngalo testified under cross examination that he reported to Mr. Qhina the immediate supervisor of the Applicant when he became aware that the Applicant will not attend to the case he was dispatched to. He conceded that Mr. Qhina acted irresponsibly by not getting back to him in order to inform him what the position with the Applicant was. The witness maintained that he was not aware of the practice that employees leave at 05h30 the station to go home.

23. The next witness of the Respondent was Mr. Pumelelo Qhina who testified that he worked for the Respondent for 27 years. He stated that he is an acting shift leader and his duties are to supervise staff in the control room. The witness testified that he is the Applicant's supervisor.

24. He testified that he called the Applicant around 6h10 and that the Applicant never refused to attend to the case in Paterson and he believed that the Applicant was still available to attend to the case. The witness further testified that he was unaware of the practice that employees leave at 5h30 and not at 07h00 at the end of their shifts.

25. The witness testified that the Respondent was consistent in dealing with cases such as the Applicant's case and stated that in a case in Port Alfred employees were dismissed because they refused to convey a patient and gave the patient panado tablets instead. He stated that any maternity related case is a priority 1 case, meaning that priority must be given to such cases.

26. Under cross examination the witness testified that staff is expected to leave the station at 6h30. He conceded that the travelling distance from Paterson and Port Elizabeth is 45 minutes. The witness further conceded that cleaning an ambulance before hand over can take anything from 5 minutes to an hour and this depend on the nature of cases they dealt with before the handing over.

27. The witness denied under cross examination that the Applicant stated to him that he had a problem and that his child was sick. He denied having any knowledge about the practice that employees leave at 05h30 instead of 07h00 at the end of a shift, day or night shift.

28. The witness further testified under cross examination that he instructed the Applicant to go back and attend to the case and if he knew that his child was sick he would have made another plan and called Mr. Ngalo to inform him of the sick child.

29. The next witness of the Respondent was Mr. Freddie Yose who is currently an acting station officer and has been working for the Respondent for 29 years. The witness testified that he was not the supervisor of the Applicant as he worked on a different shift.

30. He stated that the morning after the incident he was dispatched around 08h02am he was dispatched to attend to a priority 1, maternity case in Patterson. He moved to the case with his partner Mr. Klerk and when they got at the scene there were lots of people and the public started to swear at them.

31. The witness testified that he went inside the house and found a lady lying on a bed and a baby lying there in a pool of blood. He practiced CPR on the baby it was too late. He stated that he took the mother and the baby to the ambulance and informed the family that he was not working in Patterson and the person that was working there did not attend to the matter. He took the mother and the child to Kirkwood, Sunday Valley Hospital.

32. The witness testified that he was not aware of the rule that employees leave Patterson at 05h30 on a daily basis and has been practice that if a call comes through from the control room by 6 o'clock or 6h30, the crew has to go back and attend to the call. And if the time goes to overtime the crew must book overtime.

33. During cross examination the witness stated that whether day or night shift, a crew member must knock off and leave Paterson at 19h00pm or 07h00am.

34. He further stated under cross examination that he worked the whole day in Patterson and left at 19h00pm that night. He also stated that no one is allowed to leave before 19h00pm unless arranged with the supervisor. He stated that he disputes that he ever left Patterson at 05h30.

35. Under cross examination the witness stated that the patient he attended to was Thandeka Plaatjies a 29 year old female, and could not explain the discrepancy on the charge sheet that stated that the patient attended to was a 14 year old woman.

36. During re examination the witness stated that he was not referring to the same address as the address of 193 Goba Street was where the mother stays and the address given to him to attend was 1656 Emanqindini.

37. Mr.Micheal was the next witness who testified that he is the Station Manager at Kirkwood and Paterson area and that the Applicant works under his command. He testified that it was standard procedure that when you receive a call you have to attend to the case. He stated that he was unaware of the rule that employees leave at 05h30.

38. During cross examination he stated that everyone leaves the station at 06h30 or 18h30 and they must inform the control room about it. He stated that there is no way that shift change happens at 07h00. The witness further testified during cross examination that when he became aware that the Applicant was not going to attend to the case he called Mr.Qhina who is the supervisor of the Applicant. He conceded under cross examination that for Mr.Qhina not to get back and informed the control room whether or not he got a hold of the Applicant was irresponsible.

40. Miss Rhawutini was called and her evidence was that she called the Applicant to inform him about a case he had to attend in Paterson and the Applicant informed her to call Mr. Klerk to attend to the matter as he already left Paterson.

Applicant's evidence and submissions

41. In the arbitration the Applicant disputed breach of the rule. This was tendered by the Applicant in the process of narrowing the issues.

42. The Applicant testified that he received a call the morning of 24 March 2013 around 05h32am reporting that his child was sick and was having fits for the first time. He stated that he tried to call the control room but the call was not answered, he was then rushed home by his partner.

43. The Applicant testified that Miss Goqwana also known as Miss Rhawutini called him shortly after 06h00am and he was already at home at the time. He stated that he called Mr.Qhina to enquire and explained to him that he had a sick child at home and could not attend to the case and Mr.Qhina understood and agreed to inform Mr.Ngalo.

44. The Applicant stated that when he got home, he tried to stabilise his child and rushed the child to the doctor. A doctors certificate was submitted and an extensive report from the doctor. This was never disputed by the Respondent.

45. He further testified that it was practice at Paterson to leave the station at 05h30 or 17h30 in order to clean the ambulance and hand it over to the next shift.

46. The Applicant requested that he be retrospectively reinstated.

47. The Applicant called Mr.Matani as a witness and he testified that he start working for the Respondent since August 2010 as an ambulance practitioner. He stated that he was stationed at Patterson during 2012 and that there is only one ambulance at the station.

48. The witness testified that all employees left the station at Patterson at 05h30 in order to be in Uitenhage at 07h00 in order to hand over the vehicle to the next shift. He testified that if you get a call and you are on the road from 05h30 you have to go back and attend to the case. In the event you have a problem you have to inform your supervisor and the supervisor in return will inform the control room.

49. During cross examination the witness stated that ever since he started to work in Paterson the employees left the station at 05h30.He conceded that he never asked the managers or supervisors about the time to leave.

50. Mr.de Klerk testified that he started to work for the Applicant in 2010 and that he was allocated in Uitenhage. He testified that the morning of 24 March 2013 he reported for duty at 06h30 at John Street in Uitenhage, he proceeded to get his partner Mr.Yose in Lyndsey road who is the shift leader.

51. The witness stated that they washed the ambulance and received a call to attend to a case in Paterson, however they first finished to wash the ambulance before they attended to the case in Paterson. They left around

08h03 to attend to the case in Paterson. He testified that it has been practice to leave the station at 05h30 and that Mr.Yose is aware of that. He further testified that it can take up to 30 minutes to wash an ambulance.

52. Mr. Goeda was the next witness who testified that the practice was to leave Paterson at 05h30 and that he worked with Mr.Yose before and that Mr.Yose is aware of the 05h30 practice. He testified that on 23 March he worked with the Applicant and the Applicant received a call from his wife around 05h25 that his child was sick. A result of which he went to drop the Applicant at his house around 06h00am. He stated that the Applicant did not receive any call from the control room to attend to a case when they were together.

53. The witness testified that the Applicant tried to call the emergency number and no one was picking up at the control room, also the signal on the radio was bad and he could not get through to the control room.

54. Mr. Speyers testified and agreed with all the witnesses called by the Applicant that they all leave the station at 05h30 and supervisors including Mr.Pedro and Mr.Yose participated in this practice. He stated that even to date all employees leave the station at 05h30.

ANALYSIS OF EVIDENCE

55. The Applicant's case was based on inconsistencies by the Respondent in that it was practice for ambulance personnel to leave the station at 5h30 at the end of a shift and that the supervisors was aware of that practice. The Applicant challenged substantive fairness in that he was unfairly dismissed for something he did not do.

56. Section 192(2) of the Labour Relations Act 66 of 1995 as amended places the onus on the Respondent to prove that the dismissal was fair. In the case **Marapula & Others vs Conteen (Pty) Ltd [1999] 8 BLLR 829 (LC)** at 837 C it was held that the onus is discharged if the employer can show by credible evidence that its version is the more probable and acceptable version.

57. It has been clearly shown in evidence of both parties that the Applicant was aware of the charges leveled against him after a disciplinary hearing was held and he was found guilty and dismissed.

58. The Applicant's testimony in the arbitration was to the effect that he pleaded not guilty to all counts and through his own evidence bring about a denial of any wrong doing. It is important as well to note that in his closing argument, the Applicant is praying for retrospective reinstatement.

59. The Applicant throughout his evidence and the evidence of witnesses maintained his innocence.

60. It is important to state that arbitration is a matter de novo and must be decided accordingly. For the purposes of this award I will only base myself on evidence tendered viva voce and documents contained in the bundles submitted.

61. The witnesses of the Applicant put much emphasis on the knowledge of the 05h30 practice and the procedures in the control room. All the Applicant's witnesses and the Applicant testified that if a call was received by the control room by 05h30, you have to turn back and attend to that call. They all were consistent in their evidence that the supervisors were aware of the practice and that it was never an issue leaving the station at that time.

62. The witnesses were further consistent in that this practice has been in place since 2010 and that it still is practice to date that they leave at 05h30. This was never disputed under cross examination by the Respondent.

63. The Respondent's evidence was based on the fact that the 05h30 practice was applied illegally by the staff and that the Applicant refused to obey a legitimate instruction to attend to a case in Paterson after he was dispatched to do so at 06h02 on the day of the incident. The Respondent failed to show through evidence the link of the Applicant's refusal to obey an instruction with the death of an unborn child.

64. There is no evidence before me that suggest that the Applicant was solely responsible for the unfortunate death of an unborn child. Evidence was led by the Respondent that the Applicant informed Ms.Rhawutini that she must instruct Mr.de Klerk to attend to the case, but then the same evidence is contradicted by the Respondent's witness that the Applicant informed Mr.Ngalo that he will attend to the case in Paterson.

65. Evidence of Mr.Goeda , the Applicant's partner suggest that when he was with the Applicant no call was received from the control room to attend to a case in Paterson, if that was the case they would have turned and attended to the case. This was never disputed under cross examination.

66. Clearly in my view the Respondent's witnesses, especially Mr.Ngalo and Mr.Qhina does not want to take any responsibility in the part they played in delaying to get an ambulance on time to attend to the case. These two witnesses denied that they had any knowledge about the practice that the staff leaves at 05h30. This I find to be impossible as all the Applicant's witnesses were credible and stood nothing to gain to lie under oath about the 05h30 practice.

67. The Respondent failed to clarify under oath the discrepancy of the patient attended to on the day and the patient mentioned in the charge sheet the Applicant was dismissed for. The patient attended to as explained by

Mr.Yose was a 29 year old female and the charge sheet stated that the patient was a 14 year old female. Furthermore the discrepancy in the different addresses of the patient was never clarified by the Respondent.

68. It is my view that the Applicant's version is more probable than that of the Respondent. There is no way that workforce practiced and knew about the 05h30 practice, but the supervisors were unaware of it. What makes the Applicant's version more probable is also that the Respondent never disputed that the Applicant's child was sick and the Respondent accepted the medical certificate and the report submitted by the doctor as true and correct.

69. I am further of the view that the Respondent used the Applicant as the sacrificial person and some needed to be held responsible for the unfortunate events of 23 March 2013. I have no evidence that suggest that the infant passed away because the Applicant failed to attend to the case, what is more surprising is that when Mr.Yose received the call he elected to finish washing the ambulance before he attended to the case. This was also never disputed by the Respondent during cross examination.

70. The fact that the control room marked the case as a priority 2 case, meaning it was a non-urgent case to attend to also counts in the favour of the Applicant. It is my view that someone in the control room needed to account as to why the case was marked as a priority 2 case and the Respondent failed to do so. I find on a balance of probabilities that the Applicant is not guilty as charged. I find the version of the Applicant more probable than the Respondents with respect to all counts.

71. The Respondent failed to demonstrate satisfactorily, undeniable instances wherein such instances have consistently been visited with dismissal when officials have been found guilty. This evidence has failed to satisfied the test that must be met in terms of Item 7(b)(iii) of Schedule 8 Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995 as amended. I find that the Applicant poses no risk when reinstated by the Respondent. I further find that the Respondent has not demonstrated sufficiently that the trust relationship has been broken between the Applicant and the Respondent.

AWARD

72. Based on the above analysis, I find the dismissal of the Applicant Z.A.Twana to be substantively unfair.

73. The employer, Department of Health- Eastern Cape, is ordered to re-instate the Applicant, Mr.Z.A.Twana in its employ on terms and conditions no less favorable to him than those that governed the employment relationship immediately prior to his dismissal.

74. As at the date of the award the remuneration due to Mr.Twana as a result of the retrospective operation of the re-instatement, amounts to his salary from the date of dismissal minus such deductions as the Respondent is in terms of the law entitled or obliged to make.

75. The amount is to be paid to Mr.Twana on or before 26 September 2014.

76. Mr. Twana is to tender his services to the Respondent on 10 September 2014.

77. I make no order as to costs.

Signature: _____



Commissioner: Theresa Malgas

Sector: Public Health
