



ARBITRATION AWARD

Case No: PSHS1343-16/17

Commissioner: CM Bennett

Date of Award: 8 October 2017

In the matter between:

NUPSAW obo Cupido

(Union/ Applicant)

and

Department of Health- Western Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. Arbitration was convened on 5 September 2017 at the Western Cape College of Nursing in Athlone, Cape Town. Zama Sonjica, an official of the National Union of Public Service and Allied Workers (NUPSAW), a registered trade union, represented Applicant. Mvuzo Nqgame, Labour Relations Officer, represented Respondent. The hearing was adjourned part heard on that date; was reconvened and completed on 18 September 2017. Warren Davids, Supervisor, Information Management, and Ruth Lewis, Assistant Director HR, Western Cape College of Nursing, testified on Respondent's behalf. Zolisa Menze, Senior Administration Officer Finance and Meurie Blignaut, Senior Supervisor Housekeeping testified on Applicant's behalf. Both parties submitted documents into evidence. The hearing was conducted in English and Afrikaans. M Mbohi provided interpretation services. The hearing was digitally recorded. Written heads of argument were submitted on 26 September 2017.

ISSUE TO BE DECIDED

2. I must determine whether Applicant's dismissal was effected in a fair manner (procedural fairness) and for a fair reason (substantive fairness).

BACKGROUND

3. Respondent employed Applicant from 11 July 1984, most recently as an administration clerk dealing with admissions at New Somerset Hospital, Cape Town. Applicant was paid a basic monthly salary of R14, 058.32.
4. On 30 September 2016 Applicant was issued with a notice to attend a disciplinary hearing, to be convened on 10 October 2016, to answer five charges of capturing incorrect salary details for himself, as a patient, on the Clinicom system, as a result of which the department incurred losses totalling R1, 794.70.
5. Following the hearing, which was convened on 18 and 19 October 2016, Applicant was found guilty of the charges and, a consequence of the chairperson's finding that Applicant's conduct had been dishonest, a sanction of dismissal was imposed. Following an unsuccessful appeal against the sanction, Applicant was dismissed on 14 December 2016.

SURVEY OF EVIDENCE AND ARGUMENT

Respondent

6. In terms of the Uniform Patient Fee Schedule issued by the Department of Health, patients are required to pay for treatment according to their means. The Means Tariff applies equally to employees and the public.
7. According to the charges, on five occasions between October 2012 and April 2016, Applicant had admitted himself for treatment, on each occasion he had:
 - 7.1 recorded his salary as R5, 000.00, which figure was well below his actual earnings;
 - 7.2 recorded the wrong home address, and
 - 7.3 on four of the five occasions shown himself to be unemployed.

8. The result of these incorrect entries was that Applicant was charged a lesser amount for treatment than he should have been and further that he did not pay anything for the treatment.
9. Respondent argued that Applicant's actions were deliberate and done with intent to defraud the department.

Applicant

10. Applicant's arguments were as follows:

- 10.1 He did not deliberately seek to defraud. He entered the information in this way to protect his private information from other employees who would be able to see what he entered;
- 10.2 He had been in urgent need of treatment and was not focussing on what he was entering but rather on obtaining treatment;
- 10.3 He was in any event entitled to free medical treatment, and
- 10.4 He was under no obligation to declare his correct salary on the Clinicom system.

11. The justification noted at paragraph 10.3 was the subject of considerable testimony. Applicant relied upon a document setting out which patients are treated free of charge. The relevant paragraph states the following: "*Sessional personnel, contract workers and personnel on the joint establishment of hospitals and universities who are not members of medical schemes and who were appointed before 1 April 1986.*" Applicant claimed that he was included under the category of *personnel on the joint establishment of hospitals and universities who are not members of medical schemes and who were appointed before 1 April 1986*. Applicant premised this argument on the fact that medical students from the University of Cape Town are placed at New Somerset Hospital for practical training, thus the hospital and its employees are party to the joint agreement.

11.1 Ms Lewis, for the Respondent, explained that the joint establishment involves only three hospitals, being Groote Schuur, Tygerberg and Red Cross, where the universities party to the joint agreement have staff that form part of the hospital establishment, that is, the complement of posts. Both the hospital and the university employ people on a 51/49% basis – 51% of their time and salary goes to the university and 49% of their time and salary goes to the hospital. As Applicant was employed by

the Western Cape government and not by a university, he was not part of the joint establishment and this provision did not apply to him.

11.2 Mr Menze and Ms Blignaut, for Applicant, explained their understanding of the provision and Ms Blignaut further stated that until she joined a medical aid scheme, she had always received free medical treatment at the hospital.

ANALYSIS OF EVIDENCE AND ARGUMENT

12. Applicant's arguments did not bear close inspection.

12.1 If he truly believed that he entitled to free treatment, there would be no need to make false entries in the Clinicom system.

12.2 He made a mistake when he made the entries: He made the same 'mistake' on five occasions over the span of four years.

12.3 He was under no obligation to enter his correct details on the Clinicom system: I find this unlikely. Patients are means tested. They must provide evidence of earnings to qualify for any discounted treatment. It is my opinion that he was most certainly obliged to enter correct and accurate details.

12.4 He qualified for free treatment as a party to the joint establishment / agreement. This claim was unfounded. Lewis's explanation of this provision was correct and applies only to people *employed* by the *universities* that are party to the agreement. Thus, medical students are not party to the agreement as they are not employees, and their presence in a hospital does not make that hospital party to the joint agreement. In any event, even if he were employed at any of the hospitals named in paragraph 11.1 above, he would still not be subject to the joint agreement, as the universities do not employ hospital clerical staff.

13. I wondered if what was before me was a case of custom and practice - that it had been custom and practice in the hospital to treat the hospital staff free of charge, even if only for minor ailments. If this were the case, no evidence of such custom and practice was presented. Applicant merely claimed that he *believed* that he was entitled to free treatment, as did Ms Blignaut. Had evidence been presented to support these claims – evidence of an agreement between unions and hospital management; evidence of *accurate* entries in Clinicom that resulted in free treatment by design rather than by accident – then Applicant's case would have been all that much stronger for it.

Unfortunately, all that was presented was opinion evidence from Mr Menze and uncorroborated statements from Applicant and Ms Blignaut. This was not enough.

14. Was Respondent's conclusion that Applicant was 'working the system' deliberately to ensure that he got away with not paying a reasonable one? I find that it was. Applicant's actions did not speak of a person who believed that he was entitled to free treatment no matter what; they speak of someone who knows how to work the system and manipulated it to ensure that he did not pay. False salary; false home address and on only one occasion did he declare himself to be an employee in the health service. I conclude therefore that Applicant sought to obtain a benefit to which he was not entitled.
15. The union further argued that even if I did not accept that Applicant had done nothing wrong, that I should find that the sanction was too harsh. Applicant is 54 years old. He has been employed for 32 years. He has no prior disciplinary history. There were other sanctions that could have been imposed that are short of dismissal. He could have been given the chance to 'pay back the money.'
16. From Respondent's perspective, however, Applicant was dishonest, not only in what he did but also in his subsequent defence of the allegations. Instead of admitting his wrongdoing, he tried to defend it and/or explain it. Dishonesty is a deal-breaker. The underlying reason for any dismissal is not for sating a desire to punish, but rather arises from a rational assessment of potential operational risk arising from continuing the employment relationship. In *De Beers Consolidated Mines Limited v CCMA and Others* (2000) the Labour Appeal Court made the following apposite observation: "*Long service is ... relevant in determining whether an employee is likely to repeat his misdemeanour. An employee who has long and faithfully served his employer has shown that he has little propensity for offending. That historical experience may persuade an employer to accept the risk of continuing to employ him now that it is known that he is not as honest as had been thought. Depending on the circumstances, long service may be a weighty consideration. But the risk factor is paramount. If, despite the prima facie impression of reliability arising from long service, it appears that ... continued employment of the offender will be operationally too risky, he will be dismissed.*"

17. Applicant pointed out that even after his 'errors' had been discovered, Respondent had continued to utilise him on admissions using Clinicom. Respondent confirmed this, pointing out that there was no evidence that Applicant had ever used his position to the benefit of anyone else to the detriment of the hospital and, furthermore, the hospital was busy and he could not be spared. Respondent conceded that it was policy that admissions clerks do not make entries in Clinicom on their own behalves.
18. Having considered the evidence and argument regarding the substantive fairness, I find that there is no justification to interfere with the sanction. If this were an isolated incident I might have come to a different conclusion but the misconduct was repeated five times in four years and, I believe, would have continued unabated had the discovery not been made. Further, I am not convinced by Applicant's claim of a belief of entitlement. As I observed earlier, if he really did hold this belief, there would be no reason to make false entries. These were clearly not errors. This was sustained repetition of the same false entries throughout the piece.
19. Having considered the evidence presented, I find that Applicant's dismissal was substantively fair.
20. Insofar as the procedural aspects are concerned, Applicant argued that he was a shop steward and that Respondent had not complied with the requirement to "advise and consult" before acting against an official. If it had, it is argued, the dismissal might have been avoided. How it might have been avoided is not stated. The union has had ample opportunity to prove that Applicant *is* entitled to free treatment, either by contract or custom and practice, and has failed to make its case. It has had eight months since the dismissal to do so. I have to conclude that if it has not been able to produce the evidence after eight month's investigation, that a "meaningful consultation" would not have produced any different result. I find therefore that even if Respondent did not comply with the guidelines, it made no material difference to the outcome. The dismissal was, I find, procedurally fair.

AWARD

21. Applicant's dismissal was both procedurally and substantively fair. The applicant's claim is dismissed.

A handwritten signature in black ink, appearing to read 'C M Bennett', with a long horizontal line extending from the top of the signature.

C M BENNETT
COMMISSIONER