



# ARBITRATION AWARD

Panellist/s: THULANI AKIM  
Case No: PSHS534-10/11  
Date of Award: 14th OCTOBER 2011

In the ARBITRATION between:

NEHAWU OBO NQAYI, K.P.

(Union / Applicant)

and

DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT -GAUTENG

(Respondent)

Union/Applicant's representative:

MR. PHILLIP MAJIKA

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative:

MR. PODI PODI

Respondent's address:

Telephone:

Telefax:

## **1. DETAILS OF HEARING AND REPRESENTATION**

1.1. The matter was set down on the 27<sup>th</sup> September 2011 as arbitration process at 10:00 at Bank of Lisbon, cnr. Saur and Market Street, Johannesburg. The parties agree to submit the written closing of arguments on the 4<sup>th</sup> October 2011.

1.2. The employee party, Mr. Khayaletu Nqayi (hereinafter referred to as "Applicant"), appeared in person and was represented by Mr. P. Majika the union official.

1.3. The employer party, Department of Health and Social Development -Gauteng (hereinafter referred to as the "Respondent"), was represented by Mr. P. Podi the IR Manager.

1.4. The proceedings were electronically recorded and the Interpreter was not required in these proceedings.

## **2. ISSUES TO BE DECIDED**

2.1. Whether the dismissal exist, if so whether the dismissal was substantively and procedurally fair or not.

## **3. THE BACKGROUND OF THE ISSUE**

3.1. The parties submitted pre-arb minutes at the outset of the proceedings and I further assisted the parties to narrow down some of the issues, which were not covered by the minutes, and the following issues were common cause between the parties:

3.1.1. The Respondent employed the Applicant on the 9<sup>th</sup> April 2009 as a Professional Nurse at Chris Hani Baragwanath Hospital.

3.1.2. The Applicant was earning R135 532, 00 per annum.

3.1.3. The Applicant absconded from work at Chris Hani Baragwanath Hospital on the 18<sup>th</sup> February 2010.

3.1.4. On the 1<sup>st</sup> July 2010 the Applicant lodged an appeal against the decision of his termination and his appeal hearing was held on that 6<sup>th</sup> December 2010.

3.1.5. On the 10<sup>th</sup> December 2010 the outcome of the appeal was issued and the Applicant's appeal was unsuccessful.

3.1.6. The Applicant became aware of the appeal outcome on that or about April 2011.

3.1.7. The Applicant applied for a Professional Nurse position at Chiawelo Clinic and he was appointed on the 1<sup>st</sup> August 2010.

3.1.8. The Applicant was paid by means of BAS and not by means of Persal System from the period of August 2010 to the 29<sup>th</sup> October 2010.

3.1.9. On the 15<sup>th</sup> October 2010 the Respondent stopped the Applicant from coming to Work.

3.2. The Applicant contended that on the 15<sup>th</sup> October 2010 the Respondent dismissed him and his dismissal was both substantively and procedurally unfair.

3.3. The Respondent dispute the existence of the Applicant's dismissal.

3.4. The Applicant sought reinstatement as relief.

#### **4. SURVEY OF EVIDENCE AND ARGUMENTS:**

4.1. I would like to indicate that I would only concentrate on the summary of salient points of the evidence, which bears relevance to the issue.

4.2. The Applicant testified in person.

4.3. The Respondent led the evidence of Mr. Oupa Moerane (hereinafter referred as “Oupa”) and submitted a common bundle marked “R”.

## **5. THE SUMMARY OF APPLICANT’S EVIDENCE**

### **5.1. MR. KHAYELETHU NQAYI**

5.1.1. He testified that on the day of the alleged incident he went to the Regional HR office in Hillbrow to find out about the none payment of his salary. He was attended by the lady called Norah, who was the Head of HR.

5.1.2. Norah advised him that the Respondent would not be able to continue paying him because it was encountering problem when it was supposed to pay his salary. She further promised to pay him all of his outstanding salary by means of BAS. He then cried because he realized that he had just lost his job. Norah suggested to him that he must try to get work at the private hospital, which was going to open soon.

5.1.3. During cross examination he testified as follows:

5.1.3.1. He conceded that his services were already terminated at Chris Hani Baragwanath Hospital when he made an application for the Professional Nurse position at Chaiwelo Clinic t.

5.1.3.2. He explained that the issue of none payment was not only discussed with Norah, It was also discussed with Oupa and Oscar.

5.1.3.3. He conceded that before Norah advised him to go and stay at home the issue of Persal System was discussed with him and he was advised that the Persal System

reflects that he absconded.

5.1.4.8. He clarified that on the 15<sup>th</sup> October 2010 Norah advised him that the Respondent was unable to process his salary due to Persal system. She further explained to him that there was no use for him to continue working if he was not going to be paid.

5.1.4.9. He conceded that the reason, which caused his none payment of his salary was due to Persal system. He explained that it indicated that he absconded from Chris Hani Baragwanath Hospital. He further conceded that he became aware through the Persal System that his name was blocked because he absconded from Chris Hani Baragwanath Hospital.

5.1.4.10 He denied that he was told to come back when his issue was sorted out.

5.1.4.11. He conceded that he was told not to come to work because the Persal was blocking his name and due to that he would not be paid his salary.

## **6. THE SUMMARY OF RESPONDENT'S EVIDENCE**

### **6.1. MR. OUPA MOERANE**

6.1.1. He testified that the Respondent employed him as a Middle manager HR.

6.1.2. He mentioned that the Applicant's services were terminated at Chris Hani Baragwanath Hospital on or February 2010. The Professional Nurse post was advertised on or about 2009 and the interviews were conducted on or about May 2010.

6.1.3. The Public Service Act 30 of 2007 (PSA) prohibits the employment of employees, who were dismissed in the public service. He stated that the Applicant's appointment letter clearly indicate that the offer was subject to verification of submitted information.

The Applicant's submitted information was verified and his appointment status was blocked in the system due to the fact that he absconded at Chris Hani Baragwanath Hospital.

6.1.4. The Applicant was informed that system does not allow the Respondent to appoint him. The Respondent tried to resolve the issue with Baragwanath, however they were unsuccessful. The Applicant was then advised to sort out the issue and come back after he had managed to resolve it.

6.1.5. During cross examination he testified as follows:

6.1.5.1. The Applicant was called in a meeting and advised about his employment status and he was further given an opportunity to deal with the problem and thereafter he could resume his duties.

6.1.5.2. The Applicant was not dismissed, however after his appointment, his employment status was blocked due to Persal System.

## **7. ANALYSIS OF EVIDENCE**

7.1. In an enquiry of this nature, I am required to determine whether the dismissal exist, if so whether the dismissal was substantively and procedurally fair or not.

7.2. The Applicant bears the onus to prove on a balance of probabilities that the dismissal existed, if he manages to prove dismissal then the onus would shift to the Respondent to prove on a balance of probabilities that the dismissal was substantively and procedurally fair.

7.3. It is common cause that the Respondent stopped the Applicant from coming to work on the 15<sup>th</sup> October 2010. It was clear from the Applicant's version during cross

examination that the reason for Norah to stop him from coming to work was due to the fact that the Respondent was unable to process his salary by means of Persal system.

7.4. Oupa testified on behalf of the Respondent that the Applicant's employment status was blocked in the Persal System. This version was not placed in dispute thus probable. Furthermore this version was consistent with the Applicant's version that he confirmed that according to Persal System his employment status was blocked due to the fact that he absconded at Chris Hani Baragwanath Hospital.

7.5. Oupa testified that in terms of the PSA it prohibits the employment of employees, who were dismissed in the public service. This version was not placed in dispute and thus it is my view that the Respondent was unable to employ the Applicant.

7.6. It was common cause that the Applicant's services at Chris Hani Baragwanath Hospital was terminated due to absconsion on the 18<sup>th</sup> February 2010. He lodged an appeal on the 1<sup>st</sup> July 2010, however it was unsuccessful. This version clearly shows why the Applicant's employment status was blocked according to the Persal System.

7.7. Oupa testified that in terms of the Applicant's letter of appointment it clearly indicated that the offer was subject to verification of the submitted information. This version was not placed in dispute thus probable. This version shows that the Applicant's appointment was only going to be confirmed after the Applicant's information was verified.

7.8. Oupa testified that the verification of the information submitted was done and the it was discovered that the Applicant's status was blocked due to the fact that he absconded at Chris Hani Baragwanath Hospital. This version was not disputed.

7.9. The Applicant denied during cross examination that after the issue of Persal System was discussed with him, he was not advised that he could come back after he had sort out

his problem. This denial was not substantiated.

7.10. Oupa testified that the Respondent tried to assist the Applicant with the issue of Persal System, however they were unsuccessful and they requested the Applicant to go and sort out his problem and after he had sort out his problem to resume his duties . This version was not disputed thus probable.

7.11. It is thus my view that it is improbable that the Applicant was dismissed because it is evident that the Respondent was unable to confirm his employment due to the PSA and the Persal system.

7.12. I therefore find that the Applicant had failed to prove on a balance of probabilities that he was dismissed on the 15<sup>th</sup> October 2010.

## **8. AWARD**

8.1. I find that the Applicant was not dismissed on the 15<sup>th</sup> October 2010,

8.2. The application is dismissed, and

8.3. There is no order as to costs.

**SIGNED AND DATE AT PHSDSBC OFFICES, CENTURION, ON THE 14<sup>th</sup> OCTOBER 2011.**



PART-TIME PANELIST

**Signature:** \_\_\_\_\_  
**PANELIST:** Thulani Akim  
**SECTOR:** PUBLIC HEALTH & WELFARE