



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS952-16/17

Commissioner: Gerald Jacobs

Date of award: 25 September 2017

In the matter between:

Lebogang Johannes Pose

(Union/ Applicant)

and

Department of Health- Northern Cape

(Respondent)

Details of hearing and representation

1. This is the award in the arbitration between the applicant, Mr Lebogang Johannes Pose and the respondent, Department of Health- Northern Cape.
2. The arbitration was held on 4 September 2017 at Kuruman Hospital. The applicant represented himself. The respondent was represented by Mr Paul Koopman, its Labour Relations Officer.
3. The proceeding was digitally recorded.

Issue to be decided

4. The issue to be decided concerns the termination of the applicant's employment. The first is whether the respondent's decision to terminate the applicant's service constituted a deemed discharge in terms of section 17 of the Public Service Act of 1994 as amended (PSA). If it did, as the respondent has sought to argue, there was no dismissal and the Bargaining Council does not have jurisdiction.

5. If I find that the Bargaining Council has jurisdiction, that is the termination of the applicant's service constituted a dismissal in terms of the Labour Relations Act and not by operation of law, the second issue to determine is whether the termination of the applicant's service was fair on both substantive and procedural grounds. The applicant is challenging the procedural and substantive fairness thereof and is seeking reinstatement with back pay.

Background to the dispute

6. The applicant has been a long-serving employee of the respondent and had been employed in the position of a Basic Ambulance Assistant. Sometime in November 2011, he was given a letter signed by the then Acting Deputy Director General and it reads as follows;

"RE: TERMINATION OF CONTRACT OF EMPLOYMENT: YOURSELF

The above mentioned refers.

You are well aware that you failed and or ignored to renew your PRDP License, which is a statutory requirement in terms of chapter IV of the South African Traffic Regulation Act 93 of 1996 to transport patients and it is an inherent job requirement to your job. You were given sufficient notice to comply with this requirement from September 2008 to date. You failed and or ignored to do so, and therefore your failure has rendered you unemployable.

- a) *You are discharged from the Public Service in accordance with Schedule 8(9) of the Labour Relations Act, 1995 with immediate effect, from date of receipt of this letter.*
- b) *All your benefits in lieu of your years of service will calculate and be paid to you.*
- c) *You have the right to make representation to the Member of Executive Council (MEC) in this regard, within five (05) working days, from the date of receipt thereof.*
- d) *If you fail to do so, your service will be terminated accordingly*
Thank you".

7. At the time of the termination, he earned a monthly salary of R8 957.00. It is common cause that subsequent to receiving this letter and following discussions with the unions and the respondent, the applicant with his union's assistance made

representations in a letter address to the MEC of Health, Mr Mxolisi Sokatsha. The letter reads as follows;

RE: J.L POSE PERSAL NO 54188482. TERMINATION OF CONTRACT OF EMPLOYMENT

"I refer to the above matter and your letter dated the 5th September 2011 which I received on 2 November 2011.

I am appealing against my dismissal which is procedural and substantive unfair
PROCEDURAL UNFAIRNESS

The department unilaterally terminated my contract of employment. I was not afforded an opportunity to state my case at the disciplinary hearing, which was not held. Schedule 8-code of good practice of dismissal state for dismissal to be procedural fair, the employer must, conduct an investigation determines whether there are grounds for dismissal. This does not need to be formal enquiry.

The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to allegations. The employee should be entitled to a reasonable time to prepare the response and to be assisted by a trade union or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision if the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the CCMA.

In my case the department failed to comply with the guidelines. This amounts to procedural fairness.

Substantive unfairness

The department has stated two reasons for my dismissal.

Lack of PRDP License

Poor work performance (Schedule8(9) of the (LRA)

When I was appointed by the Department, I was appointed with a code 8 driver's license with PDP. I agree that my PDP expired in 2007 and the Department of Road and Traffic Services declined to renew my PDP license after I was found guilty for contravening road traffic offence. My suspension was for 5 years. The suspension was lifted this year after expiry of 5 years. I have since applied for

renewal and still waiting for the outcomes and was informed that my application is still being under consideration.

I wish to state that the department have aborted all code 8 vehicles. As a result, am not allowed to drive any code 10 vehicles as it is against the law. The reason for me does not to drive Ambulances is not that I don't have PDP is because the department does not have code 8 vehicle.

As a result of this, I was assigned to treat patients and escort patients while transporting them. At no stage did the department complain about my performance, I have been evaluated on quarterly basis (four times a year) and my performance have been satisfactory.

If my dismissal is based on my poor performance, the department have failed to conduct an enquiry in terms of poor work performance. I was not informed that am not performing my tasks or failing to meet the required standard. The department never helped me with any form of assistance to meet the required standard. I am very surprised to hear about my poor performance for all this years I have being evaluated, I have been getting performance bonuses it is really strange that the Department is alleging that am not performing. My dismissal is also substantively unfair.

Your urgent response will be highly appreciated. I kindly request that I should still be paid pending the finalisation of the matter because I don't think the Department is having the right to suspend my salary taking into consideration factors I have mentioned above. I am having passion for my work and want the Department to allow me to serve the people of Gordonia and Northern Cape”.

8. It is apparent that the applicant made numerous attempts to be reinstated by writing letters to the respondent. In March 2015, some four years after the applicant's service was terminated, the then Chief Director of Hospitals, EMS and Quality Management of the Northern Cape address a letter to the Northern Cape Head of Department that reads as follows;

“RE TERMINATION/ RE-EMPLOYMENT OF MR JL POSE

Dear HOD

I have received the attached series of correspondence that gives me cause for concern.

I request that Provincial Labour Relations review this and recommend on the way forward.

My understanding is:

- 1) Mr Pose had his contract terminated in a letter dated 05 September 2011;*
- 2) Mr Pose wrote a letter to the HOD appealing his termination. This was received by LR Officer on 07 October 2011;*
- 3) I have seen no evidence that this appeal was successful (It would have to be by the MEC). I also have a feeling from the other correspondence that this person has continued to receive a salary since dismissal in September 2011.*
- 4) There are various pieces of correspondence from officials seeking his reinstatement.*

The questions that I think need to be answered are;

- a) Was the termination of contract implemented in late 2011? If not, why not? Who is responsible?*
- b) Was the appeal process implemented? Where is the paperwork? What was the outcome?*
- c) If this person has continued to be paid, does this need to be recovered?*
- d) What is the view going forward on future employment, bearing in mind he requires a code 10 driving license?*

*I would be grateful if Labour Relations could look into this as a matter of urgency?
Kind regards”.*

9. It is common cause that there was no correspondence from the Head of Department in this regard. In June 2015, the respondent abruptly stopped paying the applicant his salary. It would appear that as if this none payment of his salary led to him, on 28 November 2016, referring an unfair dismissal dispute to the Bargaining Council together with an application for condonation. The lateness was condoned in a ruling issued on 26 April 2017.

Survey of evidence and arguments

10. Mr Koopman argued on behalf of the respondent that the applicant was not dismissed. He argued that the nature of the applicant's job was such that in order to perform his duties he had to be in possession of a valid Public Drivers Permit (PDP). The applicant did not have a valid PDP and was in contravention of the Road Traffic Regulation, Chapter IV of the South African Traffic Regulation Act 93 of 1996. In addition to this, his registration with the Health Professional Council of South Africa (HPCSA) was not valid at the time. Mr Koopman argued with regards to the none compliance, that he had no PDP and because he was not registered with the HPCSA the deeming provision in terms of Section 17 of the Public Service Act (PSA) of 1994 as amended came into effect. Therefore, so he argued, the Bargaining Council did not have jurisdiction because the dismissal was due to the operation of law.
11. When the matter was ripe for hearing, and Mr Koopman brought to my attention that he would not lead any oral evidence. He requested to submit written arguments. He stated that it would provide him with enough time to properly formulate his argument that there was no dismissal and the Bargaining Council did not have jurisdiction.
12. He was given until 11 September 2017 to submit his written arguments. The 14 days would then be calculated for this date.

Applicant's evidence and arguments

13. In 2006, whilst in the employ of the respondent he was involved in an accident. He was at fault which resulted in his PDP being suspended for five years. His PDP expired in 2007 and had to wait for the five years to expire before he could apply to renew his PDP. This meant for the time the suspension was still in place he could not drive the respondent's ambulance. Since he did not have a valid licence to drive the ambulance the respondent instructed him to treat injured patients when they were being transported.
14. On 2 November 2011, he received the letter terminating his service. Thereafter he lodged an appeal against the decision. He handed the appeal documentation to the Labour Relations Officer, Mr Kammies.

15. Shortly after lodging his appeal he enquired as to the outcome. Since he was still receiving his salary he wanted to establish whether he could return to work. On each occasion, he was given the same answer that the matter was being given the necessary attention.
16. In 2012, the suspension expired he applied for the renewal of his PDP. He handed over the proof of the renewal to the human resources officials.

Cross-examination

17. He stated that his registered with the HPCSA. It was put to the applicant that proof of payment cannot serve as proof that he was registered with the Council. The applicant stated further that he received the card which he handed over to the human resource officials.
18. He stated that there were two other employees who also received the same termination letter that was handed to him. The two were re-instated after producing their PDP renewal documentation.

Respondent's arguments

19. Mr Koopman argued in his papers under paragraph 3 that "*Section 17 of the Public Service Act refers to discharge as a deeming clause, and thus not a dismissal, the department did not unfairly dismiss the applicant; his employment contract was terminated by operation of law and independent of any action of the department. Thus, no dismissal. The courts in De Villiers v Education, Western Cape Province (2010) 31 ILJ 1337 (LC). Is an authority relevant in expressing discharge vs dismissal*"? He argued the applicant was discharged because of his failure to comply with the inherent requirement of the job and not dismissed. For this reason, the Bargaining Council lacks jurisdiction
20. He conceded that the applicant PDP was renewed in 2012 but argued that the applicant was given from September 2008 to September 2011 to provide the respondent with a valid PDP. The applicant failed or ignored to adhere to the request. The respondent then instituted the deeming provision of the Act and discharged the applicant in terms of the Labour Relations Act. He further contended that the other two employees, Mr Mapikitla and Mokoane were discharged in the same manner and was not reinstated.

Analysis

Whether the respondent's decision to terminate the applicant's service constituted a deemed discharge in terms of Section 17 of the Public Service Act of 1994 as amended

21. In addressing respondent's argument that the termination constitutes a deemed discharge, I wish to start with the authority cited in support. I have gone through it and have noted some aspects that distinguish it from the case at hand. In *De Villiers v Education, Western Cape Province* (2010) 31 ILJ 1337 (LC) the applicant was the principal of Van Riebeeckstrand Intermediate School, Melkbosstrand. The applicant was charged with three counts of misconduct and dismissed. The applicant's appeal was unsuccessful and he referred an unfair dismissal dispute to the Education Labour Relations Council. The arbitrator ruled that the applicant's dismissal was substantively and procedurally unfair, and reinstated him into his previous post. The award further ordered the respondent, after consultation to redeploy the applicant to another suitable position with the same seniority. This did not happen and the applicant did not report at the school. The respondent regarded the applicant's failure to report as an absence from work without permission and wrote a letter to the applicant advising him that in terms of s 14(1) of the Employment Educators Act, he was deemed to have been discharged from service on account of misconduct. The applicant thereafter instituted proceedings in the High Court, seeking to review and set aside the respondent's decision not to reinstate him. That application was dismissed, on the basis that the Labour Court had exclusive jurisdiction. The applicant then lodged an application to the Labour Court. The issue the Labour Court had to determine was whether the respondent's decision not to *reinstate the applicant* constitutes a 'dismissal' for the purpose of the LRA and the conduct of the respondent in failing to reinstate the applicant in terms of s 14 (2) of the Employment Educators Act constitute administrative action.
22. This present case is, however, distinguishable from the above case in that the applicant was employed by the respondent as a Basic Ambulance Assistant. Unlike in the above case, the applicant was employed in the Health Sector and not in the Education Sector. Furthermore, the issue is not related to the respondent's refusal

to reinstate the applicant and the dismissal was not in terms of section 14 of the Employment of Educators Act.

23. Mr Koopman on behalf of the respondent seeks to rely on the *De Villiers v Education, Western Cape Province* case above in support of its argument that the dismissal for poor work was by operation of law, which does not constitute a dismissal as defined by the Labour Relations Act. As can be seen from the above, the case he relies on relates to totally different issues.

24. Turning to the case at hand. The Public Service Act provided in Section 17 as follows;

“(1) (a) *Subject to paragraph (b), the power to dismiss an employee shall vest in the relevant executive authority and shall be exercised in accordance with the Labour Relations Act.*

(b) *The power to dismiss an employee on account of misconduct in terms of subsection (2) (d) shall be exercised as provided for in section 16B (1).*

(2) *An employee of a department, other than a member of the services, an educator or a member*

of the Intelligence Services, may be dismissed on account of-

(a) *incapacity due to ill health or injury;*

(b) *operational requirements of the department as provided for in the Labour Relations Act;*

(c) *incapacity due to poor work performance; or*

(d) *misconduct.*

(3) (a)(i) *An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.*

(ii) *If such an employee assumes other employment, he or she shall be deemed to have been dismissed as aforesaid irrespective of whether the said period has expired or not.*

(b) If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.

(4) (a) A person-

(i) dismissed in terms of subsection (2) (d) for misconduct, including misconduct relating to the offering or receipt of any undue gratification or the facilitation of such offering or receipt; or

(ii) deemed to be dismissed in terms of subsection (3),

may only be re-employed by any department after the expiration of a prescribed period.

(b) Different periods may be so prescribed for different categories of misconduct.

(c) Notwithstanding the condition contained in paragraph (a) that an employee may only be re-employed in any department after the expiration of a prescribed period, the Minister may prescribe acts of misconduct in respect of which no period need expire before a person is again employed in a department.

(d) Subject to paragraph (a), a decision whether or not to re-employ a person dismissed in terms of subsection (2) (d) shall be taken with due regard to the nature of the misconduct concerned”.

25. Two issues become apparent from this section. First, section 17 (3) deals with abscondment or desertion. It provides that when an employee absent's him or herself for a period exceeding one calendar month without permission the deeming provision apply and the employee is deemed to be dismissed by operation of the law. The coming into operation of the deeming provision is not dependent upon any decision of the employer. When the deeming provision has been met, the Bargaining Council would lack jurisdiction to determine the dispute. (See *Minister*

van Onderwys & Kultuur v Louw 1995 (4) SA 383 (A) at 388G-H, also *Phenithi v Minister of Education & others* (2006) 27 ILJ 477 (SEA).

26. Second, an employee may be dismissed for conduct relating to incapacity due to ill health or injury; operational requirements of the department; incapacity due to poor work performance; or misconduct. The dismissal should be treated in similar fashion as provided for in the Labour Relations Act 66 of 1995 as amended (“the Act”).
27. The reason for the applicant’s dismissal was not that he was absent from the workplace for a period longer than 30 days without permission. It did not concern a dismissal within the meaning of section 17(3) of the PSA by operation of law but instead dismissal for incapacity due to poor work performance. To put differently, he was dismissed for being unemployable or incapacitated from doing his job as an ambulance assistant. The Act accordingly has an application, as does the Code of Good Practice contained in Schedule 8 of the Labour Relations Act. As such, I find that the Bargaining Council has jurisdiction.

Whether the termination of the applicant’s service was fair on both substantive and procedural grounds

28. The applicant is challenging the procedural and substantive fairness of the dismissal. The onus in dismissal disputes is governed by section 192 (1) and (2) of the Labour Relations Act, 1995. The onus is on the applicant to prove the existence of dismissal. Once the existence of the dismissal is established, the onus shifts to the respondent to prove that the dismissal was fair. In this present matter, it is common cause that the applicant was dismissed. That being the case the burden shifts to the respondent to prove on a balance of probability that dismissal was fair on both substantive and procedural grounds.
29. When considering terminating an employee’s service for reasons of non-performance the employer is obliged to follow the guidelines as prescribed in terms of Schedule 8, item 9 of the Code of Good Practice: Dismissal (the code). In the case of incapability or poor work performance, the employee is not capable of achieving the required performance standard hence the need for the procedure prescribed by the Code of Good Practice: Dismissal.

30. In this present matter, the poor work performance that led to the applicant's dismissal, as stated in the termination letter, was his failure to renew his PDP. This rendered him unemployable or incapacitated from doing his job as an ambulance assistant. His failure to renew his PDP constituted misconduct. The burden is, therefore, on the respondent to prove that it acted reasonably in treating the reason for dismissal of the applicant as sufficient ground for terminating his employment.
31. The facts thereof are common cause. The applicant was employed by the respondent as a Basic Ambulance Assistant or better known as an ambulance driver. Whilst being in the employ of the respondent he was involved in an accident. This happened in 2006. The applicant was at fault and it resulted in his PDP being suspended for five years. The undisputed evidence was that the respondent was aware. The respondent then gave him alternative duties to perform. He was instructed to assist the injured patients when they were being transported. He performed these duties until his service was terminated.
32. Mr Koopman contended that the applicant had from September 2008 to September 2011 to provide the respondent with a valid PDP. The applicant failed or ignored to adhere to the request. The respondent then instituted the deeming provision of the Public Service Act and discharged the applicant in terms of the Labour Relations Act. According to Mr Koopman, the deeming provision came into play after the applicant failed to adhere to the respondent's request to provide a valid PDP. I have difficulty with Mr Koopman's contention that since the applicant failed to adhere to the respondent's request to provide a valid PDP the deeming provision came into play. I have already dealt with the deeming provision in the award and do not find it necessary to restate it again. Suffice to say that the coming into operation of the deeming provision is triggered when the employee is absent for a period extended a calendar month and it's not dependent upon any decision. It then follows that the applicant cannot be dismissed in terms of the Labour Relations Act if the deeming provision came into effect.
33. At any rate, it was evident from the applicant's submissions that the respondent was at all material times aware of the reason as to why his PDP could not be renewed. Hence the respondent accommodated him by giving him alternative duties to perform. The applicant performed these duties for approximately four

years. Mr Koopman conceded that the applicant's PDP suspension expired in 2011 and it was renewed in 2012.

34. In the circumstances, the respondent was not precluded from allowing the applicant to continue performing the alternative duties until he could renew his PDP. The decision to dismiss the applicant was not appropriate in the circumstances.
35. The non-renewal of the PDP also did not make it possible for the respondent to terminate the employment relationship by dispensing with the proper procedure in terms of the labour legislation. It was evident from the evidence that the respondent had failed to afford him the opportunity to state his case in response to the reason for the dismissal is the non-renewal of his PDP. The decision to terminate the employment relationship was taken in the absence of any fair or reasonable procedure being followed.
36. On a balance of probabilities, the applicant has shown that his dismissal was both procedurally and substantively unfair.
37. The last issue was the relief to be awarded. The Labour Relations Act in section 193 states that where a dismissal was found to have been substantively unfair the primary remedy should be reinstatement or re-employment. Section 193(2) states that reinstatement or re-employment for a substantively unfair dismissal should only be rejected in favour of compensation where the employee indicates that she or he does not wish to be reinstated or re-employed, where the continued employment relationship would be intolerable due to the circumstances surrounding the dismissal or where it would not be reasonably practicable for the employer to reinstate or re-employ the employee.
38. Mr Koopman contended that the applicant was not registered with the Health Professional Council of South Africa. He stated that reinstatement would be impossible because the applicant was not able to practice in the profession. He handed in a piece of paper which purported to be a report on the status of the applicant registration with the Health Professional Council of South Africa.
39. On the face of it, the paper handed in by Mr Koopman appears to be a computer printout. It contains the applicant's name and surname. Under the heading registration, it shows a registration number. The word suspended appear next to the wording '*REGISTRATION STATUS*'. However, it does not state the reason and

does not give a date. From this piece of paper, it's not clear whether the word '*suspended*' relates to the suspension of the applicant's registration with the Health Profession Council as Mr Koopman wants one to believe. In my view, the piece of paper falls short of disproving the applicant's claim that his registered with the Health Professional Council of South Africa. The applicants wish to be reinstated and I concluded that reinstatement in the circumstances is not improbable. As a result, I make the following award.

Award

40. The dismissal of the applicant, Mr Lebogang Johannes Pose by the respondent, Department of Health- Northern Cape was substantively and procedurally unfair.
41. The respondent is ordered to reinstate the applicant in its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to the dismissal.
42. The reinstatement is to operate with retrospective effect from 5 September 2011. The respondent stopped paying the applicant his salary with all benefits by end of June 2015. As at the date of the award, the remuneration due to the applicant because of the retrospective operation of the reinstatement amounted to R250 796.00 (Two hundred fifty thousand seven hundred ninety-six rand and null cents) minus such deductions as the respondent is in terms of law entitled or obliged to make. The amount is to be paid to the applicant by no later than 31 October 2017. Interest will accrue on the amount in accordance with section 143(2) of the Labour Relations Act. The respondent must restore the benefits and service record of the applicant as if the dismissal had not occurred.
43. The applicant must report for duty on 1 October 2017.

The parties are reminded of section 143 of the Labour Relations Act 66 of 1995, which quoted here for their convenience:

“143 Effect of arbitration awards

- 1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court unless it is an advisory arbitration award.

- 2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgement debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the award provides otherwise.
- 3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1)
- 4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court
- 5) Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court
- 6) Subsections (1), (4), (5), as amended by the Labour Relations Amendment Act 2014, takes effect on the date of commencement of the Labour Relations Amendment Act,2014, and applies to an arbitration award issued after such commencement date.”

Signature:



Commissioner:

Mr Gerald Jacobs

Sector:

Public Health and Social Development
