



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Case No: **PSHS397-17/18**

Commissioner: **T ERASMUS**

Date of award: **24 October 2017**

In the matter between:

**DENOSA obo J MHLOPHE**

(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) of the Labour Relations Act 66 of 1995 (“the LRA”) and was heard at the offices of the 1<sup>st</sup> Floor Boardroom, Western Cape College of Nursing, Klipfontein Road, Athlone on 16 October 2017. The Applicant was represented by Mr L Munzhelele from DENOSA, whilst the Respondent was represented by Mr A Solomon, Labour Relations Officer at Respondent.

## **ISSUE TO BE DECIDED**

2. I must decide whether Applicant's dismissal was substantively fair. Procedural fairness was not placed in dispute.

## **APPLICANT'S OPENING STATEMENT**

3. Applicant was charged with submitting an altered medical certificate, she was booked off from 19 to 26 January 2017. Applicant changed the return date to 6 February 2017. Applicant developed a pulmonary embolism after the birth of her child.
4. Applicant was subjected to a disciplinary hearing, which was initially meant to take place on 12 April 2017, but the hearing was postponed to allow Applicant an opportunity to obtain union representation.
5. Applicant pleaded guilty at the disciplinary hearing, which took place on the 2<sup>nd</sup> of May 2017. Applicant only places the sanction of dismissal in dispute.
6. Applicant disputes the sanction of dismissal, due to the following reasons:
  - she showed remorse during the hearing, admits she was wrong;
  - she promised she won't repeat the same conduct;
  - she was going through stress;
  - she asked for a second chance;
  - in the case of Mr Faizel Francis, employee at Tygerberg hospital, Francis was also charged with misrepresentation. He pleaded guilty in the hearing. The sanction was a final written warning and 1 weeks' suspension without pay.
  - Faizel Francis was an operational manager, who misrepresented the MSP
  - Applicant is a staff nurse;
  - Applicant does not place the seriousness of the misconduct in dispute, but the harshness of the sanction;

- there was no evidence adduced in the hearing of dishonesty or that Applicant might commit the same transgression in the future.
7. Applicant seeks a remedy, in terms of which the sanction of dismissal is reversed and Applicant re-instated. Applicant was dismissed on 7 July 2017. Applicant earned R10 000.00 net per month.

## **RESPONDENT'S OPENING STATEMENT**

8. Applicant pleaded guilty to a very serious charge of misconduct by changing the dates for which she was booked off. Applicant received 11 days more than for which she was booked off. Applicant defrauded her employer by receiving a salary for 11 days more than to which she was entitled to. Applicant applied for the leave in terms of her altered medical certificate. Applicant was already on Pillar/incapacity leave. Applicant has every intention to obtain whatever leave she applied for. Applicant received extra days, during which she was not actually sick. Part of the Applicant's job as a nurse, is to complete documents on a daily basis. There is the possibility that she might change documents during the course of her work.
9. Respondent stands by the sanction of dismissal.
10. The two other cases to which Applicant referred are not linked to leave and can therefore not be used as a basis. The one case was related to 'housing allowance' and the other to SMPS. The cases are in essence totally different; therefore the Respondent was not inconsistent in taking cases to disciplinary hearings. Changing the medical certificate to gain extra payment of a salary from the employer is viewed in a very serious light. Ms Oliphant testifies on behalf of Respondent and explains which impact Applicant's transgression had on the trust relationship. Respondent will also call the chairperson of the disciplinary hearing to testify why she thinks dismissal is the appropriate sanction in these type of cases.

## **RESPONDENT'S CASE**

11. **SHMEEM MODACK-ROBERTSON testified on behalf of Respondent (hereinafter referred to as “Robertson”)**
  
12. Roberts was the presiding officer in Applicant’s disciplinary hearing. Applicant was charged with altering her medical certificates. Robertson saw the original medical certificate, evidenced on page 26 of Respondent’s bundle. Applicant pleaded guilty to the charge as per charge sheet. Robertson heard the testimony of the supervisor and the investigating officer. Applicant was given an opportunity to provide mitigating evidence via her union representative. Robertson took the following into account when she reached a decision on the sanction:
  - the nature of misconduct, which equates to fraud;
  - the fact that the provincial government grants employees 36 days of sick leave and there are other processes available to employees, one can apply for 29 days short time Pillar leave if you have a genuine condition and it is granted, that option was also open to Applicant;
  - if your sick leave is exhausted you can also apply for unpaid sick leave
  - Applicant was entrusted in working with patients and Respondent will have to trust that Applicant will not alter information when working with patients.
  
13. Robertson attached the report, with mitigation and aggravating factors as per pages 12 to 14 of Respondent’s bundle. Sister Oliphant testified about the aggravating factors. Applicant could have utilized the following options in respect of leave:
  - sick leave;
  - short term pillar;
  - long term pillar;
  - more than 10 years’ service;
  - annual leave if she had available to her.
  
14. Applicant suffered from depression post maternity and she was diagnosed with a pulmonary embolism.

15. Applicant had sick leave for pulmonary embolism. Post maternity depression was raised by the union official, but no supporting evidence was tendered at the disciplinary hearing.
16. A lesser sanction less than dismissal was not considered, due to the following reasons:
  - Applicant commenced employment in 2012;
  - Respondent's disciplinary code also makes provision for suspension;
  - The transgression was serious;
  - There were other options available to Applicant in the department;
  - Respondent had to act consistently, the Respondent has a zero-tolerance policy towards fraud.

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

17. The issue of other leave was not presented during the hearing. The leave policy applies to everyone in the Respondent's employment. It was a very serious transgression. No evidence was tendered at the disciplinary hearing to the effect that Applicant was unprofessional, yet Oliphant testified that she didn't know if she could trust Applicant, because she can alter patient documentation in future. It is common cause for everybody that one must be professional. It was put to Robertson that committing misconduct does not amount to unprofessionalism. This was disputed by Robertson, as she believes that it is unprofessional.
18. Oliphant did testify that this kind of conduct is not allowed in the working environment.
19. Applicant pleaded guilty, therefore she was not required to submit other evidence or call the doctor to testify. Applicant had the same opportunity to bring evidence to proof mitigating factors, of which opportunity she did not make use. Robertson testified that in her capacity as chairperson she is not aware of which evidence the accused will adduce, during the hearing.

20. Robertson testified that she is not familiar with the other two cases to which Applicant referred as she works for EMS and not for Tygerberg Hospital. Robertson conceded that an employee can receive a sanction of suspension of one week without pay, but she is not aware of the facts of these cases. Robertson testified that if the facts and consistency are taking into consideration, but given the fraud in the present case, the fact that Applicant pleaded guilty, doesn't change the seriousness of the transgression. Robertson testified that she considers each case on its merits. She went through whatever is presented to her in the hearing.

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

21. It is Applicant's responsibility to apply for leave.
22. **SYLVIA OLIPHANT testified on behalf of Respondent (hereinafter referred to as "Oliphant")**
23. Oliphant is employed as the operational manager at one of the ICU wards at Tygerberg Hospital, where the Applicant was employed, since her appointment in 2012. Applicant worked in the same department as Oliphant, Oliphant was her direct manager. Applicant was charged for changing her sick certificate, as a result of which she was dismissed. Applicant and Oliphant had a good working relationship, prior to the incident. Oliphant became aware of the matter, when the area manager called her in and told her about it. Although their work relationship was good, with what took place with Applicant's fraud, the trust relationship between them, became doubtful. Applicant was employed as a nurse who must care for people, who depend on her. Medication must be given to patients and there will always be doubt for Oliphant, before she brings proof that she brought the correct document in. Oliphant will always have doubt, whether Applicant will repeat her fraudulent behaviour. The trust relationship was hugely impacted.

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

24. Oliphant worked with Applicant since 2012 until her dismissal and she never had any problems with her before. Applicant's attendance was good, she always did her work correctly, she never stole medication and Oliphant had never needed to discipline Applicant in the past. There were also no problems between Applicant and any of her colleagues. Applicant's transgression did not have a direct impact on patients. Oliphant conceded that employees can be rehabilitated.
25. Oliphant testified, that although she would be able to work with Applicant again, if the same situation circumstances occur, there will always be that doubt in her mind about Applicant's honesty.

### **APPLICANT'S CASE**

26. **JABULILE MHLOPHE testified in support of her own case (hereinafter referred to as "Applicant")**
27. Applicant has been employed at Tygerberg Hospital, since October 2012, where she was an enrolled nurse, it was her first job. Applicant has never been disciplined before. She comes from a family of four and she is the only member of the family that is employed. Applicant was diagnosed with pulmonary embolism, after the birth of her child. Applicant was meant to return to work, during December 2016, but she was unable to do so due to ill health, Applicant was booked off sick during January 2017.
28. Applicant admitted that she altered the date on which she was meant to return to work, but she testified that before she changed the dates, she did not understand the seriousness of altering the medical certificate and she certainly will not repeat her behaviour in the future.
29. Applicant testified that she had a good working relationship with Oliphant. Applicant testified that she even received a SPMS from one of the managers in the past for good performance. Applicant wants to be reinstated. Applicant has never stolen

medication from Respondent in the past. Applicant had a good working relationship with her colleagues.

30. Applicant pleaded guilty at the disciplinary hearing, because she accepted what she did was wrong. Applicant averred that she was sick and lost her senses. Applicant understands now that what she did was wrong and she won't do it again. Applicant will apologize to Ms Oliphant, if she gets the opportunity to do so.

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

31. Applicant admitted that she changed the date on her sick certificate from 26 January to 6 February 2017. Applicant claimed sick leave until her return to work on the 7<sup>th</sup> of February 2017.
32. Applicant did not complete a date on her pillar application, because Pacama told her not to put a date on her Pillar application. According to Applicant, she has a medical certificate for the period from 30 January until 6 February 2017. Applicant was challenged on why she would change the certificate if she had another sick certificate for exactly that period. Applicant responded that she was still sick at the time and didn't think straight when she changed the certificate. Applicant testified that she asked her doctor for a medical certificate. According to Applicant, she handed the medical certificate to Pacama, but she didn't keep a copy of that medical certificate. Applicant believes that the doctor might have a medical certificate. Applicant explained that she changed the medical certificate, because she was sick. Applicant conceded that she was paid for the sick leave days, for which she claimed.
33. Applicant did not apply for sick leave, as she already applied for pillar leave. Applicant had never stolen medication at work, Applicant conceded that it is wrong to steal medication. Applicant was challenged on why it is then not wrong to change a medical certificate? Applicant replied that she didn't think straight. Applicant conceded that her actions can be equated to stealing, but she didn't think it through.



34. Applicant conceded that she stole 11 days from her employer. Applicant was challenged on why Oliphant would testify that Applicant was aware that the changing of any document is wrong. Applicant maintained that she did not know that it is wrong, but Applicant heard that the Respondent has started teaching new incumbents that it is wrong. Applicant testified that she would refrain from completing incorrect information on patients.

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

35. Applicant was questioned on whether on receipt of the medical certificate, whether it was accepted by Respondent. Applicant was challenged on whether Respondent accepted the altered medical certificate, which she handed in. Applicant responded that Respondent informed her that they had an issue with the medical certificate with the altered date. Respondent did not accept the altered medical certificate, that is the reason why Applicant was submitted to a disciplinary hearing. According to Applicant her nursing career remains unaffected by her fraudulent conduct.
36. Applicant would not have altered her sick certificate if she was aware of the consequences of altering her sick certificate.

#### **RESPONDENT'S CLOSING ARGUMENT**

37. Applicant was charged with altering a medical certificate from 26 January until 6 February 2017 to substantiate her leave of absence from Respondent. She was dismissed by the presiding officer, after listening to mitigating and aggravating factors, the aggravating factors outweighed the mitigation factors.
38. Changing of official documentation, especially in this case, equating to 11 days of sick leave, Applicant had a financial gain. Robertson testified that in the public service there are different means for leave or get a new certificate from the doctor, Applicant could apply for vacation leave.

39. Robertson took into account the Applicant is a nurse and works with patient records on a daily basis.
40. She must be trusted to give a good account of what happens in her working environment. Applicant knew for the sick leave to be translated into incapacity leave, she must be covered by a medical certificate. Her current medical certificate only covered her to 26 January 2017. Robertson said there was evidence that the Applicant suffered from a pulmonary embolism, but there was no evidence that she was suffering from depression. Applicant is the only person responsible for submitting the correct medical certificates.
41. Oliphant testified they had a good working relationship, but following the incident, she could not trust Applicant anymore. Even if Applicant should return to work, that doubt will always be there.
42. Even though the Applicant has a clean disciplinary record, the seriousness of the transgression, impact on the trust relationship. Applicant alleges there is a second medical certificate, but there is no proof of such certificate. Applicant understands that stealing from Respondent is wrong, that is why she did not steal any medication. Changing the medical certificate, equates to stealing, as she claimed sick leave for a period not covered by her medical certificate. The fact that she has a good work record, does not mean the conduct of the employee can be overlooked. The Applicant had a financial gain, it is a serious transgression. Applicant broke the employment relationship and Respondent believes that dismissal is the appropriate sanction in this instance and the Respondent asks for the application to be dismissed.

## **APPLICANT'S CLOSING ARGUMENT**

43. The Applicant pleaded guilty at the disciplinary hearing and at the Arbitration hearing. She showed remorse, she admits it was wrong what she did, she admits it was gross for her to change the medical certificate. That would mean that any employee guilty of fraud should be dismissed.

44. Even in the case of Francis, who is a manager, he misrepresented Respondent, that there was an agreement reached between him and his subordinate. It affects the employee or the employer.
45. An alternative sanction to dismissal can be given, instead of dismissal.
46. In the matter of **SACCAWU V IRVIN & JOHNSON, 1999 (20) ILC (LAC)** it was held that the issue of consistency is an element of fairness in the disciplinary process. Francis' case – Respondent argued, every case should be treated differently. Francis did not even plead guilty, he did not show remorse.
47. Applicant is the breadwinner in the family, 33 years old and can be rehabilitated. Applicant had a new baby in August 2016. Applicant is currently still unemployed, she has been punished enough to stay at home, without any income. Applicant even got a performance bonus in 2016. Ms Oliphant said she won't have a problem if Applicant returns to Tygerberg hospital, but she will always have a doubt if the Applicant will commit the same misconduct. It doesn't mean that every employee will commit the same misconduct, as rehabilitation is possible. The Respondent did not say the relationship has broken down irreconcilably. Applicant did not do anything that affected the patient's wellbeing.
48. Applicant's condition should also be considered:
- pulmonary embolism
  - she was not really mental aware of what was going on around her
  - currently she knows it is wrong for her to do it
  - she will never commit the same transgression again.
49. The chairperson at the disciplinary hearing testified that Applicant could have utilized other type of leave, but unfortunately Applicant already utilized all her leave. Robertson testified no leave information was testified in front of her. Applicant accepted it was an honest mistake under the circumstances.

50. **TOYOTA SA MANUFACTURING (PTY) LTD v RADEBE & OTHERS (1998)19 ILJ 1614(LC)** - employee was also charged for misrepresentation, he pleaded guilty and showed remorse. CCMA Commissioner reversed the dismissal. Respondent referred the case to review, but the LC dismissed the case and agreed with the Commissioner.
51. It will be unfair for Respondent to dismiss the Applicant who showed remorse, but Francis who was a more senior employee, who did not show remorse, was not dismissed.
52. Respondent did not suffer any loss; currently new employees are told on orientation that changing a medical certificate is wrong. There is already a shortage of nurses, it will benefit Respondent to take Applicant back into ICU. Applicant seeks reinstatement with anything short of dismissal, such as suspension without pay and a final written warning, even 2 to 3 months without pay.

## **REPLICATION**

53. On the 2 cases brought up:
1. FRANCIS'S case is on spms – Solomons was actually recommended for a bonus, it was not about the scoring of the employee, but whether there was a meeting or not. Francis used a date for a meeting that never took place. We don't know the details of the Francis case. We only have the outcome of the case.
  2. GREEF'S case – about housing allowance. The merits are totally different to what we have before us.
  3. COURT CASES- where he said the court held, that consistency is about fairness in the workplace. Each case is dealt with on its own merits. The

presiding officer in Applicant's case took everything into account and made a decision to dismiss Applicant.

4. Applicant submitted the correct dates on the pillar application, therefore she was aware of what was going on around her.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

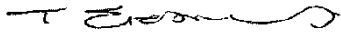
54. Applicant was charged with tampering with a sick certificate. She was found guilty and dismissed as a result thereof.
55. The Applicant's representative placed on record that the Applicant admits that she tampered with the medical certificate by altering the date.
56. Applicant avers that Respondent was inconsistent in imposing a sanction of dismissal on Applicant.
57. Applicant avers that her case is similar to that of two other cases at Respondent, where the employees were also charged with tampering with a medical certificate. Applicant however did not call any witnesses to attest to the alleged evidence and therefore it is treated as hearsay evidence, and there was no evidence before me of any exception to the hearsay evidence rules.
58. Applicant was dismissed for fraud.
59. Applicant conceded that the changing of the medical certificate amounted to fraud, although she testified that at the time when she altered the medical certificate, she did not know that it was wrong. She does however realise now that she was guilty of wrongdoing.
60. Applicant only showed remorse at the time of her disciplinary hearing, at which date she pleaded guilty for the first time. Applicant claimed leave in terms of the altered leave certificate and the undisputed evidence before me, was that Applicant

was enriched, in that she received a salary in respect of 11 (eleven) extra sick leave days to which she was not entitled.

61. Applicant conceded that she is guilty of a serious transgression, yet Applicant believes that dismissal is not the appropriate sanction under the circumstances.
62. I find that given the seriousness of the charge against Applicant, the breach of the trust relationship with Respondent, as well as her conduct when she claimed sick leave for 11 (eleven) days more than to which she was entitled to, coupled with her evidence that she initially did not believe that she was in the wrong, that dismissal was the appropriate sanction under the circumstances.
63. I take cognisance of the undisputed evidence before me that Applicant is employed in a position of trust and that she may just as well alter patients' records in future, which could ultimately endanger the lives of patients.
64. I find that Applicant's dismissal was substantively fair.
65. There was no evidence of procedural unfairness before me.

## AWARD

66. Applicant's dismissal was substantively fair. Procedural fairness was not placed in dispute. Therefore, Applicant is not entitled to any relief.



**COMMISSIONER: T ERASMUS**