



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **R J Purshotam**

Case No: **PSHS588-16/17**

Date of Award: **5 June 2017**

In the matter between:

VUMANI SHABALALA

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

- 1 I satisfied myself that the PHSDSBC had jurisdiction to hear this matter.

- 2 The arbitration hearings were held on 28 September and 7 November 2016; 1 February, 15 March and 29 May 2017 in a boardroom of the respondent in Natalia Building, Pietermaritzburg. The applicant was represented by attorney Mr Y Bhamjee (by consent) while the respondent was represented by Mr P N Lukhozi (at the first sitting only) and thereafter by Ms P M Mkhize (assistant director labour relations). Both representatives had approximately 10 years of experience in representing parties at arbitrations. The proceedings were manually and digitally recorded; and interpreted in isiZulu.

- 3 The respondent handed in its bundle of documents on 28 September 2016. The applicant did not dispute any of the documents as regards their authenticity or the correctness of their

contents. (It was accepted by both parties that the medical certificates on pages 32 and 35 of the bundle were fraudulent and had been submitted by the applicant to the respondent.) The applicant did not hand in any documents.

4 A pre-arb was conducted on 7 November 2016 with the consent of the parties. A minute thereof was distributed to both parties. After minor amendments were made thereto, it was read into the record on 1 February 2017. The parties were advised to keep the minute handy and make regular reference to it to ensure that their witnesses dealt with all the disputed issues.

5 At the outset the parties were advised as follows: *“The purpose of cross-examination is, amongst other things, to test the credibility and reliability of evidence, and to show that your version is more probable. It is important to bear 3 things in mind when cross-examining – (a) You must put your version to the opposing witness; (b) If an opposing witness has left out an important fact then that should be put to the witness; (c) If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously.”*

6 The above advice was repeated at the beginning of each new sitting.

ISSUE TO BE DECIDED

7 Whether the applicant was dismissed unfairly. He sought reinstatement with back pay.

BACKGROUND TO THE DISPUTE

8 The applicant is VUMANI SHABALALA (male age 43), a full-time pharmacy assistant. He commenced employment in terms of a written indefinite term employment contract on 13 November 1995. He was dismissed on 10 August 2015. He earned R11 015pm for working a 5 day / 45 hour week. He remains unemployed despite making attempts at finding alternative employment. He has not earned any money from casual work. The applicant had 8 dependants (4 adults and 4 children). The applicant’s highest standard of education is Gr 12.

- 9 The respondent is DEPARTMENT OF HEALTH, KWAZULU-NATAL, a provincial government department that administers Edendale Hospital being the applicant's workplace.
- 10 The applicant was given a notice to attend a disciplinary hearing on 7 April 2016. He was charged with the following misconduct:
- a. Charge 1: On 2 November 2015 you displayed an act of insubordination in that you did not report at the inpatient pharmacy as per amended roster and when the stores AM (Ms Majozi) told you to report to your direct supervisor (Ms Hansa) in the section you were assigned to, you did not do so.
 - b. Charge 2: You submitted a fake medical certificate purporting you to be sick from 5 November 2015 to 6 November 2015.
 - c. Charge 3: You submitted a fake medical certificate purporting you to be sick from 7 December 2015 to 9 December 2015.
 - d. Charge 4: you absented yourself without permission on the following dates: 9.11.2015; 24.11.2015; 17.12.2015.
 - e. Charge 5: You prejudiced the administration, discipline and efficiency in the Pharmacy Department by misconducting yourself in a manner stated in the above charges.
- 11 The hearing was held on 11 May 2016 after being postponed on 15 April and 9 May 2016. The applicant attended, was represented by a union official from NEHAWU, gave evidence in support of his case but did not call any witnesses. He pleaded guilty to charges 2, 3 and 4 and not guilty to charges 1 and 5. However he was found guilty of all the charges and dismissed in respect of charges 2, 3 and 4. He was given a final written warning for charge 1 and a written warning for charge 5. The applicant lodged an appeal on 31 May 2016 but it was refused on 12 July 2016. The matter was conciliated but remained unresolved, hence the arbitration.
- 12 For purposes of the arbitration only charges 2, 3 and 4 were relevant as dismissal was imposed as the sanction for these offences.
- 13 The parties submitted written closing statements by email on 2 June 2017.

SURVEY & ANALYSIS OF EVIDENCE & ARGUMENT

- 14 The following gave evidence for the respondent: Tasha Pilling (assistant director of occupational therapy since 2008 and employed by the respondent from 2002; she was the chairperson of the disciplinary hearing); Nafeesa Hansa (assistant manager in the pharmacy at Edendale Hospital for 10 years and the applicant's immediate superior); Zanele Silindiwe Innocentia Ndwandwe (chief executive officer of Edendale Hospital for 15 years and employed in the respondent for 28 years). Only the applicant gave evidence in support of his case.
- 15 The following was either agreed to, common cause, admitted, undisputed or conceded during the pre-arb or the arbitration:
- a. That the rule in relation to charges 2 and 3 is that the applicant is duty-bound to conduct himself honestly in the workplace;
 - b. That the rule in relation to charge 4 is that it is his duty to report for work on regular basis unless he is authorised to be absent;
 - c. That the applicant was aware of these rules and that he considered them to be reasonable;
 - d. That the applicant was aware that dishonesty in the workplace is a dismissible offence;
 - e. That the applicant breached the rule relating to honesty by handing in 2 fake medical certificates that he had paid for;
 - f. That buying fake certificates did not help solve his financial or family problems;
 - g. That he was not ill on the days that he procured the fake medical certificates;
 - h. That Hansa, the applicant's immediate superior, was the only person that could approve or reject his absence from work;
 - i. There is no indication in the applicant's appeal that he was apologetic or remorseful;
 - j. That the charges against the applicant were not fabricated;
 - k. That inconsistency was not being raised as an issue;
 - l. That barring the warnings contained on pages 27 and 29 the applicant had a clean disciplinary record;
 - m. That the applicant had long service;
 - n. That the applicant's position had not been filled.
- 16 On the probabilities, I make the following findings on the disputed issues (as identified during the pre-arb):

- a. Whether there were any procedural lapses in the disciplinary hearing and whether the applicant suffered any prejudice as a result of the alleged lapses: the applicant cross-examined Ms Pilling at length in an attempt to prove that there were a number of lapses. These included whether she had applied her mind to the evidence; whether she had ignored the medical treatment that the applicant was allegedly undergoing; whether she had failed to consider the applicant's clean disciplinary record; whether she had given any weight to the warnings; whether the applicant intended pleading guilty or not guilty; whether there was a duplication of charges; whether the disciplinary proceedings commenced within a reasonable period of time. I find that there is no substance in these issues because the applicant failed to lead evidence on these issues nor did he demonstrate any prejudice that he had allegedly suffered as a result.
- b. Whether the applicant is guilty of charges 2 and 3: With the applicant admitting that he submitted fake medical certificates, he was found guilty correctly of these charges.
- c. Whether the applicant is guilty of charge 4: I find that the applicant was correctly found guilty of charge 4 probably for the following reasons:
- i. Hansa gave evidence on this issue. I found her evidence reliable and credible, and she had no reason to fabricate evidence against the applicant. There were a number of discrepancies in the applicant's explanation for his absence on the relevant days.
9 November 2015
 - ii. Hansa stated that the applicant was absent on 9 November 2015. The applicant for his part submitted that he was allocated to perform duties in the stores on that day.
 - iii. Hansa disputed this and stated that his name did not appear on the official printed roster for stores for that day. She submitted that the applicant had probably written his own name by hand on the roster.
 - iv. If the applicant did indeed work in stores on that day I find that he ought to have at least got a witness to testify in support of that submission. He stated that Londiwe Majazi (the assistant manager in stores) had seen him work there. He failed to do that.
 - v. I find in the circumstances that the applicant was probably absent without permission on 9 November 2015.

24 November 2015

- vi. Hansa stated that the applicant had called her on that day to say that he will be late for work, as he was going to collect his driving licence. But he did not arrive at all for work on that day.
- vii. The applicant for his part submitted that he had attended at FAMSA on that day to deal with personal problems. Hansa disputed this.
- viii. I find that the applicant ought to have at least obtained a letter from FAMSA to show that he was attending there for counselling and sent it to Hansa. He failed to do that.
- ix. I find Hansa's version probable. I find that the applicant was absent without permission on 24 November 2015.

17 December 2015

- x. Hansa submitted that unpaid leave must be approved and that she had informed the applicant on that day at 9am to say that his leave was not approved.
- xi. This was not disputed by the applicant.
- xii. I find in the circumstances that the applicant was absent without permission 17 December 2015.

- d. Whether the respondent suffered any loss, harm, prejudice or damage as a result of the applicant's alleged misconduct: it is self-evident that the applicant's dishonesty would have caused harm to the respondent. Ndwandwe stated that the applicant would probably have wanted to be paid for days that he was supposedly on sick leave.
- e. Whether the charges were serious having regard to the applicant's circumstances: the applicant attempted to justify his wrongdoing by reference to his financial and family difficulties. I find that the unique circumstances of an employee cannot alter the nature of the charge. Dishonesty remains serious regardless of the personal circumstances of an employee.
- f. Whether there were any aggravating factors: I find that there are aggravating factors as follows:
 - i. I agree with Ndwandwe that the applicant, even though he had a relatively clean disciplinary record, was a repeat offender: he had handed in two fake medical certificates over 2 months. There is no evidence that he had any contrition after

handing in the first fake document. In other words he engaged in the same serious misconduct more than once.

ii. The applicant attempted to argue in his closing statement that even though 2 fake certificates were handed in by him, it should not be considered as a repeat offence. I have difficulty in understanding the applicant's submission. On his own version he committed the same offence twice. He did not pause after committing the first offence, to consider the consequences: he committed the same offence a month later.

g. Whether there were any mitigating factors: it was submitted by the applicant that he had long service and a relatively clean disciplinary record. Ndwandwe submitted that long service is not a mitigating factor when an employee engages in dishonesty on more than one occasion. I agree.

h. Whether the applicant had shown any remorse: the applicant submitted that his guilty plea should be interpreted as a sign of remorse. He also indicated that he had apologized. I agree with Ndwandwe that the proper time to show remorse would have been before he was caught (ie before being confronted with his own wrongdoing): not when he pleaded guilty at the hearing. The applicant himself stated that he had also shown remorse during his appeal. But he could not show where in his appeal submission there was any indication of remorse.

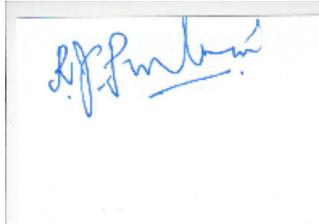
i. Whether there was a breakdown of trust serious enough to warrant dismissal: Ndwandwe stated that the applicant cannot be trusted and that the relationship between the parties had become intolerable as a result of the applicant's dishonesty. I agree.

j. Whether the sanction of dismissal was fair and appropriate: I find that the applicant's dismissal to be fair and appropriate because his dishonesty destroyed the most important pillar of the employment relationship: trust.

17 In all the circumstances I find that the applicant's dismissal to be fair and I propose to dismiss the application.

AWARD

18 The dismissal of the applicant was substantively fair. The application is dismissed.



R J PURSHOTAM
Commissioner