



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS32-17/18

Commissioner: T ERASMUS

Date of award: 20 June 2017

In the matter between:

NEHAWU obo Ndabambi, VM

(Union/Applicant)

and

DEPARTMENT OF HEALTH: WESTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 191(5)(a) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard at the 1st Floor Boardroom, Western Cape College of Nursing, Athlone on 12 June 2017. Applicant was represented by Mr M Mancayi from NEHAWU, whilst the Respondent was represented by Mr A Mniki, Labour Relations Officer at Respondent.

ISSUE TO BE DECIDED

2. I must decide whether Applicant's dismissal was both procedurally and substantively fair.

APPLICANT'S OPENING STATEMENT

3. Applicant commenced employment with the Respondent on 1 June 2009 in George in the capacity as a driver at the laundry. Applicant was dismissed on 4 May 2017 and he earned R11 000,00 at the time of dismissal. Applicant avers that his dismissal was both procedurally and substantively unfair. The Respondent has no evidence proving that the Applicant was indeed drunk whilst on duty on the premises. Applicant was charged with charges 2 to 4 as evidenced on page 9 of bundle A. the charges were as follows:

“Charge 2: sleeping on duty on the 14 October 2016 from 23h30-23h59.

Charge 3: sleeping on duty on the 15 October 2016 from 24h00-06h00.

Charge 4: being under the influence of alcohol on the 14 October 2016 from 23h30-23h59.

Charge 5: being under the influence of alcohol on the 15 October 2016 from 24h00-07h00.”

4. Applicant avers that he was on lunch at the time of the incident and in the rest area in the kitchen. Applicant disputes that he was sleeping whilst on duty. In terms of charge 4 it was alleged that the same time that Applicant was alleged to be sleeping whilst on duty, he was found to be under the influence of alcohol, which allegation Applicant disputes. Applicant's case is that he was under medication and the Respondent failed to follow the procedure the Respondent must prove that Applicant was drunk and that he was sleeping. Applicant seeks retrospective reinstatement. Applicant is currently unemployed.

RESPONDENT'S OPENING STATEMENT

5. Respondent stated that the charges against Applicant originate from page 9 of bundle A. Respondent will prove that Applicant was found sleeping on duty whilst he was under the influence of alcohol. The security was well as Applicant's manager tried to wake Applicant, but he failed to wake up. The checklist was completed and the manager noted her observations. The symptoms listed are what is expected from a person under the influence of alcohol on the balance of probabilities. The Respondent must subject an employee to a breathalyser test to establish whether a person was under the influence, but it is something that the Applicant must agree to. Applicant was employed in the capacity as a full time driver and it is a high risk to have someone on duty who is drunk. Applicant's conduct cannot be tolerated by Respondent and his conduct is viewed in a very serious

light. Applicant did not indicate or admit to his manager that he had an alcohol problem so that he could be referred to ICAS. Respondent seeks an order confirming the sanction of dismissal.

RESPONDENT'S CASE

6. **BRENDA BUCKTON testified on behalf of Respondent (hereinafter referred to as "Buckton")**
7. Buckton testified that she is employed as the night assistant manager at Mowbray Maternity Hospital and she was Applicant's supervisor on the night of the incident. Applicant's role of driver is that of transferring specimens, blood samples, etc. for the hospital. Mowbray Maternity Hospital is a level 2 hospital and the Applicant's job entails the fetching of equipment, transfer of staff, fetching files from various hospitals and driving.
8. Buckton testified that Applicant's job description is listed as per page 28 of bundle A, which includes the transporting of staff to courses. Buckton testified that on 14 October 2016 she wrote a report as evidenced on page 3 of bundle A. She reported an incident related to the Applicant. She came on duty at 18:45. Applicant was late. She informed him that he was late when she saw him. She worked night shift. Applicant only came to her at around 19:50. He said that he was there all the time. Although she signed off his attendance, she noticed something strange about him, he was standing far away from her at the time when she was signing off his attendance.
9. Buckton testified that she phoned the security officer and asked her to keep an eye on Applicant. At around 11 o'clock she received phone calls from various staff members informing her that Applicant was drunk and the staff told him to go and sleep. The security guard called Buckton to have a look at Applicant, after which she went down. She tried to wake him up. He was in the drivers' location. He smelled of alcohol but Applicant did not wake up. The security guard, Ms Philander, took a photo of Applicant whilst he was sleeping, whereafter Buckton fetched her phone, but when she came down with her phone, he had changed his position and she end up not taking a photograph. Philander was with Buckton in order to witness Applicant's behaviour. Buckton told Philander that the same thing happened approximately 5 months ago when he was driving. Buckton proceeded to take the car keys from his pocket and locked it away.
10. Reference was made to page 20, being a photograph of Applicant sleeping in the drivers' quarters. Buckton testified that she cannot watch Applicant all night. She was very busy and she had to help

in theatre. She told the doctors that they do not have a driver and that she would drive. The male nurse, Mr Basic, then offered to drive instead. The doctors were looking for her in round 2. She was busy scrubbing up to assist with a caesarean section. The doctors were unable to obtain any results from the blood tests, therefore they were unable to treat patients. At around 3:00 she went to look for Applicant again and found that he was still sleeping. She needed to speak to him as soon as he was awake and round about 4:00 she phoned Philander to find out where he was. Applicant then ran into her office at 6:00 and asked for his logbook. Buckton was angry with him and asked him how he could do this with his job. Applicant responded that he had a migraine after which Buckton got angry and told him his is talking nonsense. She initially told Applicant that she did not want him to work on that evening, whereafter she phoned his supervisor, who said that there was nobody else available to drive. Buckton did not want him to drive as he was unstable in the light of his behaviour.

11. Buckton then told Applicant that he had to drive on the evening in question. She could not decide whether to report the matter or not. She then decided to offer to help him. Buckton asked Applicant whether he was offered ICAS on the previous transgression approximately 5 months ago. He replied that it was offered to him, but he declined the offer. Buckton told Applicant that from now on she would have to smell him, as she can no longer trust him. He said: "Yes sister, I am fine tonight." Philander phoned her at 8 o'clock and said that Applicant is making a big story, accusing her of stealing his money, whereafter Buckton told her to calm down and send the Applicant to her.
12. Reference was made to page 25 of the bundle, being Applicant's previous transgressions, which related to:

- "1. *Misuse of Government Vehicle for private use on 2 and 3 November 2015.*
2. *Exceeding the prescribed speed limit with a Government Vehicle on 3 November 2015.*
3. *Financial misconduct, in that you failed to record trips with the Government Vehicle on 2 and 3 November 2016.*
4. *Absence from workplace without permission on 2 and 3 November 2015."*

which is unrelated to the present matter, but Applicant was also on duty on an opposite shift. They could not prove that he was drunk. He took a vehicle and drove around, they found him in the vehicle the following morning. He was with another security guard on the previous occasion. Applicant was on a final written warning, although it is unrelated to the present incident.

13. Reference was made to pages 7 and 8 of bundle A, being the checklist for assessing intoxication, which was completed by Buckton on 15 October 2016. Applicant could not speak as he was asleep. He could not be subjected to a breathalyser test as he was asleep. All the evidence was there. Respondent handled the matter discreetly, as Buckton wanted to protect and help Applicant. Applicant did not say that he needed help. On the Monday morning Applicant came past her office on his way home and patted her on the shoulder and said: *“Moenie worry nie suster. Ek gaan ‘n nuwe blaadjie omslaan, ek gaan nie weer hierdie doen nie.”* Applicant was already on a written warning for leaving the premises without permission, absence from the workplace, without permission and financial misconduct for failing to report certain trips. If Applicant showed that he wanted help, this would never have happened, as Buckton was prepared to assist Applicant. This kind of behaviour cannot be tolerated. Applicant plays a big role in Respondent’s emergency services. He has too an important role for Buckton to just overlook Applicant’s transgression and she could no longer trust him. If Applicant showed that he needed assistance, the trust relationship could still have been repaired, but Applicant refused to admit that he had a problem and the he needed assistance.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

14. Buckton confirmed that both Sister Diedericks and Mr Beauzick phoned her to inform her about the Applicant’s drunkenness, it was anything between 23:05 and 23:15. Reference was made to page 3 of bundle A, being Buckton’s written statement, where it is noted that Diedericks and Beauzick phoned her around 23:30. She confirmed that Applicant started night duty on 12 October 2016, but he also worked for the department the previous week. Buckton relayed Applicant’s previous transgression on 5 May 2016 when he was also intoxicated. She learnt this from the sister that was in charge on that shift. Buckton confirmed that Applicant did not approach her at any time to inform her that he had a drinking problem. Buckton asked Applicant about his previous transgression on 5 October 2016. She asked him if the Respondent offered him any help at that time. He confirmed that they offered him ICAS. She was Applicant’s direct supervisor on the night of the incident, whilst Mary Vyfer was the day shift supervisor. Buckton testified that the driver was hospitalized, therefore Applicant had to stand in on the night of the shift. She could not get hold of Vyfer immediately, but her deputy already told Vyfer about Applicant’s behaviour on the night shift.
15. Buckton confirmed that she did not smell anything at first when Applicant reported for duty. She noticed that he stood far away from her. He then gave her a form which he had partially filled in, the

part that should have been filled in by Buckton. She had to give him a new form to fill in. She phoned the security to watch over Applicant as she was suspicious about his behaviour.

16. Buckton confirmed that Philander is the security guard who sits right opposite Applicant. She phoned Philander to watch over Applicant after people phoned her to inform her about Applicant's drunkenness. Philander told Buckton that she better come down and see for herself what condition Applicant was in.
17. Reference was made to the photographs on page 20 of the bundle, where Applicant is seen sleeping on a bench in the drivers' office. Buckton confirmed that Applicant's drunkenness and the fact that he was sleeping was first reported to her at around 23:00 and around 3:30 he was basically still unconscious.
18. Buckton stated on page 4 of the bundle in her report that she did not want Applicant back as a driver, because he was a liability to the Respondent. Buckton confirmed that she completed the checklist around 3 o'clock in the morning when he was still there. She asked both Diedericks and Philander to write a report about the incident. She then fetched the protocol file and read through the steps that she had to follow, as she had never dealt with a case like this before. There was nobody else present when she completed the checklist in her office. Reference was made to the checklist as evidenced on page 7 of the bundle. It was put to Buckton that the checklist had to be completed in the presence of the Applicant. Buckton responded that her observation of what she noted on the checklist was indeed correct. She could not offer Applicant a breathalyser test as he was unable to make use of the breathalyser test. He was basically passed out. Buckton confirmed that Applicant's behaviour could not be tolerated in the capacity as a driver as the Respondent could not allow him to drive whilst under the influence of alcohol. All the evidence showed that Applicant was under the influence of alcohol and he smelled of alcohol. She offered him ICAS on the morning of the 15th when he came to her with the logbook. She had a long talk with Applicant on the Saturday, but he did not take up her offer. She offered him ICAS again on the Saturday night, but he did not want to take it. Reference was made to page 5 of the bundle B, being part of her report, where it is stated "if an employee fails to follow the formal programme..." She wrote a report where it showed that she offered him ICAS on Friday, Saturday and the Sunday. It was put to Buckton that it is Applicant's case that he was never given the opportunity to go to ICAS. This was denied by Buckton.

THE FOLLOWING ENSUED FROM RE-EXAMINATION:

19. Applicant did not show Buckton the medication that he has allegedly taken and Philander was with her when she observed Applicant in his drunken state.
20. **NATASHA RENET PHILANDER testified on behalf of Respondent (hereinafter referred to as “Philander”)**
21. Philander testified that she is a senior security officer on night shift at the Mowbray Maternity Hospital. She is situated in the CCTV camera room. Philander testified that on 14 October 2016, just past 7 o'clock, she met Applicant halfway through the gate. He said he was on his way to fetch his cellular phone from his friend's car. It was not his normal behaviour, especially not during visiting hours, he would normally not be around them. He would usually take his paperwork and go to the matron's office and his car would already be checked.
22. Philander testified that Sister Buckton phoned her and asked her where the driver was, as she had work for him. Philander then phoned Buckton and told her that she needs to come down and deal with the situation, as it does not form part of her job description. Philander confirmed that she would normally knock on the drivers' door before entering the office. Applicant did not respond at all. He was lying with his one leg off the bench in his office. Philander found it strange that the Applicant did not open the door at all, or that he did not respond. She could smell alcohol in his office. He was alone in the office. Sister Buckton came downstairs and tried to wake Applicant at least 3 to 4 times. He opened his eyes and closed it again. Buckton asked her where the car keys were. She told Buckton that Applicant never goes anywhere without the car keys. Buckton then looked in his jacket and found the keys in his jacket pocket. Buckton wanted to fetch her phone to take a photo. She then informed Buckton that she had her phone with her and Buckton asked her to take a picture of Applicant, as evidenced on page 20. He could have changed his position in the meantime. Sister Buckton went to her office on the Saturday morning, whilst Philander stayed behind. Applicant later came from his office and spoke in Xhosa in the foyer. She asked him what he was saying, as she could not understand him. He asked for log book and his keys. Philander told him that she could not remove anything, but that he must ask Sister Buckton about it. It was just past 6 in the morning. Besides the alcohol, she found it strange that Applicant was not around in the main foyer, he would normally complete his drivers' sheet. It was surprising that evening that he was moving around up and down the whole time and he was speaking in a loud voice, whilst he is normally soft spoken. Applicant was under the influence when he was speaking to Mr Lacombo.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

23. Philander had not known Applicant for a long time as he previously worked day shift, whilst she always work night shift. Philander was challenged as to whether she could assess Applicant's "normal behaviour" as she has not known him for that long. She responded that she knows that Applicant is a quiet person and he was certainly not quiet on the evening in question. She did not base her observation that Applicant was drunk on his initial loudness in the foyer. She only found this out when she went down with Sister Buckton at 23:00. She confirmed that Buckton tried to wake the Applicant, but she was unsuccessful. She asked for his car keys and she told Buckton that Applicant would never leave his car keys lying around. If he signed for the car keys, it would be on him. She did not go back to establish if he was still sleeping. She was stationed at the main foyer, whilst Applicant's office was just opposite hers. She could see everything and she did not see anybody else go into the office apart from the mail nurse, Mr Dickey. She cannot recall whether Sister Buckton came back at 3 am. Buckton did not complete the form in front of her as she completed the form in her own office. She was required to write a statement. She did not see Buckton at 3 o'clock, as she took her lunch break at 3 o'clock.

APPLICANT'S CASE

24. **MABAMBI NDABAMBI testified in support of his own case (hereinafter referred to as "Applicant")**
25. According to Applicant he used pain tablets before he went to work. Sister Buckton called him and the porter to her office before they started working. She made an example of Mr Sias, the other driver, who does not want to collect the blood samples. Buckton informed him that the other driver does not want to co-operate. Applicant denies that he was drunk at work as he took headache and back ache tablets. His head started to pain again, whilst he was on duty, therefore he took another head ache and backache tablet. This was after teatime and according to Applicant he can take lunch at any time and he was sleeping during his lunch hour. According to Applicant there is no specific lunch hour. It was put to Applicant that Respondent's witnesses testified that they woke him at around 23:30. Applicant denied this and stated that he was still doing his rounds at this time. He was feeling dizzy and it is not true that he was drunk. Applicant denies that Buckton and Philander tried to wake him up at 23:30, as he was busy doing his rounds at this time. According to Applicant he took his lunch hour past 12 pm during which time he switched off the lights and relaxed on the bench in his

office, as is the custom with all the drivers. Applicant denies that he was drunk on duty. Applicant conceded that he was subjected to disciplinary proceedings in the past for unrelated incidents. Applicant denies that he has an alcohol problem.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

26. According to Applicant he took the tablets at home and again at work when his headache reoccurred. According to Applicant he bought the tablets at the doctor's surgery, he did not go to the pharmacy. Applicant confirmed that he was charged with sleeping on duty and being under the influence of alcohol whilst on duty. Applicant did not bring the tablets to the disciplinary hearing or to Buckton to prove that he used tablets, although he reported the incident to his supervisor. Applicant confirmed that Buckton was his supervisor on the nightshift. According to Applicant he already took the tablet before he reported for duty. This was the first evening he worked with Buckton. He informed Buckton that he was not drunk, but she did not ask him about the tablets. She refused him a day's leave, as there was no other available driver. Applicant confirmed that he did not show the disciplinary chairperson the medication that he took either, Applicant maintains that he was not drunk. The disciplinary chairperson did not ask for the tablets, she said it was fine. The presiding officer did not ask him to show the tablets. Applicant denies that Buckton offered him ICAS support. Applicant confirmed that he took his lunch hour past 12. This was not put to Respondent's witnesses at all. It was put to Applicant that Sister Buckton testified that she tried to wake him but he did not wake up. He cannot recall this. He testified that he searched his pockets and could not find his keys, whereafter he went to Sister Buckton. Applicant was challenged on whether he was speaking the truth, as this information was not put to Sister Buckton. It was put to Applicant that Buckton testified that he was still sleeping at around 3 o'clock.
27. It was put to Applicant that two people testified that he was drunk and that he smelled of alcohol. Applicant however denies that he was a drinker and he also disputed the correctness of the checklist noted by Buckton on page 7 of bundle A, as Applicant was using tablets and according to Applicant, Philander does not know him as he is indeed a talkative person and not as quiet as alleged by Philander. According to Applicant he went to Sister Buckton at about 6 o'clock after he searched in his pockets for his keys. Applicant was challenged on why Buckton would lie in her report evidenced on page 4. Applicant did not know that Buckton took the keys from his pockets.

RESPONDENT'S CLOSING ARGUMENT

28. The circular presented by Applicant is not relevant as the Applicant made it clear he doesn't have an alcohol problem. This is a misconduct matter. Respondent's two witnesses were credible and their evidence collaborated each other's. Respondent never indicated any problem they could have personally with Applicant in order for them to have a negative agenda towards him. Observations by Buckton were collaborated by Philander. Sister Buckton explained how important the Applicant's role is as a driver in Respondent's organisation. He was the only driver on the night in question. It would be negligent for the driver to drive in such a condition. There was no procedural flaw by the Respondent. The Respondent would have to account if Applicant drove the vehicle in his drunken state. There is no guarantee that he will not do the same thing again. On the balance of probabilities the Applicant is lying. The first thing he should have done, was to present the tablets. Applicant was not a credible witness. Respondent seeks an Order in terms whereof the sanction of dismissal is confirmed.

APPLICANT'S CLOSING ARGUMENTS

29. Applicant's incorrect behaviour was not corrected by the Respondent. Applicant was not under the influence of alcohol, but took tablets which may cause drowsiness. In terms of Respondent's policy, where an employee denies that he was drunk, there are two routes the employer can take:

1. breathalyser
2. evidence of the checklist - must be done in the presence of the witnesses

30. None of the above happened in the present case. Applicant admits he was sleeping during his lunch time. It was not normal rest, but he was sleeping due to the medication. Sister Buckton's evidence was not supported by anybody, when she said she went to Applicant's office at 3 o'clock. Applicant stated he was not given an opportunity to go to ICAS. Sister Buckton said she spoke to applicant three times, whilst he only worked on 14 and 15 October 2016. Applicant had no alcohol related incidents in the past. Applicant seeks retrospective reinstatement.

REPLICATION

31. Circular – it is illogical to expect the employer to follow the policy, if the Applicant says he doesn't have an alcohol problem.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

32. In terms of the evidence, Respondent's witnesses, both Buckton and Philander confirmed that Applicant's office as well as Applicant smelled of alcohol when they entered the drivers' office. Applicant did not dispute Buckton's evidence that she received telephone calls from various employees, reporting Applicant's condition. Philander's evidence that she called Buckton to come down to Applicant's office to see for herself, was not disputed either. Applicant did not deny that it was him sleeping on the bench as evidenced on page 20 of the bundle. On the contrary, Applicant admitted that he slept. He went as far as to state that he could choose when he wanted to take his lunch hour and that he slept as a result of the headache and migraine tablets that he took. Applicant has yet to provide evidence of the said tablets, in spite of Applicant's allegation that he received tablets from his medical doctor. Applicant could have at least obtained a letter from the doctor, substantiating same, which he failed to do at either the disciplinary hearing or at the Arbitration. Applicant stated that he was still on his rounds at 23:00, but this could not be collaborated by any other witness, which is highly unlikely in such huge institution.
33. I have to decide whether Applicant breached a rule. It is common cause that there is a rule against being intoxicated whilst on duty, especially in Applicant's capacity as driver.
34. I therefore find that the rule is a reasonable rule and that Applicant was aware or should have reasonably been aware of the rule against driving whilst under the influence of alcohol or reporting for duty, albeit reporting for duty whilst under the influence of alcohol.
35. I find that Applicant breached a reasonable rule.
36. "The Court made the following points in **Transnet Freight Rail v Transnet Bargaining Council and Others [2011] 6 BLLR 594 (LC)**

- *The fact that the employee was ‘caught’ before any serious incident arose did not mean that the employee should be treated more favourably than the person who was not caught.*
- *The job function of the employee is relevant in determining the fairness of dismissal in cases where the allegation is that the employee was under the influence of alcohol. Where the job is highly skilled, responsible or hazardous, or the offence is committed by a senior employee who should be beyond reproach, dismissal for a first offence is justified. Where the job function of an offending employee is such that misconduct of this nature would be extremely dangerous and could result in death, injury or damage, a strict application of the rule forbidding alcohol use must be applied. The strict application of such a rule is of importance to the company, its employees and public policy.*
- *The implications of being lenient in the application of an important rule, and the message such leniency sends to other employees regarding their infringement of such a rule also needs to be considered. The need to deter other employees from committing the same misconduct is a response to risk management and is as legitimate a reason for dismissal as a breakdown in trust.*

It also stated that - in cases involving misconduct for reporting for duty under the influence of alcohol a commissioner should, in determining the fairness of dismissal, consider and weigh against each other (based on the above), among other things:

- *That the employee knew of the rule and was aware that breaching it could result in dismissal;*
- *That the employee wilfully committed the misconduct;*
- *The nature and responsibilities of the employee’s job function;*
- *The basis for the employee’s challenge to dismissal;*
- *The importance of the rule breached;*
- *The principles and necessary application of progressive discipline and the importance of consistency;*
- *The employee’s disciplinary record, including the presence or lack of any relevant valid warnings or final written warnings that may be in effect;*
- *The harm (or potential to bring harm) as a result of the misconduct.”*

37. The Applicant was charged with a transgression related to being under the influence of alcohol whilst on duty and sleeping whilst on duty.

38. I must ascertain whether there was a workplace rule against reporting for duty whilst under the influence of alcohol.
39. I am convinced that on the balance of probabilities Applicant was indeed under the influence of alcohol whilst on duty. Applicant admits that he slept whilst on duty.
40. I therefore find that the finding of guilty on the charges against Applicant were fair. I further find that Applicant was subjected to a fair disciplinary hearing. I therefore find that Applicant's dismissal was procedurally fair. Under the circumstances I find that the seriousness of Applicant's transgression justifies dismissal, albeit his first transgression of this nature, although he has a disciplinary record of unrelated transgressions.

AWARD

41. I find that Applicant's dismissal was both procedurally and substantively fair and Applicant is therefore not entitled to any relief.



COMMISSIONER: T ERASMUS