



# ARBITRATION AWARD

Panellist/s: Paul Kirstein  
Case No.: PSHS504-11/12  
Date of Award: 3-May-2012

In the ARBITRATION between:

**IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL  
BARGAINING COUNCIL (HELD AT CAPE TOWN)**

CASE NO: PSHS504-11/12

In the matter between

**DR M MAHARAJ**

Applicant

and

**DEPARTMENT OF HEALTH – WESTERN CAPE**

Respondent

**ARBITRATION AWARD**

1.

The arbitration was set down on 26 to 29 March 2012 in Cape Town. The applicant was represented by attorney B Conradie. The respondent was represented by advocate R Nyman. The applicant submitted a bundle of documents marked bundle A. The respondent submitted a bundle of documents marked bundle B. The applicant submitted a statement of case and the respondent a reply thereto. The arbitration proceedings were mechanically recorded. The respondent submitted a report dated 4 April 2012 relating to:- "*Response to 'Recent cases reported by other Nuclear Physicians (Senior and Junior Consultants) with serious errors.*" Both parties submitted written heads of argument.

## **ISSUE IN DISPUTE**

2.

The applicant contends that her dismissal on 31 October 2011 was substantively and procedurally unfair.

## **SUMMARY OF EVIDENCE**

3.

The following witnesses testified on behalf of the respondent:

- Prof M D Mann – currently holding the following appointments:

- Associate Professor in Division of Paediatric Medicine University of Cape Town;
- Consultant nuclear physician, Division of Nuclear Medicine University of Cape Town;
- Clinical tutor and honorary professor, Division of Nuclear medicine University of Witwatersrand.

Prof Mann has been working in the field of nuclear medicine for approximately 40 years.

- M Lazarus – Assistant Director: Personnel: Grootte Schuur Hospital (GSH).
- Dr T Kotze, Head of Nuclear medicine at GSH since October 2008.
- B Patel – Chief Operating Officer of GSH.
- Dr F T Carter, Chief Executive Officer of GSH.

4.

The applicant testified and the following witnesses testified on behalf of the applicant:

- Dr C Padia, Chief Radiologist at the Military Hospital.
- Dr N Ahmed, a Senior Specialist in the Department of Radiology at GSH.

5.

The representatives of the parties extensively referred to the evidence of various witnesses in their heads of argument. The background of the dispute is summarised as follows:

5.1 The applicant was trained as a Registrar in the Department of Nuclear medicine at Tygerberg Academic Hospital.

5.2 After completing her training the applicant was employed on a fixed term contract at GSH in the Nuclear Medicine division from the period 2 March 2010 until 31 August 2010. The fixed term period contract was extended until the end of December 2010.

5.5 During September 2010 a permanent post for a consultant (medical specialist) in the division of Nuclear Medicine was advertised at the GSH. The applicant was the successful candidate and employed with effect from 1 November 2010. The appointment was subject to a 12 month probationary period.

5.6 On 8 March 2011 Dr T Kotze, the head of the Division of Nuclear medicine at GSH, conducted the first quarterly assessment of the applicant's performance in terms of the staff performance management system (SPMS). The

applicant was assessed at a performance grade of being “unacceptable performance”.

5.7 Follow-up meetings between various personnel of the respondent and the applicant and her representatives were conducted regarding the evaluation of the applicant’s performance. Correspondence between the parties were exchanged regarding the issues of concern. At a meeting on 7 September 2011 alternative solutions were discussed. Shortly after the meeting Dr Kotze, the head of Nuclear Medicine at GSH tendered her resignation because she was no longer prepared to take responsibility for mistakes made by the applicant.

5.8 On 22 September 2011 the applicant received a notice of intention to terminate her probationary period and services at the respondent. The applicant replied on 29 September 2011 to the allegations in the mentioned notice. After having consulted with Prof Mann and other colleagues Dr Carter, the Chief Executive Officer of GSH, determined that the applicant’s services to be terminated with effect from the end of October 2011.

## **ANALYSIS**

6.

It is common cause that the applicant was appointed on 1 November 2010 as nuclear physician (consultant) in a permanent post at the Nuclear Medicine division (GSH), subject to a probationary period of 1 year.

7.

The principles relating to a probationary employee are applicable and the dismissal of the applicant should be adjudicated upon the requirements set out in the following prescripts:

- Schedule 8(1) of the Code of Good Practice attached to the LRA;
- Clause 4 of the Probation Procedural Manual.

The PSCBC Resolution referred to by the respondent in the heads of argument and included in the respondent's bundle is not a signed copy and therefore not considered.

8.

The total period of employment of the applicant at the respondent including the fixed term contract period was a period of 20 months. Prof Mann's ability to assess the applicant's performance during the fixed term period and after the applicant's permanent

appointment as a specialist was not disputed. In a letter dated 8 March 2011 Prof Mann expressed his concerns about the large number of errors in reports written by the applicant. Prof Mann expressed the following viewpoint in the mentioned letter:

*"Many of the mistakes have had the potential to have considerable adverse impact on patient management."*

During September 2011 when Dr Carter had a discussion with Prof Mann regarding the competence of the applicant, the view of Prof Mann remained that the applicant was not performing at the level of a specialist. Prof Mann's opinion is that the applicant's competence was at the level of a registrar at the end of the second year of training. Prof Mann indicated that the applicant was not competent and that reinstatement in her position could not be justified on ethical grounds. The applicant's evidence in relation to her performance is *inter alia* reflected in the applicant's report dated 26 September 2011 where the following is *inter alia* stated:

*"If Dr Kotze and associates have disagreed with my assessment they have failed to act in a manner that is collegiate, nurturing and affirming and becoming of an academic environment. Not a single patient came to grief as a consequence of my assessments. The clinical assessment by the physician determines whether a patient is treated and this encompasses history, clinical, biochemical and imaging modalities. In the circulated list of complaints there are several discrepancies and many of the complaints are without substance. I have always tried to maintain a professional decorum and relationship with my colleagues and other staff members as well as with patients' at Groote Schuur Hospital. I also have on record letters of commendation from senior colleagues in the interacting Departments at Groote Schuur as well as senior members of staff within the Department of Nuclear Medicine. (A few of the letters are attached). Over the past 19 months, I have continued performing all my assigned daily duties as per scheduled roster. I have fulfilled my after hour service according to the designed roster. I have presented at clinical meetings, performed investigations and continue to provide a full service in the Department in the capacity as a Nuclear Physician consultant. If the questioning my*

*competency was a serious allegation, Dr Kotze would have assisted me with my duties. This has not been the case, and is a false allegation."*

9.

It is accepted that a junior consultant is allowed to have a margin of error but in a specialist post as occupied by the applicant it must be accepted that even a small margin of error may have severe consequences for patients. It is accepted that a limited amount of the actual reports produced by the applicant was evaluated by Dr Kotze and other colleagues. What is of concern is that even in the limited reports evaluated the margin of error was of such concern that independent colleagues have confirmed the evidence of Prof Mann regarding the competence of the applicant. The witnesses who testified on behalf of the applicant did not take the matter any further with regard to the competence of the applicant in her capacity as a nuclear physician. In the light of the evidence of Prof Mann it is not necessary to evaluate the evidence of Dr Kotze (particularly because of the alleged strained relationship between Dr Kotze and the applicant) and the report dated 4 April 2012 submitted by the respondent after the arbitration. The evidence of Prof Mann is compelling and warranted the conclusion drawn by Dr Carter in the termination letter dated 3 October 2011 where the following was stated in the first two paragraphs:

*"There is sufficient evidence that your clinical judgement and decision-making places patient care and health at significant risk.*



*I have therefore determined that your ability to function independently as a specialist in Nuclear Medicine during your probation period has not been confirmed."*

Item 8(1)(j) of Schedule 8 determines that any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period. Although the conclusion referred to above of Dr Carter was warranted on the evidence considered by him, it is necessary to determine if the applicant was afforded the required procedural rights to such an extent that it could have an impact on the conclusion drawn by Dr Carter that the applicant's services should be terminated.

10.

It is common cause that the first quarterly assessment in terms of the SPMS was conducted on 8 March 2011. During this assessment Dr Kotze scored the performance of the applicant at an "unacceptable performance". The applicant was clearly aware of the competence issue from March 2011. Subsequent meetings regarding the competence issue was conducted on 17 March 2011, 12 August 2011 and 7 September 2011. Additional discussions took place between Dr Carter, the

Chief Director of GSH and the applicant regarding the alleged incompetence of colleagues and the failure of the applicant to admit to such incompetence. Sufficient assistance was available for the applicant to perform according to what has been expected of a nuclear physician in a specialist post. In this regard reference was made to the following:

- The Hermes System – a system in place to obtain second opinion.
- A second consultant on stand-by.
- Monday and Thursday meetings where scans could be discussed.

Various alternatives were discussed during the abovementioned meetings and referred to in correspondence. The alternatives included a mediation process, a possible transfer and a rehabilitation process. Due to various reasons the alternatives considered could not be implemented. There is no evidence confirming that if the alternatives were indeed implemented that the applicant would have performed on the competence level expected of a nuclear physician in a specialist post. It is common cause that Dr Kotze shortly after the meeting on 7 September 2011 tendered her resignation. The indication is that the resignation of Dr Kotze had an influence on the process in that the process was no longer directed to rectify the strained relationship between the applicant and Dr Kotze, but focused on the real issue being the applicant's performance.

The procedural requirements for dismissal of a probationary employee are set out in Item 8(1)(b), (e), (f) and (h) of the Schedule 8. Sufficient assessment and evaluation was conducted during the probationary period. The applicant was afforded the opportunity to make representations regarding the allegation against her. Taking into consideration what has been stated by the Labour Appeal Court in the case of **Somyo**<sup>1</sup>, it is determined that the respondent has materially complied with the procedural requirements. Taking into consideration the evidence presented at the arbitration it is determined that the respondent proved on a balance of probabilities that the dismissal of the applicant was substantively and procedurally fair.

## AWARD

1. The dismissal of the applicant on 31 October 2011 was substantively and procedurally fair. The application is dismissed.
2. No order as to costs.

SIGNED AT PRETORIA ON THIS THE 2nd DAY OF MAY 2012.



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<sup>1</sup> **Somyo v Rose Poultry Breeders (Pty) Ltd** (1997) 7 BLLR the Labour Appeal Court stated that the more senior, highly paid and specialised the employee the normal requirements may not apply for a poor standard of performance.

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**PH KIRSTEIN**

**ARBITRATOR**