



# ARBITRATION AWARD

Arbitrator: **Mr. Anand Dorasamy**

Case No: **PSHS44-17/18**

Date of Award: **25 JULY 2017**

In the matter between:

**R V NKAMBULE (NDABA)**

(Union/ Applicant)

and

**DEPARTMENT OF HEALTH- KWAZULU NATAL**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. Ms N Mthembu an attorney represented the applicant and Mr MN Langa represented the respondent. This dispute relates to an allegation of unfair dismissal.
2. The arbitration proceedings were set down for the 17 and 18 July 2017 and after the evidence was tendered the parties agreed to submit written closing arguments on the 21 July 2017.

## ISSUE TO BE DECIDED

3. The issue to be decided was whether the dismissal of the applicant was substantively fair. Should I find in favour of the applicant I am to determine the appropriate relief.

## **BACKGROUND TO THE ISSUE**

4. The applicant faced four charges according to the charge sheet (bundle B page 32) dated the 10 March 2015 and he was found guilty of charges 1 (b) and 1 (c) and dismissed after his appeal was unsuccessful.

5. The misconduct charges preferred against the applicant for which he was found guilty are recorded as follows:

6. It is alleged that you:

### **Charge 1(b)**

During the period 01 February 2015 to 08 March 2015 at or near Nqutu EMS Sub District, you failed to comply with the instruction in that you failed to work night shift as per approved roster that is in line with operational requirements of the Department.

### **Charge 1 (c)**

During the period 09 February 2015 to 08 March 2015 at or near Nqutu EMS Sub District you reported for duty while under the influence of intoxication which is not in line with the departmental policy thereby contravening the provisions of Code of Conduct for Public Service Section 4.5.2.

7. The applicant challenges only the substantive aspects of his dismissal and seeks retrospective re-instatement with back pay.

8. The respondent contends that the dismissal was substantively fair and prays for the dismissal to be confirmed.

## **SURVEY OF EVIDENCE AND ARGUMENT**

9. The salient aspects of the party's evidence are recorded below:

## **RESPONDENT'S OPENING STATEMENT**

10. The Department will call three witnesses to show that it acted substantively fairly when dealing with the applicant's misconduct. It prays that the dismissal stands.

## **APPLICANT'S OPENING STATEMENT**

11. The applicant contends that his dismissal was unfair and does not challenge the procedural aspect of his dismissal only the substantive aspect. In respect of charge 1 failure to report for night duty the employer was aware of his reasons and could have accommodated him and could have dealt with it in another way. He seeks retrospective re-instatement with back pay.

## **RESPONDENT'S EVIDENCE**

### **PERCIVAL NDAWONDE**

12. The salient aspects of his testimony are recorded below.

13. He is the shift supervisor since 2008 and knows the applicant.

14. He is familiar with the document in bundle B pages 26-27 as it is his statement that he submitted because the applicant was having problems and the doctor told him to work day shift as the medication made him drowsy.

15. In EMS there is no day shift only. He submitted the medical certificate when his wife had a break in, (January 2014), when he was on night shift. Then he went home to sort out the problem and the following day he took some leave to take his wife for counselling.

16. Thereafter he asked to work 4 months day shift and Mr Molefe granted him his request. When he returned he wanted to extend the day shift and that is when the problem started. At the time there was a shortage of vehicles but when he came back it was a problem and they could not assist him.

17. Then he was working against the roster and he was told to work 2 day shifts and 2 night shifts. On the first night shift the ESV (vehicle) was outside and when they were asked for a reason his crewmate said that he (applicant) was in his car. He said he was taking medication so he can't work.
18. He phoned Mr Mbatha the district manager who told him to take the applicant home. The applicant left his car at the base. Mr Mbatha asked him to ask the applicant to see a doctor. The second night shift he came again and took his medication at 18H00. He again phoned Mr Mbatha who told him to take the applicant to the hospital and the doctor confirmed that the medication made one drowsy.
19. The applicant could not work and he had to call the overtime staff to replace him.
20. The following shift he did the same until the case was held. He would come to work signed the register and then went away and sometimes he booked off sick. He is aware of the document on page 27 as the applicant wrote to work day shift (11:08:2014). After that date he never worked night shift. He is familiar with the document on page 28, the SOP (Standard Operations Procedure) and they are bound by it .
21. The applicant would come to work and take medication while on duty. He put question marks against the applicant's name on the register because he was not at work as he would come at 19H00 and leave around 20H00. He did not do any work. He was accommodated because Mr Molefe gave him months to sort his life out. He worked day shift for 4 months.
22. Under cross examination he stated as follows:
23. The applicant said that he could not work because he was drowsy. There was no need to draw his bloods.
24. The request to work day shift (11 August 2014) was written before the applicant was charged (10 March 2015). The applicant was charged in 2015 and dismissed in 2017.

He worked during that period but did not work night shift. He asked management what to do.

## **RALPH DENNIS MOLEFE**

25. The salient aspects of his testimony are recorded below.

26. He is the acting sub district manager since 2013. He replied to the union's request for the applicant to work day shift only (pages 51 and 52) He could not grant the request and the applicant did not work night shift after he wrote the letter.

27. He granted him 4 month's day shift to support his wife who was attacked. After the 4 months, he instructed him to go back to the normal shift that of 2 day and 2 night shift. The applicant would work day shift and was absent at night.

28. He called the applicant, Mr Mazibuko and Mr Mbatha to discuss the matter. He asked the applicant to swop with someone and he would grant the swop but he did not come up with a swop. Thereafter he came at night but did not work. When he came during the day he was not allocated any work as he was rostered in the night.

29. He submitted letters from the doctor requesting him to work day shift. He is familiar with the SOP in terms of medication even prescribed by a health care practitioner and it is not allowed.

30. Under cross examination she stated as follows:

31. He sends reports to the district level and they take the decision.

32. He advised him to get his doctor to treat him outside the work period because the treatment would not allow him to work. The applicant was his colleague and without night duty he has no problem with him.

## **INNOCENT LETHUKUTHULA MBATHA**

33. The salient aspects of his testimony are recorded below.

34. He is the acting district manager since 2013. The applicant was found guilty of charges (b) and (c).

35. He is aware of the SOP and discussed the matter at supervisor's level and the applicant could not be accommodated for night shift. The nature of the work (24 hours) it was difficult to allow one employee to work day shift only.

36. The doctor confirmed that the medication made the applicant drowsy and if possible to post him during the day shift. They looked at the request and tried but could not accommodate the request.

37. Under cross examination she stated as follows:

38. He is aware of the applicant leave without pay applications. The applicant was an Intermediate Life Support (ILS) and PPT work is for Basic Life Support (BLS) and with his qualifications it is not advisable to work PPT. His skills are more of operational than planning.

39. There was an impact on finance. The day shift was over staffed and the night short staffed. When he presented himself during the day out of roster he was not doing anything.

## **APPLICANT'S CASE**

### **RICHARD VELAPHI NKAMBULE (NDABA)**

40. The salient aspects of his testimony are recorded below.

41. He started in 2005 and in 2014 an incident happened at his home where his family was affected. Dr Mhlongo gave a letter to the Department that after a certain period he can survive the incident.
42. Unfortunately, the time period had finished and he was still not mentally fit even at present. Dr Mhlongo referred him to Dr Magubane on the 31 July 2014.
43. When he returned to work after one month's leave he went to work day shift for two days. He was working four day shifts before he went on leave. He then had to work the normal shift that of two day and two night shifts. The two night shifts he would come because the employer insisted that he work two day and two night shifts.
44. At night shift he came to work, signed and went to his car and Mr Masondo came and informed him that they had to report for duty and he asked him if he knew that he was taking medication.
45. Mr Masondo could drive the ambulance.
46. The employer sent him to Dr Chiwaya who confirmed that the medication causes drowsiness.
47. The first charge relates to not working night shift and he did not work night shift. If his doctor says that he can work night shift he will work night shift. At this stage he cannot work night shift.
48. He seeks re-instatement or the employer takes him to their specialist who would suggest a medication that would not cause drowsiness.
49. Under cross examination he stated as follows:
50. The incident at home occurred on 31 January 2014 and he was working night shift.
51. From 1 February 2015 to 8 March 2015 he did not make any application for incapacity leave.

52. His union representative wrote to the employer requesting to work day shift before he submitted the medical certificate from Dr Magubane. The employer responded by saying it was not possible.

## **CLOSING ARGUMENTS**

53. The parties agreed to submit written closing arguments on the 21 JULY 2017. The parties' submissions were considered when arriving at my decision.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

54. This matter was cited as an unfair dismissal dispute in terms of Section 191 of the LRA and the issue to be decided was whether the dismissal of the applicant was only substantively fair.

55. The applicant was found guilty of two charges and dismissed. He appealed but her appeal was dismissed.

56. In this matter, it is clear from the documents and oral evidence submitted by the parties that the following may be recorded to determine the matter.

57. The applicant was charged with four counts of misconduct and found guilty of two counts.

58. The applicant did not challenge the procedural aspect of his dismissal.

59. The charges for which the applicant was found guilty are not working night shift and being under the influence of intoxication in contravention of the departmental policy.

60. In respect of the first charge it was not disputed that the applicant did not work night shift. The work arrangement requires an employee like the applicant to work two-night

shifts and two-day shifts. The applicant was part of a crew that comprised two persons and if one is absent then he or she had to be replaced to make the team of two.

61. The applicant's family was attacked on the 31 January 2014 while he was on night shift. He requested a concession to work day shift and was granted a four-month period to work day shift. At the time because there was a shortage of ambulances he could have been accommodated.

62. After the four-month period he met with his supervisors who instructed him to revert to his normal work schedule. He attended to work for day shift but for night shift he came to work, signed the register and did not work. It was not explained why he would come to work if he told that he would be on leave without pay.

63. On a plain reading of the charge it cannot be said that the presiding officer was wrong to find the applicant guilty because he did not work and had to be replaced for his night shift.

64. In respect of the second charges for which he was found guilty it is also confirmed by his own doctor and the employer's doctor that the medication that he was taking caused drowsiness. The respondent's SOP states as follows:

65. Page 28 bundle A " 1.6. ALCOHOL AND SUBSTANCE ABUSE/USE

66. Personnel are to report to work sober (less than 0.02mg%) and may not be under the influence of intoxicating substances, including those prescribed by a health care practitioner.

67. Personnel may not consume, inject or ingest intoxicating liquids or substances for the duration of the shift.

68. The applicant confirmed that the duration/ period for which the charge relates he came to work and took his medication that made him drowsy and unable to work.

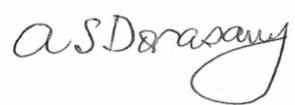
69. The question arises whether the above-mentioned infractions/ misconduct is such that it warrants dismissal.
70. It is the prerogative of the employer to set standards that the employee is expected to render service.
71. The applicant was paired with another employee to perform night shift duties. After an initial four-month period he was instructed to resume his normal shifts but he would come in at night sign the register and without informing his supervisor would leave or place the supervisor in a difficult position to replace him at short notice. This action may not be in the interest of providing the public with effective service.
72. There is no question of the correctness of guilty finding of the presiding officer because the applicant was not on night shift duty and had ingested an intoxicating substance prescribed by a health care practitioner therefore I am inclined to prefer the version of the respondent over the version of the applicant.
73. Because of the above it is established that the respondent had discharged the onus that the dismissal of the applicant was substantively fair.
74. I determine that the sanction imposed by the respondent to be appropriate and deem it unnecessary to interfere with the sanction of dismissal.
75. Because of the above I determine that the dismissal of the applicant was substantively fair.

## AWARD

76. I find that the applicant's dismissal was substantively fair.

77. The application is dismissed.

78. This file should be closed.

A handwritten signature in black ink, reading "aSDorasamy". The signature is written in a cursive style with a large, looping 'D' at the end.

Arbitrator: Anand Dorasamy