



ARBITRATION AWARD

Commissioner: **KM Moodley**

Case No: **PSHS1220-18/19**

Date of award: **5 September 2020**

In the matter between:

NEHAWU obo Sipiwe Peter Mhlungu

Applicant

and

Department of Health- KwaZulu Natal

Respondent

Details of the hearing and representation

1. The arbitration was held over several sessions at the boardroom, Natalia, in Pietermaritzburg and was finally concluded on 14 August 2020. The Applicant was represented by Advocate AT Ngubane. The Respondent, Department of Health-KwaZulu Natal was initially represented by the late Mr. SB Msane and thereafter represented by Mr. MM Lembethe. The proceedings were mechanically recorded and all witnesses testified under oath. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter.
2. The parties tabled bundles of documents, i.e. Bundle A was tabled by the Applicant. and Bundles B and C were tabled by the Respondent The contents of the bundles were accepted by both parties as being what they purported to be. A pre-arbitration minute was concluded and signed by the parties and submitted into the record. Both parties presented their Closing Arguments in writing. No points in limine were raised by either of the parties.
3. No objection was raised to me as the Commissioner presiding over the arbitration.

Issue to be decided

4. The issue to be decided is whether the dismissal of the Applicant was unfair, and if so, what the remedy should be.

Common cause issues

5. The following were issues of common cause:
 - 1) All four charges are linked to the Applicants use of state vehicle KZN 211135 during the period 26 to 29 January 2018.
 - 2) The Applicant admits that he was the driver of the vehicle when the accident occurred on 26 January 2018 and that he paid in the cost of repairs to the state vehicle in the amount of R28,02 9,56 to the Respondent.
 - 3) The Applicant deviated a distance of less than 1 km from the main road to buy some lunch at Westville Spar.
 - 4) The Applicant used the Respondent's petrol card to refuel the vehicle on the 26th of January 2019.
 - 5) The Applicant does not deny that on the 26th of January 2018 he drove the vehicle KZN211135 to his home in Sweetwaters without authorisation.

Issues in dispute

6. The Applicant challenged the procedural and the substantive fairness of the dismissal.

Background to the dispute

7. At a disciplinary enquiry held on the 5 March 2019 the Applicant was charged with the following:

Charge 1: Dishonesty:

“You provided different versions on what transpired during accident that took place during the period 26 to 29 January 2018 while you were driving the vehicle KZN 211135 despite being afforded numerous opportunities you decided to withhold the information.

The damages on the vehicle suggest that something serious must have happened but you are failing to be honest with the employer on what transpired during the accident.

You further indicated that when you came back from Durban on 26 January 2018 you realised it was already late you therefore went straight home whereas the records at our disposal indicate that around 21h00 you were still around town in Pietermaritzburg

Charge 2: Fraud:

You falsified information on the trip authority in relation to kilometres it was concluded that it was for your own personal gain.

Charge 3: Unauthorised use of State property:

You used the state vehicle KZN 21135 outside and beyond authorised period. You used the state property without authority when you took the vehicle KZN211135 according to you, to your home in Sweetwaters.

You abused the state property KZN 211135 by diverting out of the route and drove to Westville spar and to conduct your private affairs.

You caused damage to state property vehicle KZN 211135.

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Charge 4: Unauthorised use of petrol card:

At 21h07 you used petrol card that belonged to employer at Pietermaritzburg Caltex garage without authority when you used the vehicle KZN 211135 without authority.”

8. Although 4 charges were listed there were several charges within the charges.
9. The Applicant was found guilty of the charges and was dismissed. He then lodged a dispute with the council. The matter was then set down by the Council for arbitration. The Applicant sought to be reinstated with retrospective effect.

Survey of evidence and arguments

10. As the proceedings were mechanically recorded, reference will only be made to that evidence which bears relevance to my findings.

Respondent's case

Witness 1: Masuzgo Muhondo: (Assistant Director: Corporate Governance)

11. Muhondo testified on the policy and procedure that the Applicant was required to follow when using a state vehicle, and the responsibilities of the driver when doing so. He testified that the trip must be authorised by a supervisor before commencement of a journey. The driver is only permitted to travel within the route that the trip is authorized for. Authorisation is also required should the vehicle be required to be kept elsewhere overnight. He stated that it is an offence should the vehicle be operated outside the authorised times and routes.
12. Muhondo stated that on 26th January 2018 he allocated vehicle KZN 20135 to the Applicant. The vehicle was supposed to have been returned by 17h35. He stated that there were instances when vehicles were returned after the authorised period, and where mistakes were made in the recording of mileage and trip details on the trip sheet. He testified that on 26 January 2018 he noticed that the odometer readings of vehicle KZN211135 were altered on the trip sheet. This was not permitted. He stated that he should have brought these irregular practices to the attention of the senior managers but he did not.

Witness 2: Nontuthuzalo Pakade (Office Manager: Legal Services)

13. Pakade testified that on 26 January 2018 the Applicant was instructed to deliver documents to Dr. Batchelder in Kloof and thereafter he was to proceed to King Dinuzulu hospital in Durban. He was not authorized to deviate from the route and from the times authorized on the trip sheet.
14. Pakade then waited up to 15h00 on that day and as she did not hear from the Applicant, she then called him. However, there was no response. On the 29 January 2018 the Applicant told her that he had been involved in an accident on 26 January whilst driving from Durban. He told her that he had knocked into a pedestrian on the freeway but when he stopped the car the pedestrian ran away. The Applicant then drove back to Pietermaritzburg.
15. She testified that the Applicant also gave her a second version as to what happened. He also told her that he went to see a friend in Westville before proceeding to King Dinuzulu hospital. On his way back to Pietermaritzburg he knocked down a pedestrian. He then drove the vehicle to work and parked the

vehicle there. The Applicant then went home. She then referred the matter over to the labor relations department.

16. Pakade then walked out of the arbitration proceedings as she had other matters to attend to. She subsequently refused to return to the arbitration despite many efforts. The cross examination could not be completed.

Applicant's case

Applicant: Witness 1: Sphiwe Peter Mhlungu

17. The Applicant testified that on 26 January 2018 he was instructed to deliver documents in Kloof and at King Dinuzulu hospital in Durban. On his way back he went to Spar supermarket in Westville where he bought food and a cold drink. He then sat down to eat his lunch there.
18. On his way back the vehicle had a problem with the tyre, on the M13 road. As there was no wheel spanner in the vehicle he had to wait on the roadside until someone assisted him. As a result of this delay he only reached Pietermaritzburg at about 21h00. When he saw the fuel gauge on low level, he decided to refuel the vehicle in Pietermaritzburg using the state-owned petrol card. As it was now late and he could not get public transport at that hour he decided to drive to his home in Sweetwaters with the state vehicle.
19. On the following day, 27 January 2018 he was on his way from Sweetwaters to Pietermaritzburg to return the vehicle when he met with an accident. As the vehicle was extensively damaged, he decided to drive back home to Sweetwaters. He only returned the vehicle to the Respondent the next day. He then reported the matter to Pakade He also reported the incident to SAPS.
20. The Applicant denied having given two versions of this incident to Pakade. He stated that he had only issued one statement to the Respondent. The Applicant did not deny that he had deviated from the authorized route on that day, but he had a good reason to do so. He wanted to buy food. He further stated that it was a common practice to deviate from a route as he had done so several times before.
21. The Applicant denied that he had altered the odometer readings on the trip sheet, fraudulently. He stated that as he had entered the mileage incorrectly on the trip sheet, he corrected it as soon as he realized his mistake. He had simply corrected the mileage on the trip sheet.

22. He further testified that as he had authorization to use the vehicle on 26 January 2018 therefor, as the driver of the vehicle, he automatically had authorization to use the petrol card associated with that vehicle. Therefore, he was not guilty of the charge.

Analysis of evidence and argument

23. The Respondent presented its case very poorly. It failed to secure its key witnesses timeously, if at all. All its problems excepting one, were of its own making and could have been avoided if more effort was put in its preparations. Notwithstanding all the shortcomings of the Respondent I granted extensive indulgence to the Respondent, against the wishes of the Applicant. At times the matter either stood down or the Respondent's application for postponement in order to secure its remaining witnesses, or to secure additional witnesses, was granted. Notwithstanding this indulgence the Respondent failed to secure its witnesses. Eventually the representative of the Respondent reported that he could not secure additional witnesses and would be closing the case. This was a very risky thing to do.

24. At the pre arbitration conference the Respondent indicated that 5 witnesses would be called. However only one witness testified in full. The second witness walked out of the proceedings during the course of her cross-examination as she had other private engagements to attend to. She refused to return to the proceedings as she was no longer interested in doing so.

25. It is understandable that Mr. Msame, who was the initial representative of the Respondent, had recently passed away and so a new representative had to be appointed during the course of the proceedings. However, the Respondent's repeated failure to subpoena witnesses timeously in order to secure their attendance at the arbitration, cannot be condoned. To expect to succeed in an arbitration without securing key witnesses is in my view, simply wishful thinking.

26. In addition, the quality of the one witness, Muhondo, left much to be desired.

27. The Respondent's second witness, Pakade walked out of the arbitration proceedings while she was still under cross examination, and never returned. The Respondent was permitted to introduce new documents into the record during the course of the proceedings, even though they were not included in their initial bundles of documents.

Procedural fairness

28. The Applicant challenged the procedural fairness of his dismissal arguing that in terms of Resolution 1 of 2003 an investigation must be finalized within two weeks from the date on which the incident came to the attention of the employer. In this instance the offence occurred on 26 of January 2018 and the Respondent became aware of the incident on 29 January 2018. The Applicant was duly charged on the 25th of July 2018 i.e. some 5 months later. No evidence was led by the Respondent as to the reasons for the delay and why this procedure was not followed.

29. I find that the Respondent failed to comply with its own procedure and that there was procedural unfairness in this matter.

Substantive Fairness:

30. I did not find Muhondo to be a reliable witness. Although he was able to outline the procedure to be followed by state employees when requesting for and utilizing state vehicles, however under cross examination he floundered on several occasions. At times his evidence supported the version of the Applicant rather than the version of the Respondent.

31. The Respondent charged the Applicant for using a petrol card for vehicle KZN 21135 without authority. The Applicant testified that as he had arrived late from Durban, i.e. at about 21h00, he was compelled to refuel the vehicle as the fuel level was low. Therefore, it was not irregular to use the petrol card to refuel the vehicle. When Muhondo was asked whether it was wrong to refuel the vehicle KZN 21135 in the manner that the Applicant did, Muhondo replied "No, otherwise he would have been stranded".

32. I therefore accept the version of the Applicant that it was not irregular to use the petrol card to refuel the vehicle, as his version is supported by Muhondo.

33. Muhondo also testified that he had noticed "a trend of returning vehicles after the authorized periods..." and that although he had control over these matters, he did not bring it to the attention of the senior managers.

34. The Applicant testified that " it was a norm that I was allowed to deviate from the trip authorization whenever I came back late", and that such deviation from the authorized route was normal practice in the past as no disciplinary action was taken against him. In support of his version the Applicant cited two instances where he

had stayed over without formal authorization being granted. On 7 July 2017 he had gone to Vryheid on the instruction of chief director Mkasi in order to undertake a private errand for Mkasi at the Engen Garage in Vryheid. As it was late, he stayed over at Dundee and only returned the vehicle on 8 July 2017 although no authorization was granted for him to do so. No disciplinary action was taken against him for this incident although his supervisors knew about it.

35. In the second incident on 19 June 2017 the same chief director Mkasi instructed the Applicant, who was on leave at the time, to drive a state vehicle to Empangeni. In that incident as well, the Applicant arrived late that evening in Pietermaritzburg and drove the State vehicle to his home in Sweetwaters. This was also without authorization and no disciplinary action was taken against him for this. From this I can only conclude that the Applicant erroneously believed that he could take the state vehicle to his home in Sweetwaters without authorization, and that there would be no consequences.

Was there a Rule?

36. Evidence was led by the Respondent that the “Policy on State owned Vehicles- version 1 of 2017” was applicable to all state employees who used state vehicles. This was not challenged. Therefore, I am satisfied that there was a rule in place.

Was the rule a reasonable one?

37. The policy is applicable to all state employees utilizing state vehicles. No evidence was led to show that the rule was unreasonable. I therefore accept that the rule was reasonable.

Was the Applicant aware of the rule?

38. Although the policy on state owned vehicles was introduced as evidence by the Respondent, no evidence was led to show that the Applicant was aware of the rule. As the Applicant did not argue that he was not aware of the rule not to deviate from the authorized route, I can conclude that he was aware of the rule.

Did the Applicant contravene the rule?

39. The Applicant admitted that he deviated about one kilometer from the authorized route in order to buy lunch. Therefore, the Applicant contravened the rule.

Was the rule consistently applied?

40. The Applicant argued, incorrectly, that as he had deviated from the authorized routes on several occasions and as he was not disciplined for this by the Respondent therefore the Respondent had acted inconsistently. The Respondent's reluctance and or failure to discipline the Applicant on the previous occasions that he deviated from the authorized route, does not take away the right of the Respondent to discipline the Applicant for contravening the rule, in this instance. In *Cape Town City Council v Masitho and others* (2000) 21ILJ 1957 (LAC) the Court held that an employer cannot be expected to continue to repeat a wrong decision in the name of consistency.

Was dismissal an appropriate sanction?

41. S4 of Schedule 8 of the Code of Good Practice; Dismissal, provides that it is generally not appropriate to dismiss an employee for a first offence except if the misconduct is serious and of such a gravity that it makes a continued employment relationship intolerable.

42. No evidence was led to show that this was not a first offence. It was common cause that the Applicant deviated only about one kilometer from the authorized route in order to buy lunch for himself. This, in my view, is not regarded as an act of serious misconduct. No evidence was led to show that the employment relationship was so intolerable that dismissal was the only possible sanction. The Respondent has also failed to apply the concept of corrective discipline in this instance.

43. Under these circumstances I find that the sanction of dismissal is not an appropriate one, and therefore the dismissal of the Applicant is unfair.

44. Witness Pakade walked out of the proceedings while she was being cross-examined as she had other errands to carry out. The Applicant was denied the opportunity to complete the cross examination, and so he applied for the evidence of Pakade to be disregarded. The Respondent however requested that the evidence already presented by Pakade was sufficient enough to be accepted as evidence. I have decided to accept only that part of the evidence of Pakade that can be corroborated.

45. I found Pakade to be neither credible nor reliable. She contradicted herself on more than one occasion. She initially testified that she was the immediate supervisor of the Applicant. However, under cross examination she conceded that one M Temba was the immediate supervisor of the Applicant, and not her. She then testified that

on 26 January 2018 she telephoned the Applicant at about 15h00. as she was worried that he had not returned. I found this hard to accept as Pakade knew very well that she had authorized the Applicant's trip up to and including 17h35 and therefore at the time that she telephoned him the Applicant was not late.

46. Pakade also testified that the Applicant gave her two conflicting versions of what had transpired on the 26th of January 2018. The Applicant on the other hand denied this and testified that he had only given one version of what had transpired. On a balance of probabilities, I find the version of the Applicant to be more probable than the version of Pakade and therefore I accept the version of the Applicant that he gave only one version of what had transpired on 26 January 2018.
47. The Applicant was also charged for fraud in that he falsified information on the trip sheet in relation to the kilometers. The Applicant testified that initially he had filled in the odometer readings incorrectly on the trip authorization sheet so he was merely correcting the mileage. When this version was put to Muhondo, his response was that he "can't comment". As no other evidence was led by the Respondent to prove that an act of fraud had been committed by the Applicant, I accept the version of the Applicant that no act of fraud had been committed.
48. The Applicant did not deny that on 26 January 2018 he deviated one kilometer from his authorized route to Westville Spar where he bought, and ate, lunch. The Respondent pointed out that in the Applicants initial statement he indicated that he bought groceries and not lunch, from the Spar. However, as the parties have signed a pre arbitration minute confirming that the Applicant had bought lunch at the Spar I accept the version of the Applicant that he bought lunch and not groceries.
49. The Applicant also argued that as he is employed by the Respondent as an Administration Clerk it is not one of his designated duties to drive the state vehicle doing deliveries. He was merely assisting the Respondent to carry out these functions therefore he should not be disciplined for this incident. I reject this argument for the reason that the Applicant had a choice to either accept the additional duties or object to it. By accepting this duty, the Applicant is automatically bound by the Respondent's policies and procedures concerning the use of state vehicles.

Conclusion

50. In matters of this nature the onus is on the Respondent to prove on a balance of probabilities that the dismissal of Applicant is fair. In this instance I find that the Respondent has failed to discharge this onus successfully. I therefore find the dismissal of the Applicant procedurally and substantively, to be unfair, and I rule accordingly.
51. The Applicant was dismissed on the 22 February 2019 and earned a salary of R16 920.97 per month at the time of his dismissal. The backpay due to him for the period 22 February 2019 (date of dismissal) to 5 September 2020 (date of award) amounts to $R16\,920.97 \times 18,5 \text{ months} = R313\,037.95$.
52. The Applicant argued for costs to be awarded as the Respondent was responsible for much of the delay in these proceedings. However, I decline to award costs as some of the delays were beyond the control of the Respondent.

Award

53. I make the following award:
54. The dismissal of the Applicant, Sipiwe Peter Mhlungu, procedurally and substantively, is unfair.
55. The Respondent, Department of Health- KwaZulu Natal, is hereby directed to reinstate the Applicant, Sipiwe Peter Mhlungu, to his previous post of Administration Clerk: Legal Services with retrospective effect, i.e. with effect from 22 February 2019.
56. The reinstatement shall be on the same terms and conditions of employment as was applicable to the Applicant at the time of his dismissal on 22 February 2019.
57. As a result of the retrospective effect of this reinstatement the Respondent is hereby directed to pay the Applicant an amount of R313 037.95 being backpay due to the Applicant from date of dismissal up to the date of this award.
58. The Respondent is also directed to pay the amount of R313 037.95 into the bank account of the Applicant by no later than 20 September 2020.
59. The Applicant is directed to tender his services to the Respondent on 20 September 2020.
60. I make no order as to costs.

KMoodley

COMMISSIONER: KM MOODLEY