



PHSDSBC

Public Health and Social Development
Sectoral Bargaining Council

ARBITRATION AWARD

Commissioner: **Elsabè Skinner**

Case No: **PSHS1128-19/20**

Date of award: **18 September 2020**

In the matter between:

PSA obo Malibongwe Simon Mcingani

(Union/ Applicant)

and

Department of Health - Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for arbitration at Universitas Hospital in Bloemfontein on 23 July 2020. On 2 and 3 September 2020 the arbitration was held at Stoffel Coetzee Hospital in Smithfield. The parties filed written heads of argument on 10 September 2020.
2. The Applicant, **Mr. Malibongwe Simon Mcingani**, was present and represented by Mr. Jack, an official of the PSA. The Respondent, **Department of Health - Free State**, was represented by Mr. Gumede, the Assistant Director Labour Relations of the Respondent.
3. The proceedings were held in English and were mechanically recorded. On 3 September 2020 Mr. Tshabalala rendered interpretation services.

BACKGROUND TO THE DISPUTE

4. During the narrowing of the issues, the parties agreed as follows:

4.1 The Applicant was employed by the Respondent on 1 April 2011. He worked 160 hours per month in terms of a roster as an Emergency Care Officer (ECO) and earned R13 283.00 per month.

4.2 The Applicant was dismissed after a disciplinary hearing was held. The Applicant lodged an appeal and received the outcome of the appeal on 8 January 2020. The Applicant was charged with one charge (Page 3 bundle B).

Charge 1:

That you are allegedly guilty of misconduct in terms of the Disciplinary Code and Procedure for the Public Service, in that on or around 11 February 2019, you responded to an emergency call at **House no. 186 Mbangula street, Rouxville**, and you left the scene without treating and transporting patients (**Ms. K. Monyane and Baby Monyane**) as per protocol safe delivery to medical facility of patient's choice and thus contravention of Standing Operational Procedures for Emergency Care Personnel (SOP) paragraph 3.2.1 "A patient should be taken to the closest appropriate medical facility" and Health Professions Council of South Africa (HPCSA) Basic life Support Provider Guideline 5. Continuity of care "No one shall be abandoned by a health care professional worker or a health facility which initially took responsibility for one's health".

5.3 The parties agreed as follows regarding substantive fairness:

5.3.1 The Respondent had the following rules at work.

Rule 1: Standing Operational Procedures for Emergency Care Personnel (SOP) paragraph 3.2.1 "A patient should be taken to the closest appropriate medical facility"

Rule 2: Health Professions Council of South Africa (HPCSA) Basic life Support Provider Guideline 5. Continuity of care "No one shall be abandoned by a health care professional worker or a health facility which initially took responsibility for one's health".

5.3.2 The Applicant was aware of the rules.

5.3.3 The rules were valid and reasonable.

5.3.4 The rules were consistently applied.

5.4 The parties agreed during the narrowing of the issues that the Applicant was on the scene at house 186 Mbangula street, Rouxville on 11 February 2019. It was agreed during the arbitration that personnel from Smithfield was dispatched to house 186 Mbangula and they responded to the call.

5.5 Regarding procedural fairness, the parties agreed as follows:

5.5.1 The Respondent's Disciplinary Code and Procedures were set out in Resolution 1 of 2003 which was a Collective Agreement with statutory force.

ISSUE TO BE DECIDED

6 I must determine whether the Applicant's dismissal is substantively and procedurally fair in terms of section 188 of the Labour Relations Act 66 of 1995 (hereafter called the Act).

7 Regarding substantive fairness, I must determine whether the Applicant breached the rule and whether dismissal is the appropriate sanction for breach of the rule.

8 Regarding procedural fairness, I must determine whether the chairperson was biased when it was alleged that he had not given the Applicant the opportunity to present mitigating factors and he allowed new evidence during re-examination but did not give an opportunity for cross examination on the new issue again. I must further determine whether the Respondent had breached the *audi alteram partem* rule when it was alleged that the Applicant had requested new information after the *audi* letter was issued to him which was never provided.

9 The Applicant was seeking retrospective reinstatement.

SURVEY OF EVIDENCE AND ARGUMENTS BY THE PARTIES:

Documentary evidence

10. The Applicant's representative presented a bundle of documents which was marked A. The Respondent's representative presented bundles which were marked B, C and E as well as a memory stick marked D. The parties had no objection to the documents being handed in and were satisfied that the documents were what it purported to be except for page 50B bundle A which the Respondent placed in dispute.

Evidence by the Respondent

Mrs Nthabeleng Sylvia Mathebula testified under oath as follows:

- 11 She was working as an Intermediate Life Support and was registered with the HPCSA as an independent practitioner (page 53 bundle A). The Applicant was a Basic Ambulance Assistant, registered at HPCSA under supervised practice (page 54 bundle A). He worked under her supervision when he worked with her on a scene.
- 12 On 11 February 2019 she was at home. Between 18h00 and 19h00, people came to her house and asked for her assistance. She went to the house which was two streets away from her own and found a woman who gave birth in the toilet. The baby had fallen in the toilet and was busy drowning. She sent someone to her home to fetch her medical bag with medical equipment (called a "jumpbag"). She used her cell phone to light as there was load shedding. She took the baby out and started to do CPR with her mouth as she did not have all the equipment with her. The baby started to cough and "came back". She wrapped the baby in a towel and gave the baby to an old lady to hold. She realized that the mother had a foreign object in her vagina after the placenta came out. She did not know if the object was supposed to be there and assisted the mother from the toilet, which was outside the house, to the house. Both the mother and the baby were priority one patients. She saw an ambulance approaching and people screamed at the ambulance trying to stop it. The Applicant came with the ambulance and entered the house with his "jumpbag". She told him that she needed oxygen for the baby as the baby was gasping for air. The Applicant responded that he was not the one who was going to do the call. The call was going

to be done by the people from Smithfield. She did not answer him and again asked for oxygen. The Applicant went out to the ambulance. The Applicant took his time and she went out to the ambulance. She found him inside the ambulance sitting in the front driving seat. He was holding the small portable oxygen cylinder and told her that it had no regulator. She told him to bring the big cylinder. She went back inside the house to fetch both patients to take them to the ambulance. She then heard the ambulance driving away. She did not know how far the ambulance from Smithfield was. The situation with the baby and the mother was not good. She told the family to make a plan and to arrange for private transport. They took the patients to Zastron Hospital with a private car as it was the nearest. Upon her arrival at the hospital she found the Applicant standing next to his ambulance. He saw them, but instead of helping her with the patients he just stood there. She ran with the baby inside the hospital. She fetched a wheelchair and took it out to the mother. The Applicant never assisted with the patients. Fortunately, both the mother and baby were alive when she handed them over to the doctor. The doctor transferred both patients immediately to Pelonomi hospital as it was an emergency.

- 13 Her working relationship with the Applicant was never good because of other incidents. The Applicant was not professional and failed to do his job. She never worked with him again after the incident as they worked different shifts.
- 14 She conceded during cross-examination that the SOP states that only Control Centre will dispatch operational units and an instruction from Control Centre will take precedence (paragraphs 1.1 and 1.4 bundle C). She testified that a run-in call is when you are enroute to a scene after being dispatched and you get a run-in call whilst going to that scene. You must advise the Control Centre of the circumstances of the run-in call that would affect the instruction given by the Control Centre. The Applicant was not dispatched to the scene, but he got a run-in call which he was allowed to do in terms of the SOP. He was supposed to advise Control Centre of the circumstances. She testified that the Control Centre had called her at the scene before the Applicant had arrived.
- 15 She conceded that the Applicant had not seen the patients and he had not been dispatched to the scene. She had not issued him with an instruction to take the patients with her to the hospital. She had issued an instruction to bring oxygen which he had

not done. They were there for the community, when the community called an ambulance and it drove away, they were being disappointed and people die because of their negligence.

Mr. Lerato Michael Moloi testified under oath as follows:

- 16 He was the father of the baby who was born. He received a call from his sister that the mother was at the toilet and something had happened. She told him that they had called an ambulance and did not get hold of it. He then phoned the ambulance and told the dispatcher of the incident. He went to the scene. Upon his arrival he saw bystanders assisting there. He was speaking over the phone with the dispatcher who asked to speak to Mrs Mathebula. She had explained what had transpired on the scene. She returned his cell phone and he, the witness, then left the scene.
- 17 He was informed the following day that the mother and baby was taken to Pelonomi Hospital. There was no ambulance at the scene when he was there. He was told that an ambulance came afterwards but nothing had been done. They had to hire a car to take the patients to the hospital.

Mrs Tamzin Marwick testified under oath as follows:

- 18 She was the Station Manager for EMS at the Mohokari/Xhariep District.
- 19 She testified that a run-in call was when an ambulance was not dispatched to a scene but was stopped by the public and then told of an emergency. They were supposed to inform the Control Centre or the Supervisor and give immediate attention to the patient. The senior is supposed to take the scene over, the patient must be loaded in the ambulance and taken to the hospital whilst receiving medical attention in the ambulance.
- 20 The Applicant had abandoned the scene and the patients. The Applicant could not have attended to the patients alone as he was in supervised practice, but he should have assisted Mrs Mathebula. The Applicant's duties were to treat and transport patients as per the protocol and the safe delivery of patients to a medical facility of the patient's choice according to his job description (bullet 2 page 46 bundle B). She was

very disappointed in the Applicant's actions as everybody should have a fair chance in life. The ambulance was at the scene and to deny a small baby from oxygen is indescribable. They knew that babies are very dependent on oxygen and the baby's conditions may change in seconds. She felt that he was not trustworthy anymore. She did not know if he would attend to a scene when being sent there.

- 21 She conceded during cross-examination that the Applicant had never been suspended at work. It was not in her powers to suspend him, only the District Manager could suspend him. She confirmed that he had worked since the incident until he received the outcome of his appeal on 8 January 2020, but he was well supervised during this period. She conceded that she was not his immediate supervisor. His immediate supervisor was Mr Appelgryn. There were no complaints about the Applicant during this period.
- 22 It was pointed out to her during cross-examination that the Applicant was initially dispatched to the scene, but he had explained that he had no crew and he was then told that he could go to Zastron. She answered that she was not aware of this. It was further pointed out to her that the call was not a run-call, the call was dispatched to Smithfield personnel after the Applicant had explained that he had no crew. She responded that the Applicant was at the scene with an ambulance and the equipment and he just left. It was pointed out to her that he was called by people to the scene. He was not responsible for the scene. She responded that it was what they called a run-in call. He had to inform the Control Centre of the situation as they could not see what was going on at the scene and that the baby could not breathe. It was only common sense to help the baby when the ambulance was outside the house. It was pointed out to her that the Applicant had not taken responsibility for the health of the patients. She responded that he was not supposed to do so, he was supposed to follow Mrs Mathebula's instructions. It was pointed out to her that the Applicant had been wrongly charged. It stated that he had abandoned the patient as he took responsibility of the patient. It was further pointed out to her that the Applicant was not instructed by Mrs Mathebula to transport the patients to the hospital. She responded that it was common sense that when a baby is not breathing and is blue he/she should be transported to the hospital by the ambulance standing there.

- 23 She had not received the handwritten letter that was written by the Applicant where he requested more information regarding the *audi* letter (page 50 bundle A). She had received the typed letter (page 50 A bundle A). She had not responded to his request as he wanted the information of the informer which was confidential. The *audi* letter was clear regarding the information that was required.
- 24 The HPCSA provide the guidelines and rules on how an Emergency Care Practitioner may practice. Personnel had to register with the Council and pay a registration fee. The life of an employee's employment contract depends on registration at the HPCSA. Employees were disciplined by the Respondent if rules of the HPCSA is broken.

Mr. Phillip Engelbrecht testified under oath as follows:

25. He was the Station Manager of EMS at Winburg. He also acted as the chairperson in the disciplinary hearing. The Applicant was represented by Mrs Xhamela from the PSA during the hearing. He gave the parties an opportunity to submit closing arguments in writing. He emailed his report with his guilty finding to the Applicant's representative and the Respondent's representative. He requested mitigating circumstances. It was supposed to be sent to him by 19 September 2019. On 23 September 2019 he phoned the lady and she said she was still learning and requested him to contact Mr Jack. Mr Jack requested postponement to submit the mitigating circumstances until 27 September 2019. They never sent it. It was pointed out to him during cross-examination that Resolution 1 of 2003 states that he had to give the employee an opportunity to present circumstances in mitigation. He responded that he had. He worked through the Applicant's representative.
26. It was put to him that he had allowed new evidence during re-examination and had not given the Applicant's representative an opportunity to cross-examine on the new issues. He responded that he could not remember such an instance. He would be able to respond if they were able to be more specific.
27. He testified that dismissal was the appropriate sanction for the Applicant's actions. He refused to obey the instructions of Mrs Mathebula. He did not transport the patients and he left Mrs Mathebula at the scene with two priority patients without informing her.

The case was “life-threatening and really serious. The trust relationship was irreparably damaged”. He testified during cross-examination that Mrs Mathebula was in charge of the scene, but they were both responsible for the patients until they hand the patients over to a health facility or to other qualified people who arrived on the scene. It was repeatedly pointed out to him that he was never dispatched to the scene, he answered that he arrived on the scene with an ambulance. He agreed that the Smithfield crew arrived at the house after the patients had been transported to Zastron with a private car (page 24 bundle A).

28. He went to the Control Centre to listen to recordings after the hearing as the Applicant had alleged that he was instructed by the Control Centre to leave the scene. The recordings were not submitted during the hearing. He decided that fairness dictates that he had to make sure of this. He conceded that neither the Applicant nor the Respondent’s representative were present when he did this. It was pointed out to him that this shows that he is biased as he went on his own to the Control Room to investigate the case. He responded that the argument came from the Applicant and not from the Respondent. He felt that the Applicant’s representative was also not assisting him well.
29. It was pointed out to him during cross-examination that they were not covered by the HPCSA to sit as their board. He responded that the HPCSA does not state that they may not deal with the issues. The Respondent was also not a court of law, but they found employees guilty of contravening the Road Traffic Act. In terms of the SOP all EMS personnel they are required to perform their duties within the scope of practice as prescribed by the HPCSA (page 16 bundle C).
30. The Applicant was supposed to assist with patient treatment and to bring the equipment as instructed, to assist her and transport the patients to the hospital for further treatment.

Evidence by the Applicant:

Mr. Malibongwe Simon Mcingani, the Applicant, testified under oath as follows:

31. On 11 February 2019 he reported for duty at 19h00. He was working night shift. He received a call from the Control Centre saying that there is a maternity patient in Rouxville at 186 Mbangula Street. He explained that he had no crew. Control Centre said that he could go to Zastron. On his way to Zastron people came to the ambulance requesting his services as someone had delivered. He rushed there as he was on his way out and stopped at the house. He took his jumpbag and went inside the house. When he entered the house, Mrs Mathebula was holding the baby. He told her that the Smithfield ambulance was dispatched for the call and that Control Centre said he had to go to Zastron. Mrs Mathebula said she needed oxygen. He said okay and went back to the ambulance. He was busy looking for the regulator of the portable oxygen cylinder and saw there was none. Mrs Mathebula came to the ambulance and he had explained that he could not find the regulator for the portable oxygen cylinder. Mrs Mathebula then said that she did not want the big oxygen cylinder and went back to the house. He started the ambulance and went to Zastron as the Control Centre had instructed him.
32. Mrs Mathebula only gave him one instruction namely to fetch oxygen in the ambulance. He later testified that no instructions were given to him. When the contradiction was pointed out to him during cross-examination, he testified that she had instructed him to fetch the oxygen. He had not treated the patients as Mrs Mathebula took full responsibility for the patients. She had not asked for his help and she had not instructed him to take the patients to the hospital.
33. He testified that a run-in call was when a person was on another call and on his way to the call , he was called by members of the public requesting his help, then he had to immediately phone Control Centre about the call and ask what he must do and then Control Centre would instruct him. The call at Mbangula street was a registered call and not a run-in call.
34. He had not seen Mrs Mathebula with the patients when they arrived at the hospital at Zastron.
35. He denied that the trust relationship between him and Mrs Marwick had broken down. He worked under supervision since the incident as he was required to work under

supervised practice. He wants to be reinstated as he wanted to help his community and the Respondent as he did previously.

36. He was not requested by the chairperson to submit his mitigating circumstances. The chairperson was supposed to request it from him in person as the Respondent had brought him his dismissal letter in person. He testified during cross-examination that he was satisfied with the representation of his representative from the PSA. He disagreed that he had waived the right to have communication directed to him in person when he selected to be represented.
37. He could not remember when the chairperson allowed new evidence during re-examination.
38. He was asked what had entitled him to work after his dismissal. He responded that he had lodged an appeal against his dismissal which entitled him to work until the outcome was given.
39. He testified during cross-examination that after he was stopped by the public and informed of the patient, he went to the house, jumped out of the ambulance with his jumpbag with the intention to assist the patients. He denied that this meant that he took responsibility for the patients. His responsibility only starts when he sees the patient. He had not informed the Control Centre that he had stopped at the house. It was pointed out to him that he had responded to the call even though it was not given by the Control Centre. He denied this. He was asked why he had stopped at the house when he was alone and without a crew. He answered that he “must stop when people stop an ambulance and give assistance”. He was asked why it was never put to Mrs Mathebula during cross-examination that she told him that she did not want the big oxygen cylinder. He responded that it was her version and this was his version.
40. He testified that the correct procedures were followed by the Respondent prior to his dismissal. It was pointed out to him during cross-examination that he was requested in the *audi* letter to give reasons why he had not transported the patients to the hospital. He was asked what was not clear about this. He answered that Mrs Mathebula was the senior on scene and responsible for the patients. The *audi* letter was not clear to him. He conceded that it was also not clear what information he needed in his letter.

It was pointed out to him that even though she had not responded to his request, he was given an opportunity to present his case during the hearing. He responded that it was the representative's views.

41. He testified that if employees were not performing their duties in line with the guidelines of the HPCSA then it amounts to misconduct.
42. The above-mentioned witnesses gave evidence under oath and were cross-examined. The parties filed written heads of arguments in closing.
 - 42.1 The Applicant's representative wrote that the Applicant's evidence was reliable on all material aspects and in line with the rules that govern EMS and the HPSCA. Regarding procedural issues, he wrote that a worker must always be given the chance to give his or her side of the story before the employer decides on dismissal. The Courts have held that the *audi alteram partem* (hear the other side) rule is based on four principles, namely (1) that a party to an administrative enquiry must be afforded an opportunity to state his or her case before a decision is reached, (2) prejudicial facts must be communicated to the person who may be affected by the decision in order to enable him or her to rebut such facts, (3) the tribunal must give reasons for its decision and (4) the administrative organ reaching the decision must be impartial. The Applicant was not been given the opportunity to state his side of the story before the decision to charge him was taken. Paragraph 7.3 (n) of the Resolution stipulates that a chairperson MUST give the employee an opportunity to present relevant circumstances in mitigation. The fact that the chairperson had informed the union of the Applicant does not justify the violation and it is blatant. The Resolution was a collective agreement and was a force of law. Parties may not agree to contract out or by consent depart from its terms. He briefly summarised the evidence presented by both parties. The Respondent's witnesses contradicted themselves on all material aspects in the case. The Applicant was not instructed by the Mrs Mathebula to transport the patients to the hospital and only the Control Centre may dispatch operation units. The Applicant was not guilty of breach of the rules. The Applicant's dismissal was substantively and procedurally unfair. The Applicant must be reinstated with full benefits.

42.2 The Respondent's representative wrote that the Applicant elected to be represented by a union, namely the PSA during the hearing. Paragraph 7.3 (d) of the Resolution stipulates that if the employee wishes, she or he may be represented in the hearing by a fellow employee or a representative of a recognized trade union. Paragraph 7.3 (n) stipulates that before deciding on a sanction, the chair must give the employee an opportunity to present relevant circumstances in mitigation. The representative of the employer may also present aggravating circumstances. The right to direct communication with the Applicant in relation to the case had fallen away. Provision was made by the chairperson for the union to present mitigating circumstances. The Applicant was not able to recall where new evidence was submitted during re-examination. It proves that there was no unfairness in this regard. It is common cause between the parties that an ambulance from Smithfield was dispatched to the house. However, the Applicant was available to give assistance, but failed to provide it whilst having the resources of the employer with him whilst being on duty. The Applicant was guilty of serious misconduct as the lives of patients are important to the Health Provider which is the Respondent. The actions of the Applicant compromised the lives of the two patients which are of paramount importance to the Respondent. It was the Applicant's responsibility to submit mitigating factors even after it had been communicated to his representative. The trust relationship had broken down between the Applicant and the Respondent as testified by Mrs Marwick. The Applicant worked under supervision whilst he lodged his appeal. Employees do report to work normally when they lodge an appeal. Resolution 1 of 2003 paragraph 7.2 (a) stipulates that an employer may suspend an employee, it is not mandatory. The fact that he was not suspended did not mean that he could not be dismissed for misconduct. The application must be dismissed as the Applicant's dismissal was substantively and procedurally fair.

43. I have not repeated all of the evidence before me but concentrated on those that assisted me on arriving at my final decision.

ANALYSIS OF EVIDENCE AND ARGUMENT

44. In terms of section 192 of the Act the onus rests on the Respondent to prove that the dismissal was substantively and procedurally fair.

45. The Applicant was charged with one charge namely that he had responded to an emergency call at House 186 Mbangula street, Rouxville, and that he had left the scene without treating and transporting patients.
46. In terms of Item 7 of Schedule 8 – Code of Good Practice: Dismissal a person should consider the following when determining whether a dismissal for misconduct is fair:
- (a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
 - (b) If a rule or standard was contravened, whether or not
 - (i) The rule was a valid or reasonable rule or standard;
 - (ii) The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) The rule or standard has been consistently applied by the employer;
 - (iv) Dismissal was an appropriate sanction for the contravention of the rule or standard.
47. The parties agreed as follows regarding substantive fairness:
- 47.1 The Respondent had the following rules at work.
- Rule 1: Standing Operational Procedures for Emergency Care Personnel (SOP) paragraph 3.2.1 “A patient should be taken to the closest appropriate medical facility”
- Rule 2: Health Professions Council of South Africa (HPCSA) Basic life Support Provider Guideline 5. Continuity of care “No one shall be abandoned by a health care professional worker or a health facility which initially took responsibility for one’s health”.
- 47.2 The Applicant was aware of the rules.
- 47.3 The rules were valid and reasonable.
- 47.4 The rules were consistently applied.
48. During the arbitration the Applicant’s representative raised an issue that the Respondent was not entitled to discipline an employee for breach of the guidelines of the HPCSA as the Respondent was not a tribunal of the HPCSA. The Respondent’s witnesses corroborated each other regarding the applicability of the guidelines and

rules of the HPCSA on the employees of the Respondent and that employees were disciplined for breach of the rules and guidelines of the HPCSA. This was corroborated by the SOP which stipulates that all EMS personnel are required to perform their duties within the scope of practice as prescribed by the HPCSA (page 16 bundle C). Even the Applicant had testified during cross-examination that employees who breached the guidelines of the HPCSA were guilty of misconduct. I am therefore satisfied on a balance of probabilities that the HPCSA's rules and guidelines are applicable to the employees of the Respondent, as initially agreed to by the parties, and that the Respondent is entitled to discipline employees when a rule or guideline of the HPCSA is breached.

49. It was agreed that I must determine whether the Applicant had breached the rules and whether dismissal is the appropriate sanction for breach of the rules.

Whether the Applicant breached the rule

50. It is common cause between the parties that an ambulance from Smithfield had been dispatched to the scene of house 186 Mbangula street Rouxville. It was further common cause that the Applicant went to the scene at house 186 Mbangula street Rouxville and that he had left the scene without taking the patients to the hospital. The Respondent's version is that the Applicant had abandoned the patients when he left the scene of 186 Mbangula street without taking the patients to the hospital. The Applicant's version is that he had not abandoned the patients as he had not taken responsibility for the patients, he was not given instructions by Mrs Mathebula to take the patients to the hospital and he was not dispatched to the scene by the Control Centre. The question arises whether the Applicant was responsible for the patients although he had not been dispatched by the Control Centre.
51. The SOP stipulates that calls from the Control Centre takes precedence. However, the Respondent's witnesses corroborated one another on the fact that they were obliged to attend to a run-in call which was when an ambulance was not dispatched to a scene but was stopped by the public and told of an emergency. They were supposed to advise the Control Centre of the circumstances of the run-in call that would affect the instruction given by the Control Centre. Mrs Mathebula testified that the Applicant was not dispatched to the scene, but he got a run-in call which he was allowed to do

in terms of the SOP. Even the Applicant had testified that a run-in call was when he was on a call, but on his way to the call, he was called by members of the public requesting his help. He testified that he had to immediately phone the Control Centre about the call and ask what he had to do and then Control Centre would instruct him. It is clear that in terms of the SOP not only calls dispatched through the Control Centre were attended to, they also attended to calls where an ambulance was stopped by a member of the public.

52. It was common cause between the parties that the Applicant had not taken the patients to the hospital but had left the scene. It is further the Applicant's version is that he had not taken responsibility of the patients and Mrs Mathebula had not instructed him to take the patients to the hospital. Mrs Mathebula conceded that she had not instructed him to take the patients to the hospital. The question arises whether it was necessary for her to do so. Mrs Tamzin testified that it was common sense that he had to transport the patients to the hospital. The Applicant's job description stipulates that the Applicant's duties were to treat and transport patients as per the protocol and the safe delivery of patients to a medical facility of the patient's choice according to his job description (bullet 2 page 46 bundle B). It is undisputed that this is the Applicant's job description.
53. The Applicant's version was that he was initially phoned about the incident by Control Centre but had explained that he was without a crew and not able to assist the patient. It is common cause before me that the Applicant was under supervised practice and not entitled to assist/treat patients on his own. However, during cross-examination, the Applicant testified that he was stopped by children and requested to come and assist. He testified that he took his jumpbag and ran inside the house to assist the patients. He was without a crew and still ran inside the house alone to assist the patients. It is clear when I regard his actions, that there is no need to be instructed by a senior to assist a patient. It was part of his job description to transport patients to the hospital. When the Applicant was asked during cross-examination why he had stopped at the house when he was alone and without a crew, he answered that he "must stop when people stop an ambulance and give assistance".
54. I am therefore satisfied on a balance of probabilities that it was the Applicant's responsibility to stop and assist the patients without first being instructed.

55. It was common cause between the parties that Mrs Mathebula had requested him to bring oxygen although he stated once during cross-examination that he had not been given any instructions, he had corrected it and testified that the only instruction that was issued to him was to bring oxygen. It is further common cause between the parties that he went to the ambulance to fetch the oxygen, but he was unable to bring the small cylinder. Mrs Mathebula's version was then that she told him to bring the big oxygen cylinder and went into the house. This was never disputed during cross-examination of Mrs Mathebula. During the Applicant's evidence in chief he testified that Mrs Mathebula had told him that she did not want the big cylinder anymore. This is a new version which was never put to Mrs Mathebula during cross-examination. I can therefore not attach any weight to it. I also find it improbable that she would tell him not to bring the big cylinder when the baby desperately needed oxygen.
56. The chairperson testified during the arbitration that Mrs Mathebula had testified that she had instructed the Applicant to transfer them to the hearing. This was not her version during the arbitration. This version was never put to Mrs Mathebula during cross-examination. I am not able to attach any weight to this.
57. I am satisfied, considering the above, that the Applicant was indeed obliged to assist the patients after he had been stopped by the children. I am further satisfied that he had abandoned them when he neglected to take them to the hospital.
58. I am satisfied that the Applicant had breached the rules of the Respondent.

Whether dismissal is the appropriate sanction for breach of the rule:

59. It is trite law that three enquiries are involved when determining whether dismissal is an appropriate sanction, namely an enquiry into the gravity of the contravention of the rule; an enquiry into the consistency of the application of the rule and sanction; and an enquiry into factors that may have justified a different sanction.
60. The parties had agreed that the Respondent had consistently applied its rules.

61. The second enquiry relates to an enquiry into the circumstances of the contravention. It is trite law that dismissal as a sanction is normally reserved for serious misconduct. I am satisfied that the Applicant was found guilty of a very serious offence when I consider the nature of his job. He was an Emergency Care Practitioner whose responsibility was to attend and transport patients. I must agree with the Respondent's representative the Applicant's responsibility was to save lives. I find it interesting that the Applicant stated that he wanted to be reinstated so that he could serve his community as he did previously. It is unfortunate that the Applicant had not done this on the night in question. The Applicant is appointed to serve the community. He is supposed to assist and serve the poor and the vulnerable, but he had abandoned the mother and a baby when they desperately needed medical attention. He refused to obey an instruction from Mrs Mathebula to bring oxygen. The community was forced to hire a vehicle to take them to the nearest hospital at Zastron. I further view it as aggravating that he had again failed to assist the patients when they finally arrived at the hospital.
62. Mrs Marwick, the Station Manager of the District, testified that she did not trust the Applicant anymore. She conceded that she was not the Applicant's direct Supervisor. It is common cause before me that the Applicant was never suspended but continued working until he received the outcome of the appeal. Mrs Marwick had testified that the decision to suspend does not lie with her. The Applicant's representative pointed out to Mrs Marwick that the fact that he had continued working for the whole period without any further incidents showed that the trust relationship had been amended.
63. The Applicant never showed any remorse for his actions during the arbitration. In fact, he tried to distance himself from the taking responsibility for the patients throughout the arbitration. I am guided by the Labour Appeal Court case **De Beers Consolidated Mines Ltd v CCMA & others (2000) 21 ILJ 1051 (LAC)** at paragraph 25 where Conradie JA had this to say about the employer's position when called upon to re-employ a remorseless employee:
- "This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrongdoing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to**

re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk to continue to employ the offender is unacceptably great.

4] In the instant case I am of the view that the employee's remorseless attitude did the employment relationship untold harm. Over and above the gravity of the misconduct, coupled with the magnitude of the employer's loss, the employee still falsely persists on oath in his answering affidavit that he had done no wrong. He is basically a fieldworker. Driving is an essential component of his daily work routine. His repeated but false denial speaks volume. **The employer was understandably anxious and apprehensive that there was a great risk, that given another chance, the remorseless employee who did not acknowledge the wrong he had done, would do it again** and that he would remain a great risk to retain as a member of the workforce allowed to drive its motor vehicles (my emphasis).

64. In **Department of Labour V GPSSBC (2010) 31 ILJ 1313 (LAC)** the Labour Appeal Court confirmed the principle that a sanction aimed at correction and rehabilitation is of no purpose when an employee refuses to acknowledge the wrongness of his/her conduct.
65. The Applicant was not charged for dishonesty, but, in my view, the lives of patients are of equal importance, if not more, than being honest at work. I can therefore not agree with the Applicant's representative that the trust relationship had been amended.
66. I take into account that the Applicant was a first offender. However, when I take into account the nature of his job, his lack of remorse, the seriousness of the offence, his refusal to obey an instruction to bring oxygen, then I am satisfied that dismissal is justified in these circumstances.
67. I am satisfied that dismissal was the appropriate sanction for breach of the rules.
68. I find the dismissal substantively fair.

Regarding procedural fairness

69. During the narrowing of the issues the parties that procedural fairness is regulated by Resolution 1 of 2003 which is a Collective Agreement.
70. Regarding procedural fairness, I have to determine whether the Respondent complied with Resolution 1 of 2003 when it was alleged that the chairperson was biased as he failed to give an opportunity to the Applicant to submit mitigating circumstances and he had allowed new evidence during re-examination without allowing the Applicant's representative an opportunity to cross-examine on the new issues that were raised. The Respondent had furnished the Applicant with an *audi* letter, requesting him to respond to the allegation, but the Applicant had requested further information which was not provided to him which led to the Respondent not complying with the *audi alteram partem* rule before he was charged.

Whether the chairperson was biased

71. It was alleged during the narrowing of the issues that the chairperson was biased as he had failed to give an opportunity to submit mitigating circumstances to the employee. The evidence before me is that the chairperson had requested mitigating circumstances from the Applicant's representative, a lady from the PSA. When she had not submitted it, the chairperson had phoned her to enquire about it. He was told to phone Mr Jack, the Applicant's representative during the arbitration, which he did. Mr Jack had requested a postponement until 27 September 2019 to furnish the mitigating circumstances, but it had never been submitted. This was never disputed during cross-examination of the chairperson. It is common cause before me that the Applicant was represented by an official of the PSA during the arbitration. The Applicant's contention was that he should have been requested in person to submit his mitigating circumstances and not his union.
72. I am therefore satisfied that the Applicant's representative was requested to submit mitigating circumstances. I must agree with the Respondent's representative that when a person is being represented during proceedings, then the chairperson works through the representatives and not the employee in person anymore. This is actually

trite law and practice. It was the union's responsibility to consult with the Applicant regarding the mitigating circumstances and to submit it timeously. I am therefore satisfied on a balance of probabilities that the chairperson had given an opportunity to submit mitigating circumstances to the Applicant via his representative.

73. It was further alleged that the chairperson had allowed new evidence during re-examination whilst he had failed to give the Applicant's representative an opportunity to cross-examine on the new issues. The chairperson testified that he could not remember such an instance and requested to be given more information. The information was not provided and the Applicant testified during cross-examination that he could not remember such an instance. There is therefore no evidence before me to prove that the chairperson had indeed allowed new evidence to be presented during re-examination without providing an opportunity for cross-examination.
74. Considering the above, I am therefore not satisfied on a balance of probabilities that there exists a reasonable apprehension of bias on the side of the chairperson.

Regarding whether there is compliance with the *audi alteram partem* rule

75. It was alleged during the narrowing of the issues that the Respondent's failure to respond to the Applicant's request for further information after he was issued with the *audi* letter, had resulted in him not being given an opportunity to be heard prior to him being charged. It was alleged that the Respondent had failed to comply with the *audi alteram partem* rule.
76. It is common cause before me that a hearing was held. It is not the Applicant's case that he had not been given an opportunity to state his case during the hearing. There is further no evidence before me to prove that the Resolution stipulates that it renders a disciplinary hearing procedurally unfair by not responding to a request for further information by an employee. I take into account that the purpose of the *audi* letter is to give an employee an opportunity to respond to allegations, to be given an opportunity to be heard. I am therefore not satisfied that the Respondent's failure to respond to the request for further information resulted in the non-compliance of the *audi alteram partem* rule as the Applicant had been given another opportunity to state his case during the hearing.

77. The parties had only raised these two issues regarding procedural fairness during the narrowing of the issues. However, when the chairperson had testified, he testified that he was not biased as he even went to the Control Centre to listen to recordings, after the hearing, when the parties were not present. The Applicant's version was that he had been ordered to go to Zastron by the Control Centre. He deemed it necessary to do this investigation as he felt that the Applicant was not represented well during the hearing. The Applicant's representative pointed out to the chairperson during cross-examination that he was biased because he had done this. The question arises how the actions of the chairperson should be viewed.
78. It is trite law that an award may not be founded on matters that occurred to the arbitrator but the parties had no opportunity to address on **(Tao Ying Metal Industry (Pty) Ltd v Pooe NO and others (2007) 28 ILJ 1949 (SCA)**. The Court held that this was simply an application of the principles of natural justice, and in particular the right to be heard, the *audi alteram partem* rule. As stated previously, this issue was not raised during the narrowing of the issues. However, this, in my view, is quite understandable as the Applicant was not aware of this. It only arose during the testimony of the chairperson. It was pertinently pointed out to the chairperson during the cross-examination that this showed that he was biased. I have not asked the representatives to address me on this issue in their written heads of arguments as they were both experienced representatives and the issue was pertinently raised during the arbitration. I am therefore, in my view, obliged to find on this as it was pertinently raised during the arbitration and both parties had the opportunity to deal with the issue.
79. I am guided by the case **Danone Southern Africa (Pty) Ltd and Another v Commission for Conciliation, Mediation and Arbitration and Others (JR2177/16) [2017] ZALCJHB 252 (30 June 2017)** where the Labour Court had criticized the actions of a commissioner where he went behind the parties' backs off on his own mission of trying to find what had happened to a dispute. He dug up CCMA files and perused those files without the parties being aware of it. He arrived at conclusions without alerting the parties of his investigation and without affording them with an opportunity to answer to what he had discovered. The court had held that he had not complied with the *audi alteram partem* rule and made himself guilty of misconduct.

80. In my view, the chairperson also did not comply with the *audi alteram partem* rule in this regard and had denied the Applicant an opportunity to be heard regarding his investigations. In my view, this renders the dismissal procedurally unfair.

Regarding the appropriate remedy

81. As stated previously, I am satisfied that the dismissal of the Applicant is substantively fair, but procedurally unfair. The Applicant requested reinstatement. In terms of section 193 (2) of the Act reinstatement is the primary remedy as it states as follows:

“The Labour Court or the arbitrator **must** require the employer to reinstate or re-employ the employee unless:

- (a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is only procedurally unfair”

82. It is clear from the above, that I am only entitled to award compensation as the dismissal is only procedurally unfair. When considering the appropriate amount of compensation, I consider the following:

82.1 The Applicant was employed by the Respondent for a period of 8 (eight) years.

82.2 The dismissal is substantively fair, but procedurally unfair.

82.3 The Respondent breached a rule of natural justice, namely the *audi alteram partem* rule.

82.4 I take into account that I have come to the same conclusion as the chairperson, namely that he was guilty of breach of the rules and that dismissal is the appropriate sanction. I am satisfied that the Applicant was not unduly prejudiced by the procedural unfairness.

82.5 This was the only issue that made the dismissal procedurally unfair.

82.6 A period of approximately 8 (months) months had passed since the time of the dismissal and the date of the arbitration.

82.7 The Applicant earned R13 283.00 per month.

83. Considering the above, I deem it appropriate to award the Applicant one (1) month compensation in the amount of R13 283.00.

AWARD

84. I make the following award:

84.1 The dismissal of the Applicant is substantively fair, but procedurally unfair.

84.2 The Respondent, **Department of Health Free State**, is ordered to pay the Applicant, **Malibongwe Simon Mcingani**, in the amount of **R13 283.00** on or before 2 October 2020 minus such deductions as the Respondent is in terms of the law entitled or obliged to make.



Elsabè Skinner