



# ARBITRATION AWARD

Case No: PSHS373-17/18

Commissioner: T ERASMUS

Date of Award: 24 October 2017

In the matter between:

**DR E.M. FOSTER**

(Union/ Applicant)

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

(Respondent)

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## **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)(iii) of the Labour Relations Act 66 of 1995 (“the LRA”) and was heard at the offices of the Boardroom, Swartland Hospital, Malmesbury on 10 October 2017. The Applicant appeared in his personal capacity, whilst the Respondent was represented by Mr M Ngqame and Mr F Rodriques, Labour Relations Officers at Respondent.

## **APPLICANT'S OPENING STATEMENT**

2. Applicant was employed from July 2012 as a medical practitioner until March 2017. Applicant received a letter to make representations as to why his services should not be terminated. Applicant questioned the meaning of the letter. Respondent claimed Applicant was not registered with the HPCSA and that he was therefore unable to perform his duties. Applicant was ill and admitted to the clinic. Respondent sent Applicant a letter informing him of the termination of his services.
3. Applicant maintains that he was dismissed. Applicant requires paid leave from 16 March 2017 until 15 July 2017 and unpaid leave from 15 July 2017 until 28 November 2017. In terms of procedural unfairness, Applicant deems it fair that he should receive a salary from 15 July 2017 until 28 November 2017.

## **ISSUE TO BE DECIDED**

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

## **RESPONDENT'S OPENING STATEMENT**

5. Applicant's registration was suspended by the HPCSA, as he cannot perform his services under the circumstances. Applicant breached his contract of employment and then the contract was legally terminated. Applicant was suspended on 2 March 2017 and up to date, Applicant has not provided the Council with proof of registration. The dispute relates to an alleged unlawful dismissal and not unfair dismissal. The Bargaining Council does not have jurisdiction to deal with this matter.
6. Respondent seeks a dismissal of the application. Respondent placed the following documents in Applicant's bundle in dispute:
  - page 54 to 57: the authenticity of the document

- page 4: Applicant's sister drafted the document, the document amounts to hearsay evidence.

The documents were provisionally allowed.

## **APPLICANT'S CASE**

7. **DR ELROY MARK FOSTER testified in support of his own case (hereinafter referred to as "Applicant")**
8. Applicant referred to page 40, with the date of 1 July 2012 and page 47, clause 5.1.3.5. It was never explained to Applicant which clause it was that he was supposed to be in breach of, in spite of various requests thereto. Applicant referred to page 1(b). Applicant was suspended. It was stated that the suspension was temporary. Applicant was suspended due to his ill health, from which he recovered in the interim. Reference was made to page 2, being Applicant's suspension on 2 March 2017. Applicant was informed that he was in breach of his employment contract, in spite thereof that he was not in possession of his contract of employment. Reference was made to page 3, the extension of his deadline, this letter was never responded to. Reference was made to page 4, being an e-mail, dated 17 April 2017. Applicant attached a letter from his sister, because he was in treatment and he requested permission to respond once he was available. Reference was made to page 4(b), being a letter from Applicant. Applicant asked questions about the repudiation of his contract of employment. Applicant mentioned that the suspension was a direct consequence of his ill health and he was not of sound mind to respond. Applicant acknowledged his own incapacity at that stage.
9. Reference was made to page 5. Applicant submitted representations, being a letter by his psychiatrist. Applicant completed a temporary incapacity leave form, to which Respondent failed to respond. Reference was made to page 6 dated 24 May 2017: Applicant asked Advocate Small to reply, no reply was forthcoming. Applicant was at a treatment centre for psychiatric illness. Applicant suffered from

extremely high anxiety, which increased, due to the Respondent's failure to respond. Applicant learnt that he should not have submitted his temporary incapacity application with Advocate Small, but to Dr Barry Smith, the Clinical head.

10. Reference was made to pages 24 to 36, being Applicant's psychiatric report. Reference was made to page 37: Applicant received a letter from the Respondent advising him of the termination of his contract, due to the fact that he could not prove his registration. Reference was made to page 38: Applicant received a letter from HPCSA confirming that his registration is active, at the same time that the Respondent informed him that he was not registered. Applicant submitted the letter on page 51, that he presented to PPS, confirming that he could work half day in support of the fact that he was capable of returning to work. Pages 54 to 57 contain a letter from Dr Chanakya Jonnalagadda, confirming that he is fit to return to work. As per page 58, Applicant addressed a letter to the HPCSA, being a thorough report of his illness and his treatment. On page 62 of bundle A, it was confirmed that Applicant is clean from any drugs and could return to work. Pages 64 to 69 contain similar cases to his own. Respondent did not try to find Applicant an alternative post.

#### **THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

11. Applicant referred to page 38, being a letter from the Health Professional Council, where he tried to establish what his registration status is. He stated that he received a letter from the HPCSA, confirming his registration status. Respondent challenged Applicant that it is not an official document, as there is no stamp from the HPSCA on the said letter. Applicant responded that his registration as Medical Student, Intern and Student Intern has been terminated, but not his registration as a medical practitioner.
12. Applicant was suspended on 2 March 2017 as per page 1 of bundle R, as evidenced on page 8 of bundle R, it was confirmed in a letter dated 13 September 2017. Applicant remains suspended to practice his profession until such time that

reports received by the Committee indicate that he is fit to practice his profession and the Committee is satisfied with his progress.

13. Applicant conceded that he cannot perform his duties as medical practitioner if he is suspended. Reference was made to page 25 of bundle R.

*5.1.3.5 – “The Employee must at all times uphold his/her registration status with the relevant Statutory Professional Council(s). Failure to renew or uphold the registration status may lead to termination of this Contract.”*

14. According to Applicant, he is not in breach of this clause, as he is registered as a medical practitioner. Applicant referred to page 38 of bundle A in confirmation of his registration. Applicant conceded that if he is suspended, he cannot perform his clinical work. Applicant stated that he was discharged, according to Respondent’s letters, but page 7 of bundle R does not refer to suspension. The following is stated on page 37 in the 4<sup>th</sup> bullet point:

*“The Department is legally obligated to ensure that all health professionals are registered with the HPCSA in order to comply with this statutory requirement. Furthermore in terms of the common law principles of contract, a contract terminates when it becomes impossible to perform the terms of the contract and will therefore not constitute a dismissal. Incapacity due to impossibility of performance in your case relates to your inability to comply with your contractual duty i.e. active registration with the HPCSA.”*

15. Applicant conceded that he cannot practice his clinical obligations if he is suspended. The Act only refers to being registered. According to Applicant, he is temporarily unable to practice, due to his suspension. The Statute only requires registration and does not refer to suspension. Applicant conceded that he cannot practice his work. It was put to Applicant that he cannot practice his work, therefore he cannot meet his statutory requirements. This was placed in dispute by Applicant, as he believes that he met his statutory requirements although he is suspended.

16. Applicant conceded with reference to page 8 of bundle R, that he remains suspended. Applicant believes that he was dismissed. Reference was made to page 1(b) of bundle A, paragraph (i):

*“j) You are suspended from practicing your profession until the Committee finds you deem fit to practice;”*

17. The following is stated on page 37, 2<sup>nd</sup> bullet point:

*“Your current registration status at the HPCSA still reflected that you are suspended, and currently you couldn’t give the department proof or evidence when you lawfully will be able to practice as a medical officer again.”*

18. Applicant responded that he received unpaid leave from the 16<sup>th</sup> of March 2017. Applicant confirmed that he received the termination letter on the 7<sup>th</sup> of June 2017.

19. Applicant responded that he was on unpaid leave during the period that he was ill. Applicant requested temporary incapacity leave, which application was completely ignored. Applicant stated that he was physically able to perform the work.

## **REPLICATION BY APPLICANT**

20. Reference was made to a recent meeting on page 8 of Respondent’s bundle. The HPCSA found that Applicant needed to be suspended, due to a recent relapse as per paragraph 2 on page 61 of bundle A.

## RESPONDENT'S CASE

21. **WILLEM SMALL testified on behalf of Respondent (hereinafter referred to as "Small")**
22. Small testified that he is the HR Manager of the West Coast District at Respondent. Small referred to page 1 of bundle R, being a letter from the HPCSA. The matter was discussed at the Health Committee and Applicant was suspended, until such time as the Council finds Applicant fit to continue with his profession. In terms of page 2: *"Every person who was suspended cannot be lawfully practicing and the profession is deemed to be cancelled."* Applicant was granted leave without pay as per the last paragraph. On page 25 of bundle R, paragraph 5.1.3.5: *"Dismissal due to registration status."* Failure to uphold registration status justifies termination of an employee's contract of employment. Applicant cannot practice if he is suspended, as he cannot perform his duties. Applicant's application for temporary incapacity was never on the record in terms of the communication with Applicant, it never came up, Respondent only dealt with the fact that Applicant was suspended.
23. Applicant sent the letter evidenced on page 3 of bundle R to Respondent whilst he was on leave. Respondent's HR office dealt with the application, but according to them, Applicant did not qualify for Pillar leave. Applicant should have sent his application to his supervisor, through the correct channels. Applicant remains suspended in terms of the letter dated 13 September 2017 on page 8 of bundle R. According to Dr Jonnalagadda's letter on pages 58 to 61 of bundle A there was insufficient recovery to uplift Applicant's suspension. Respondent did not receive any other communication from the Council.
24. The operational requirements are of such a nature that Respondent cannot continue without a fulltime medical practitioner. Respondent needs fulltime doctors and Respondent has to continue to provide service to the community. The termination of Applicant's contract of employment was based on the fact that he

could not adhere to the terms and conditions of his contract of employment. Applicant was definitely not unfairly dismissed, it is a law of contract termination. Small explained to Applicant that he is entitled to take the matter up with the Labour Court or High court, if he was dissatisfied with the termination of his contract of employment. Applicant did not inform Respondent of his alleged incapacity.

**THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

25. Small was aware that Applicant was admitted to a psychiatric hospital and then to a treatment centre. Small stated that it came as a surprise when Applicant applied for incapacity, as there was no record to confirm that. Small was challenged on the point in the contract that stated that Applicant may not be suspended. Small referred to “failure to uphold”. Active registration is required”. Registration means in order for you to perform your duties, because Applicant was suspended he cannot practice. Small was challenged that there is no clause in the contract that refers to suspension. Small replied: *“Not directly, but indirectly.”*
26. The contract of employment is broader, Applicant was employed as a medical officer and his job description as a medical officer, based on the fact that he was suspended, means Applicant could not perform his duties. Small is not aware whether Applicant is registered with the HPCSA. Applicant must provide proof thereof. Applicant referred Small to page 38 of bundle A, a letter from HPCSA and challenged Small on his registration status. Small responded that it is a letter without a letterhead, there is no authenticity of this letter without a letterhead.
27. According to Applicant, it is a letter from the HPCSA, being a temporary situation. The letter of termination does not refer to Applicant’s inability to perform his duties, it only refers to “registration”. Small was aware of Applicant’s application for incapacity leave, although it was not through the correct channels. Small conceded that Applicant’s suspension is not permanent, as the letter of suspension is very clear in this respect. Small is not aware that the doctor made an error on page 61 of bundle A (the date of Applicant’s last relapse).



## **THE FOLLOWING ENSUED FROM RE-EXAMINATION:**

28. Reference was made to page 2 of bundle R: *“Please be informed that the Health Professions Act 29 of 2009 states that every person who has been suspended or whose ...”*
29. Suspension means that you cannot practice, the contract of employment is deemed to be cancelled until the period of suspension lapses. The registration as medical practitioner is suspended and deemed to be cancelled according to the Act. Only HPCSA can uplift suspension of registration.

## **CLOSING ARGUMENTS**

30. Applicant prefers to submit closing argument orally today. Respondent is to file closing arguments by Friday, 13 October 2017 and Applicant to file a Replication, if any, on Monday, 16 October 2017.

## **APPLICANT’S CLOSING ARGUMENT**

31. Applicant’s registration was temporarily suspended, but never cancelled. The Respondent did not give Applicant an opportunity to speak about his prognosis. Respondent ignored Applicant’s representations and application for temporary incapacity. Applicant asked for compensation from 16 July 2016 to 28 November 2016. Respondent caused Applicant stress and prolonged his recovery whilst he was in treatment.

## **CASE LAW REFERRED TO BY APPLICANT**

32. UNITED ASSOC OF SA o.b.o. Fortuin v Golden Arrows bus services 2004 (25 ILJ, 1142 BCA, 2004) ILJP 1142 - “The employee was diesel mechanic, should hold a prof drivers permit, couldn’t be renewed because of a drunken driving incident.”

## **SURVEY OF EVIDENCE AND ARGUMENT**

33. Applicant concedes that he was temporary unable to perform his duties, due to incapacity. Applicant was admitted to a psychiatric clinic as he suffered from substance abuse related problems.
34. Respondent served Applicant with a letter in terms of which Applicant was invited to make representations as to why his services should not be terminated. Applicant questioned the meaning of the letter. Respondent claims that Applicant was not registered with the HPCSA and as a result he was unable to perform his duties. Applicant was ill and admitted to a clinic. Respondent sent Applicant a letter informing Applicant of the termination of his services.
35. Applicant maintains that he was dismissed. Applicant requires paid leave for the period as mentioned in his opening statement. Applicant also believes that he was procedurally unfairly dismissed. Applicant testified in support of his own case. Applicant did not call any witnesses.
36. Respondent failed to explain to him which clause he was supposed to be in breach of. Applicant stated that his suspension was temporary due to his ill health from which he recovered in the meantime. Respondent informed Applicant that he was in breach of his employment contract in spite thereof that he was not in possession of his contract of employment. Applicant attached a letter from his sister, which was sent to Respondent, as he was in treatment and he asked for extension of time to respond. According to Applicant his suspension was a direct consequence of his ill health. He was not of sound mind at the time and could not respond and Applicant conceded to his own incapacity at the time.
37. Applicant submitted representations in the form of a letter from his Psychiatrist. Applicant filed a temporary incapacity leave form to which Respondent failed to respond, but Applicant concedes that he lodged the incapacity leave form through the incorrect channels. He filed with Advocate Small instead of sending it to his direct manager.

38. Respondent informed Applicant of the termination of his contract of employment due to the fact that he could not prove his registration as medical practitioner.
39. Applicant referred to the letter of Dr Chanakya Jonnalagadda, confirming that he is fit to return to work. It was confirmed that Applicant was clean from any drugs and could return to work.
40. Applicant did not dispute Respondent's evidence that he is unable to practice his profession, whilst he remains suspended and reports are received by the Committee that Applicant is fit to practice his profession and the Committee is satisfied with his progress.
41. Respondent disputed the document from HPCSA handed in by Applicant in terms of which his registration is confirmed as the authenticity of the document was disputed in the light of the fact that it is not on an official letter head.
42. It is common cause that in terms of page 25 of Respondent's bundle, more specifically paragraph 5.1.3.5, the following is applicable:

*"5.1.3.5 Dismissal due to registration status*

*The Employee must at all times uphold his/her registration status with the relevant Statutory Professional Council(s). Failure to renew or uphold the registration status may lead to the termination of this Contract."*

This forms part of Applicant's contract of employment, evidenced on page 25 of Respondent's bundle.

43. Applicant did not dispute the authenticity of his contract of employment evidenced on page 20 or the terms as stated in paragraph 5.1.3.5.
44. Applicant maintains that he is not in breach of the above clause as he is registered as a medical practitioner as evidenced on page 38 of Applicant's bundle, although

Applicant failed to prove the authenticity of the document. Applicant conceded that if he is suspended he cannot perform his clinical work. Applicant however disputes that Respondent's letters include a reference to suspension. Reference was made to the 4<sup>th</sup> bullet on page 37 of Applicant's bundle:

*"The Department is legally obligated to ensure that all health professionals are registered with the HPCSA in order to comply with this statutory requirement. Furthermore in terms of the common law principles of contract, a contract terminates when it becomes impossible to perform the terms of the contract and will therefore not constitute a dismissal. Incapacity due to impossibility of performance in your case relates to your inability to comply with your contractual duty i.e. active registration with the HPCSA."*

45. According to Applicant, the Act only refers to being registered. According to Applicant he was only temporary unable to practice his profession due to his suspension. The Statute does not refer to suspension, although Applicant conceded that he could not practice his work. It was put to Applicant that if he cannot practice his work he cannot meet his statutory requirements, although Applicant disputed this, as he believes that he met his statutory requirements although he was suspended.
46. According to Respondent Applicant's registration was suspended by the HPCSA as he cannot perform his services under the circumstances. Applicant was in breach of his contract of employment and the contract was therefore legally terminated. Applicant was suspended on 2 March 2017, up to date. Applicant has not provided the Council with proof of registration and the dispute relates to an alleged unlawful dismissal and not an unfair dismissal. Therefore the Respondent believes that the Bargaining Council does not have jurisdiction to deal with the matter. Respondent sought a dismissal of the application. The Respondent disputed the authenticity of pages 54 to 57 of Applicant's bundle, being the alleged confirmation of Applicant's registration by the HPCSA, as well as the letter on page 4 written by Applicant's sister, which amounts to hearsay evidence.

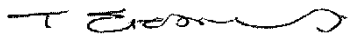
47. Advocate Willem Small testified on behalf of Respondent. Small is the HR Manager for the West Coast District of Respondent. Small confirmed that Applicant's services were suspended until such time as the Council could be provided with confirmation that Applicant was fit to continue his profession. In terms of page 2 of bundle R every person who is suspended cannot be lawfully practising and the profession is deemed to be cancelled. Applicant was granted leave without pay as per the last paragraph on page 25 of Respondent's bundle, as per paragraph 5.1.3.5, therefore Applicant cannot practice if he is suspended and cannot perform his duties. Applicant's application for temporary incapacity was not on record, as he did not follow with the correct channels. Respondent only dealt with the fact that Applicant was suspended.
48. Applicant sent a letter evidenced on 4a of bundle A which includes a letter from his doctor, Dr Lynne Wicomb, questioning the letter of suspension and informing Respondent that he was in treatment and unable to respond comprehensively to the allegations contained in the letter of suspension. Applicant did not qualify for pillar leave. Applicant should have sent his application to his supervisor in order to have followed the correct channels. Applicant remains suspended in terms of the letter dated 13 September 2017, evidenced on page 8 of bundle R. According to Dr Jonnalagadda's letter evidenced on pages 58 to 61 of bundle A, there was insufficient recovery to uplift Applicant's suspension and Respondent did not receive any further communication from the Council.
49. Applicant did not dispute Small's evidence that the Respondent's operational requirements are such that Respondent is unable to continue without a full time medical practitioner. Respondent needs fulltime doctors and Respondent has to continue to provide a service to the community. The termination of Applicant's contract of employment was based on the fact that he could not adhere to the terms and conditions of his contract of employment. Applicant was not unfairly dismissed. Applicant's contract was terminated by law. Small explained to Applicant that he could take the matter up with the Labour Court or the High Court if he was dissatisfied with the termination of his contract of employment. Applicant failed to inform Respondent of his alleged incapacity.

50. Although Applicant challenged Small's evidence that Applicant's contract of employment does not state that he may not be suspended. Small responded that failure to uphold equities suspension, therefore it refers to suspension indirectly.
51. Applicant could not practice as he was suspended.
52. Small was not aware that Applicant was registered with the Council. Applicant was employed as a medical officer. His job description is that of Medical Officer and based on the fact that Applicant was suspended, he was unable to perform his duties.
53. I took cognisance of both parties' closing arguments.
54. I took cognisance of the Health Professions Amendment Act, 29 of 2007, more particularly clause 44 thereof, where the following is stated:
- "44. Every person who has been suspended or whose name has been removed from the register in terms of section 42 shall, if his or her profession if one which, under this Act, cannot be lawfully [**carried on**] practised by an unregistered person, be disqualified from [**carrying on**] practising his or her profession and his or her registration certificate shall be deemed to be cancelled until the period of suspension has expired or until his or her name has been restored to the register by the professional board."*
55. It is common cause that Applicant's services had been suspended and it is furthermore common cause that Applicant carries out a profession which cannot be practised by an unregistered person and that Applicant is subsequently disqualified from practising his profession and that his registration certificate is deemed to be cancelled until proof of his suspension has expired or that his name had been restored to the register by the professional board. Applicant's services were therefore terminated by operational law.

56. Applicant did not make out a case for incapacity, nor did he bring an application with the Respondent through the correct channels for incapacity.
57. I cannot accept Applicant's argument that Respondent should have been alerted to the possibility of incapacity by the mere fact that Applicant was submitted to a rehabilitation clinic. Applicant referred the matter in terms of an alleged unfair dismissal and not in terms of the Employment Equity Act as averred in his closing argument.
58. Applicant's services were terminated by operation of law.

### **AWARD**

59. In find that no dismissal took place. Therefore, the Council does not have jurisdiction to deal with the matter.



**COMMISSIONER: T ERASMUS**