

# ARBITRATION AWARD

Commissioner: **Gail McEwan**

Case No: **PSHS578-20/21**

Date of award: **12 March 2021**

In the matter between:

**DOCTOR SHERIDAN WALTER**

(Employee)

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

(Employer)

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## DETAILS OF HEARING AND REPRESENTATION

- (1) Arbitration was held on 4 March 2021 at the Metro East Nursing College Campus in Bellville. Present was Dr. Sheridan Walter (employee) and the Department of Health- Western Cape (DOH) (employer) was represented by Abraham Solomon (assistant director labour relations). The certificate of outcome declaring the matter unresolved at conciliation is on file and is dated 23 November 2020. These proceedings were digitally recorded and bundles of documents were handed in marked EE1 to EE4 (employee) and ER1 & ER2 (employer).
- (2) On record is a ruling dated 7 January 2021 in which Walter was denied legal representation. Also on file is a postponement ruling dated 2 February 2021 which postponement had been granted by me due to the employer's representative having some difficulty in breathing as the aftermath of his having been infected by the Corona Virus and also due to the fact that he had only resumed work the previous day and did not have sufficient time to secure all his witnesses. In the time available on 2 February 2021, we narrowed the issues in dispute to only being the

harshness of the sanction.

## **BACKGROUND TO THE ISSUE**

(3) Walter started working for the employer on 1 January 2019; was a medical intern; earned R57 349.77 per month and was dismissed on 29 October 2020 for misconduct. In summary Walter faced twelve charges which related to him fraudulently issuing medical prescriptions on the prescript of Groote Schuur Hospital to himself and submitted them to a number of pharmacies to obtain medicine supplies for personal use on 6 separate occasions over the period 28 November 2019 to 20 April 2020. Further that Walter used the credentials of Doctor L M Chait on such Groote Schuur Hospital Medical prescripts with a fictitious Practice Number. On 2 March 2021 time was spent narrowing the issues in dispute. Walter conceded he was guilty of all charges but felt that dismissal had been too harsh a sanction to have been applied. Walter wished to finish his internship by being re-instated which would then allow him to conclude his internship to then go into the field of medical ethics in which field there is no patient contact. There were no procedural challenges in this dismissal.

## **THE ISSUE TO BE DECIDED**

- (4) I am required to determine on a balance of probabilities whether the sanction of dismissal in the case of Walters had been too harsh.
- (5) I have considered all the evidence and argument, but because the Labour Relations Act, 66 of 1995, as amended (LRA), requires brief reasons (section 138(7)), I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

## **SUMMARY OF EVIDENCE**

### **The employer's version and testimony were as follows:**

(6) Professor Mark Sonderup (Senior specialist medicine doctor and Intern Curator at Groote Schuur Hospital) testified that he played a statutory role in terms of the Health Professionals Council of South Africa (HPCSA) that requires in any institution that has training posts an intern curator must be appointed. This creates a liaison between the hospital and the HPCSA. As the curator Sonderup oversees the training, performance and execution for all interns allocated to

Groote Schuur Hospital (GSH). Walter had arrived at GSH in January 2019 to re-commence his internship. The hospital gets provided with the names each year as to who will be interns at GSH. At the hospital it is practice that the internships begin in January of each year. There is an intern orientation that took place on about 28 December 2018 which is a half to one day event. At orientation Walter commenced first for block rotation in 2019 and had started in internal medicine which is where Sonderup works. Walter had approached Sonderup stating that he was re-starting his internship having previously done eighteen months in 2015. The internship at that time had been terminated and Walter said he had been suspended by the HPCSA due to a self-harm attempt. Walter said he had been through the Health Committee of the HPCSA and had been taken through their process. Walter had then been provisionally reinstated to redo his internship of twenty four months. The provisions for the registration were that Walter got a suitable intern post and then certain requirements had to be fulfilled. Walter told Sonderup that he would forward this correspondence to him. Two weeks later after Walter had started on 1 January 2019 the correspondence from the Health Committee of the HPCSA was received and had included five provisos. These provisos are set out in a letter to Walter dated 10 January 2020 (ER bundle page 49 as had always been the case in earlier correspondence which backdates to when Walter was originally re-instated to re-do his internship) which are as follows “(1) The Committee maintains its resolution to restrict you from procuring, ordering, prescribing and administering of medications contained in schedules 5, 6, and 7 of the Medicines and Related Substances Control Act (Act No. 101 of 1965); (2) You are requested to continue consulting your psychiatrist and submit 1st quarterly report with random urine test results; (3) You are requested to continue consulting your Clinical Psychologist and submit 1st quarterly report for consideration by the Committee; (4) You are requested to submit a report from your supervisor (which is Sonderup) regarding his work performance and (5) You are informed that in spite of you being interviewed by the Committee you did not disclose that you were admitted in June 2019, in view of the report received you are requested to submit a quarterly report.” In a follow up letter the provisos remained unchanged. Sonderup had to submit a quarterly report. Sonderup met with Walter and asked whether he had a practitioner psychologist and psychiatrist to attend to his care and Walter said he had not yet set anything up. Walter had provided Sonderup with a report from his existing psychiatrist from Richards Bay. Sonderup made several suggestions to Walter regarding a local psychiatrist and psychologist so that the documents required could be submitted to the Health Committee. The Health Committee only liaises with the practitioners and not the curator – Sonderup. Walter saw a psychologist and a psychiatrist as per advice from the treating Psychiatrist. The end of April 2019 was the deadline for the first quarterly report which was submitted by Sonderup

together with a urine toxicology report with outcome attached. Everything was clear. The reports from the practitioners are submitted independently. In May 2019 Walter went to a different department. In mid-May 2019 Sonderup met with Walter as he was concerned about his mental health. Sonderup advised Walter to seek an urgent appointment with his psychiatrist which Walter had done. Walter was admitted to hospital for a period of time after which he returned to his internship. The rotation of Walter to pediatrics was problematic which resulted in a decision that Walter should return to complete further time in this department which had been contemplated to be a month. In the third week of July 2019 Walter informed Sonderup that he had been asked to urgently attend a meeting of the Health Committee in Durban. Walter had asked the Committee to delay the meeting to August and this request had been denied. Walter attended that meeting and then returned to his internship.

- (7) For clarity Sonderup set out the time line as follows: Walter started his internship on 1 January 2021 and the first quarterly report was submitted in April 2019. The Health Committee meeting took place on 9 to 10 May 2019. The consequent meeting and deals with Walter still contained the five provisos. Referring to ER bundle page 48 it was pointed out that the Health Committee set up a meeting with Walter for 25 July 2019 and the letter in this respect is dated 3 July 2019. Walter returned from the meeting and Sonderup never saw the correspondence. Walter had explained that everything continued as before. The next report provided by Sonderup took them to the last four months of 2019. Sonderup had to trouble shoot issues which arose when Walter was with the Orthopaedic rotation which issues had been dealt with. The second report provided by Sonderup included the result of a urine toxicology test in which the presence of the sedative group of drugs (benzodiazepine) such as Valium had been detected in the sample submitted for Walter. Walter and his psychiatrist indicated to Sonderup that the toxicology report was positive due the medicine prescribed by the psychiatrist. Referring back to the time line Sonderup was now in the fourth quarter of 2019; Walter had completed orthopaedics, anaesthetics and one other and Sonderup had to troubleshoot in Orthopaedics. Sonderup provided the required report. Referring to ER bundle page 49 Sonderup referred to the letter sent to Walter by the Health Committee dated 10 January 2020 in which the five provisos remained the same and a sixth proviso was added: "You are informed that in spite of you being interviewed by the Committee you did not disclose that you were admitted in June 2019. In view of the report received you are requested to submit a quarterly report". Walter commenced the first four months of 2020 in family medicine. The letter from the HPCSA dated 15 April 2020 (ER bundle page 50) was the last correspondence Sonderup had seen and which contained the same provisos. Then the first wave of Covid-19 hit. The first report for April 2020

was submitted. On 21 April 2020 Sonderup received a call from the senior consultant in the pain clinic at GSH (Dr. Van Dugerien) asking if he knew Walter. Dr. Van Dugerien had received a query from GSH pharmacy regarding a script on the hospitals' prescription pad with their letterhead which had been handed in at a local pharmacy. The scripts being queried are on ER bundle pages 4 to 21. The script on page 21 is from the pain clinic and is dated 21 April 2020. During the investigation it had been established that the signatory "L M Chiat" was not a doctor at GSH. Sonderup had seen the scripts before the medication had been blocked out. Item 1 is a schedule 6 medication. Sonderup checked with the HPCSA and found out that Dr. L M Chiat was not licenced to practice in South Africa. On ER Bundle page 52 Dr. Chiat had been erased from the register of licenced medical professionals kept by the HPCSA. Sonderup explained that the forging of prescriptions does occur and he was satisfied that that signatory on the prescription was not a practicing practitioner. Sonderup wanted to establish if Walter was the person who took the script to the pharmacy as the implications of this were very serious and he had to be sure. Sonderup drove to Clicks Pharmacy in Observatory and spoke with the pharmacist who had alerted GSH as she was worried about the legality of this script. Sonderup showed that pharmacist a photograph of Walter and he was positively identified as the script claimer. The Pharmacist explained that their pharmacy was not the only one who had concerns and Clicks Rondebosch had the same concerns. Sonderup was alarmed and partly could not believe what he was told. Sonderup then visited Clicks Pharmacy in Rondebosch and again it was confirmed that Walter had been the script claimer. It was further confirmed that Walter had visited this pharmacy on several occasions. Sonderup then handed the matter over for the correct process to be followed.

- (8) Consequently, Sonderup put in a brief report to the HPCSA regarding what had transpired and had advised that the matter was being dealt with through the dispute procedure. Referring to ER bundle page 53 the CEO (Chief Executive Officer) of GSH received an email from the Clicks Rondebosch pharmacy (complaint resolution team) regarding the incident on 21 April 2020 for which Walter had submitted a complaint about that pharmacist. The CEO was informed due to the script being on the letterhead of GSH. This email had also been sent to the HPCSA to keep them informed. Sonderup was a witness at the disciplinary hearing held for Walter at which time Walter had said that Sonderup had never given him the required support. Sonderup found this to be a curious allegation and would like to have asked Walter what more he would have liked to have been done. Sonderup frequently gave Walter support with prolific emails and WhatsApp messages sometimes received at 02h00. Therefore Sonderup had to set boundaries even though he had an open door policy. When Walter was

admitted to hospital in May 2019 it was the call from Sonderup to the psychiatrist that precipitated that admission. After paediatrics Sonderup had to make an intervention and set up meetings for Walter to meet with him every two weeks and monthly by appointment. This was only done for Walter. Sonderup received several calls from the psychiatrist with suggestions as to how they could assist Walter which had been done in the confines of the internship. There were multiple communication channels, the open door policy and Sonderup took the urine samples himself to the lab for analysis. Walter reported that others had made allegations regarding his sexual orientation and he had raised this with GSH and the Human Rights Commission (a Chapter 9 institution). By that time the trust relationship had been irrevocably broken.

- (9) In cross-examination it was put to Sonderup that Walter was an impaired practitioner as determined by the HPCSA. Sonderup said that Walter had told him that he was previously suspended from his internship. Walter had gone through the process at the Health Committee and was re-registered to start his internship with said provisos. Sonderup explained that the fact that this had happened is de facto impairment and the focus on law becomes semantic. Walter explained that in terms of the HPCSA “impairment” is defined and Sonderup said he was not an expert on the Act. Sonderup explained that this was a semantic issue as the process of the Health Committee obliged him to follow the set down provisos. Sonderup was referred to EE bundle 3 page 123 where “impairment” is defined as “a mental or physical condition or the abuse of or dependence on chemical substances, which affects the competence, attitude, judgement or performance of a student or another person registered in terms of this Act.” Sonderup was aware that Walter had previously been terminated at Addington Hospital in Durban. Sonderup had been told this by Walter when explaining why his internship had previously been stopped and how Walter had gone through the processes of the Health Committee. The suspension had come about through a self-harm incident and Walter had said that he had been suspended by the HPCSA so Walter decided to discontinue his internship. Sonderup said that this was in the realm of semantics as if suspended by the HPCSA one cannot practice as a medical practitioner. Sonderup confirmed that Walter had told him about his suspension, now says it happened in 2017 and Sonderup conceded that the date may be correct. According to Sonderup this was still semantics. It was put to Sonderup that in the paediatric block there had been an incident which gave rise to Walter being called a “faggott”. Sonderup agreed as Walter had reported that to him. Sonderup corrected his timeline as Walter admitted to him being hospitalised in May 2019 and explained that the issue now raised by Walter postdates his admission which had been precipitated by Sonderup.



Sonderup agreed that he had to troubleshoot an incident during the orthopaedic rotation. At the time Sonderup had not been in South Africa and received a call on a Friday evening from the supervisor in orthopaedics regarding an interaction which took place between Walter and a surgeon. Sonderup was told that Walter was at the clinic of which the surgeon was the head. The surgeon had never met Walter before and had raised serious concerns about the general demeanour and behaviour of Walter. Walter had been asked to leave the clinic, words were exchanged and the concerns had been elevated to Sonderup. Before every new rotation started, like when the rotation in orthopaedics started in September 2019, Sonderup would speak to Walter and have a discussion with the supervisor regarding the needs of Walter. Sonderup discussed the incident with Walter and then let things continue. It was put to Sonderup that he had said that Walter was under the influence of drugs. Sonderup explained that psychiatry fell under family medicine. Walter explained that he had blanked out the name of the medications on the scripts he had written in terms of his rights set out in The Promotion of Access to Information Act 2 of 2000 (PAIA). Referring to EE bundle 3 page 122 Sonderup had sent a letter dated 23 April 2020 to the HPCSA and the fact that the letter reads that Walter had been served a letter of suspension and did not mean that a decision was taken at that time to dismiss Walter. In the final paragraph of this letter Sonderup had written that “as it stands, he (Walter) is currently no longer in the employ of GSH”. Sonderup explained that the letter confirms the suspension of Walter and as such he was not in active employment at that time. Although the letter is dated 23 April 2020 it had only been sent by email on 24 April 2020 which was the same date that Walter had been suspended. Sonderup vehemently denied that he had confirmed the dismissal of Walter as the letter clearly states that Walter had been placed on a period of suspension pending further investigation.

- (10) In re-examination Sonderup confirmed that with reference to EE bundle 3 page 122 he had sent this letter to the HPCSA when an investigation was taking place. Sonderup was not kept informed of anything by the HPCSA only that his letter had been received. Sonderup was at the disciplinary hearing held for Walter in October 2020 at which time Walter had still been on suspension.
- (11) Dr Bhavna Patel (BSc, MBChB, MFamMed, FCFP, FCPHM, MScMed (Bioethics and Health Law) is a medical doctor and the Chief Executive Officer (CEO) at Groote Schuur Hospital) testified that she is the appeal authority so was not involved in anything other than the appeal of Walter. In this case Sonderup and the medical managers were told to follow the HR processes. Patel confirmed that Walter had pleaded guilty to the twelve charges he faced. After

the sanction of dismissal was imposed Walter had lodged an appeal against his dismissal. The appeal outcome is on ER bundle page 19 and the sanction of dismissal was upheld. The decision of Patel to uphold the sanction was arrived at after she had looked at all the documents and the outcome report of the presiding officer of the disciplinary hearing and the facts taken into account that led to the final decision to dismiss Walter. Patel had looked at the facts, the merits of the case plus the extenuating circumstances. Patel confirmed that the resources of the hospital were used by an intern to prescribe schedule 6 drugs. The prescription was signed by a practitioner not employed at the hospital and Walter had inserted an incorrect number as a medical practice which all equated to fraud. Walter had failed to uphold the Code of Conduct of Health Professionals so the misconduct was very serious. The actions of Walter tarnished the reputation of the hospital as both pharmacists had called to confirm the scripts and the doctors' names. GSH was reflected in a bad light when Walter took the scripts to have them filled. There had been times when Patel had met with Labour Relations but did not recall a case where Dr. Dreyer as an intern had been brought back to the hospital as interns have to resume rotations to get the requisite experience. There are reports annually to the HPCSA on the performance of the interns. The transgression of Walter on the employment relationship resulted in a break in trust based on the need for professional behaviour and manner of behaviour of interns at the hospital. This directly impacts on patient care where trust is required.

- (12) In cross-examination Patel confirmed that the acting CEO was Dr Bernadette Eick and she had signed the appeal outcome letter sent to Walter on behalf of Patel who had a shoulder operation at the time and was booked off from work. Eick was acting in her position and had the authority to have signed the appeal outcome. Patel explained that she had had contact with Eick and had approved the decision to uphold the decision of the presiding officer. It was put to Patel the Eick had not given any reasons for upholding such a decision. There were no questions in re-examination.
- (13) In answer to a question in clarity from me regarding why Patel had thought dismissal was appropriate Patel explained that Walter had been an intern and was aware of his responsibilities as an intern after which he may become a practitioner. The case facts show that Walter was fraudulent in his actions. Patel had been advised by a higher authority not to press any criminal charges against Walter. Patel added that Walter had to live up to the ethics and standards of the profession. Walter had acted knowingly and deliberately. Walter should have thought of the consequences of his actions. In answer to a question from Walter, Patel



explained that there had been a retrospective report that if the condition of Walter had been as he had described Patel should have immediately been informed.

(14) Aghmat Mohamed (presiding officer, head of nursing at GSH) testified that he had taken the decision to dismiss Walter who had been an intern working at the Department of Health which is part of the state. Mohamed determined that there had definitely been fraudulent activity as Walter had used the property of GSH; the name of another doctor and a false practice number on six separate occasions. All public servants are told about fraud and dishonesty and as a practitioner Walter needed to have been honest – which in this case proved he had not been honest at all. Walter was given the findings from the presiding officer in a letter dated 19 October 2020 (ER bundle page 17). The following is an extract from that letter: “In deciding the appropriateness of the sanction to be imposed I (Mohamed) considered aggravating factors as follows: (i) As a second year medical student intern at GSH and in fact on a second stint of your internship after the one in Kwazulu Natal one would expect you to understand the seriousness of these transgressions. However, you showed minimal remorse or concern to the charges against you apart from the time you read from a document stating that you were remorseful. (ii) Having studied many years to be a medical doctor and being a second year medical student intern for a second time, it can be reasonably expected of you to understand why adhering to policies and procedures are so important. (iii) All the serious charges against you have been taught to you during your studies and it was again reiterated to you on your orientation to GSH about the do’s and don’ts of prescribing. However you failed to comply with those rules that you were taught and again reminded of in your orientation.” Mohamed elaborated that dishonesty and fraud are very serious transgressions. Mohamed had looked at the facts of the case as the disciplinary code of GSH provides guidelines. In mitigation Walter had said he was seeing both a psychologist and a psychiatrist. Walter had specifically urged Mohamed to bear in mind that dismissal should only be treated as a last resort and only where there had been an irretrievable breakdown in the employment relationship which would render continued employment intolerable. Walter went on to say that his mental condition had improved significantly and that he remained in compliance with his treatment. Walter had added that there was no likelihood of the conduct recurring (ER bundle page 35). The transgression, however, had not been a once off occurrence but had been repeated in total six times. Walter had faced twelve charges to which he had entered the plea of being guilty. All the charges were very serious. Mohamed was not aware of any previous charges against Walter. Referring to ER bundle page 38 in summary Mohamed found the sanction of dismissal to be appropriate for the following main reasons: A fair procedure had been followed. Walter

had made the same serious mistake on six separate occasions so Mohamed had considered the transgressions as intentional. Mohamed had huge concerns about Walter as a medical doctor forging the signature with the credentials of another practitioner and fraudulently prescribed medical products for his own use. It was believed that Walter had sufficient support from GSH especially from Sonderup despite the times when Walter had found fault with Sonderup during the disciplinary hearing. It had been evident that Walter had been well supported. (I will not repeat the evidence of support of Walter as led by Sonderup.) The reputation of GSH had been negatively affected as stated by the pharmacists from both branches of Clicks. Those pharmacists had said whenever they saw a prescription from GSH in the future they would be extra vigilant and worried. Mohamed felt that this was not good for the reputation of GSH. The relationship between Walter and his medical colleagues had suffered negatively and the trust had definitely been affected. Additionally Walter had studied for his MBChB and was fully aware of the code of ethics with which he was expected to have complied.

- (15) In cross-examination Mohamed was asked to repeat the mitigating factors he had taken into account being that for Walter this was a first offence and his mental state. Mohamed confirmed that trust had been broken which affects the relationship. It was put to Mohamed that Schedule 8 – Code of Good Practice: of the LRA requires that personal circumstances be taken into account. Walter pointed out that he left the first internship as he took a break. In terms of the personal circumstances Mohamed believed that Walter had tried to use his mental condition to excuse his dishonesty. Walter listed all his diagnosis's as being bi-polar disorder; generalized anxiety disorder; attention deficit/hyperactivity disorder; frontal lobe epilepsy and borderline personality disorder. Mohamed agreed that there are difficulties with psychiatric conditions. Mohamed believed that Walter had been given support and had been provided with benefits as a result of his employment. Mohamed confirmed that some people with like problems can work with their health issues. It was confirmed that the performance of Water at the time of the disciplinary hearing had been satisfactory according to Sonderup. Mohamed was referred to EE bundle 2 page 88 where his treating psychiatrist (Dr. Michelle Vlok-Barnard) in her report had written: "According to the collateral reports from colleagues, there have never been concerns or incidents where Walter's clinical judgement, performance, or patient care has been in question. There is mention of interpersonal difficulties with colleagues in keeping with his diagnosis of borderline personality disorder, but this differs substantially from a record of professional interaction with patients". Walter pointed out to Mohamed that he had been hospitalised on three occasions in one year. Mohamed confirmed he was aware that Walter

had been on family rotation based at Heideveld. Mohamed explained that he was only the presiding officer and had only looked at the facts presented to him. Walter asked Mohamed if any consideration had been given to granting some temporary disability. Mohamed pointed out that the case was about misconduct. Mohamed was referred to EE bundle 2 page 93 where in a medical team report dated 13 August 2020 from the practitioners that Walter had been seeing where the recommendation had been made that an application be made for Walter to be placed on three months' temporary incapacity leave. Referring to EE bundle 2 page 47 Mohamed noted that in the event that Walter felt he had been harassed due to his sexual orientation Walter had never submitted a formal complaint or grievance prior to the investigation of his misconduct. Mohamed was referred to EE bundle 3 page 127 where in an email around about 9 December 2019 Walter had written to Dr. Nazli Daniels (psychiatrist) in an email stating amongst other things that he was exhausted, felt he was a waste of space and was running on empty. Mohamed explained that an email was not a grievance and then briefly set out the grievance procedure at GSH. Walter explained that he believed he had been harassed due to his sexual orientation but had not submitted a grievance in this regard. Walter insisted that he had been suffering from a great deal of stress at the time and Mohamed pointed out that Walter had been charged with misconduct. Mohamed confirmed that Walter had not mentioned at any time during the disciplinary hearing that he was an impaired practitioner. There were no questions in re-examination.

**The employee's version and testimony were as follows:**

(16) Sheridan Walter testified that his problems started in November 2019 when he noticed the deterioration in his mental health. Walter was scared that the frontal lobe epilepsy was playing up. In about March 2019 he had asked his psychiatrist to change his medication. After that Walter had difficulty in concentrating and had severe impairment of judgement due to his mental condition. Walter had been too afraid to ask his psychiatrist (Dr. Nazli Daniels) to re-prescribe the medication which had been stopped as she was submitting quarterly reports to the HPCSA who would have been aware of the change in the medication earlier in 2019. Walter feared that if the HPCSA became aware of this he could have been dismissed. Therefore, Walter attempted to procure the medication himself. The medication was methylphenidate and lorazepam both of which are schedule 5 medication. Walter had done this for fear of both his physical and mental health. In the event that his work performance was impaired it would reflect badly on the reports submitted by Sonderup. Walter was afraid of a seizure in the ER (emergency room) or elsewhere in the hospital as he did not recall when this happened. Walter prescribed himself this medication on a monthly basis using the name of Dr. L M Chiat. Walters

explained that he had always shown remorse for his actions. Looking back now Walter was aware that he should not have done this. On 20 April 2020 Water had prescribed himself oxycodone which is a schedule 6 medication in an attempt to commit suicide. This had been at the time of the death of his best friend. It was an isolated incident to attempt to commit suicide although he had attempted this previously. The Pharmacist from Clicks Rondebosch (Mrs. Florence) had reported that script to GSH. For the previous fraudulent scripts the medication had been dispensed. Sonderup got involved with the two pharmacies by visiting them personally; he made immediate contact with Daniels which resulted in Walter being admitted to the Crescent Clinic for the period 22 April 2020 to 8 May 2020. On 22 April 2020 Sonderup sent Walter a WhatsApp message saying that he had found out about the prescriptions and could no longer speak with Walter. Further that Daniels and the Department of Health would be in touch. On 24 April 2020 Dr. Fahd Conrad (intern supervisor) came to the clinic to see Walter who was in isolation due to Covid-19 and said that Walter had been suspended pending an investigation. In an email dated 27 April 2020 (EE bundle 2 page 78) Walter wrote that he was aware of the gravity of his misconduct and had never denied the charges against him. Walter was sent to Constantiaberg hospital to the neuro-science department and underwent a neurophysiological assessment during which Walter had to perform cognitive and physical tasks. This had been done by Dr. Kim Baille (clinical psychologist). Walter also underwent an intensive electroencephalogram (EEG) over a period of four days under Dr. James Butler (neurologist). Walter was shown to have under performance and was told before he resumed work he should see an occupational therapist. The investigation into the fraudulent scripts had started and Ragne Pillay (occupational therapist) who had been appointed to carry out the investigation. The investigation concluded on 1 June 2020 and then Walter waited for the charges against him to be delivered. Walter sank into a depression, had locked himself up in a room for four days and even his sister could not make any contact. Walter was admitted to the Milnerton Mediclinic as he was by then dehydrated and catatonic. From there Walter was moved to Akeso Psychiatric Clinic in Milnerton for twenty-one days under the care of Dr. J Burger. There had also been a clinical psychologist and neuro-phycologist as part of the team taking care of Walter. Walter had been assessed as severely depressed and told that he did not get along well with others as he had border line personality disorder – this was the first time his medication had been changed. Walter started therapy and wrote a report to the HPCSA but not about his disorders. Walter did not want to write a quarterly report as he feared he might not be honest as this may reflect badly on him in the clinical report and would undermine the doctor/patient confidentiality. Dr. Patel had said that Walter was not in control at the time when the misconduct happened.

- (17) Walter explained that when a practitioner / medical doctor has restrictions placed on him he is regarded as being impaired. The occupational therapist had wrote that the work environment was not conducive and that Walter should apply for reasonable accommodation to transfer to another hospital with no shift work plus Walter should take mood stabilisers. Walter explained that once he had completed his internship he wanted to go into the field of medical ethics. Walter explained that he is not an addict and the medications had helped in his work performance. Walter pointed out that he is being honest and had always said that he was guilty of the charges. Walter underwent mental rehabilitation both at Crescent Clinic and Akeso Psychiatric Clinic. Referring to EE 3 bundle page 114 Walter confirmed that he was granted temporary incapacity leave by the employer in July 2020 and to return to work on 5 October 2020. Walter had then been fully re-instated by the HPCSA and no restrictions were imposed. Walter did not think that the trust relationship was broken as the misconduct could have been due to his mental condition. Walter was struggling at this time with financial problems as he also had to help his mother out. Walter believed he should be punished with anything short of dismissal like for instance a final written warning. Walter gets severe flash backs of what happened in his transgressions and is ashamed for being a fraud.
- (18) In cross-examination Walter explained that the mediations had previously been prescribed which were then stopped as he was doing better and to comply with the HPCSA he would need to reduce his medication and this would be in his favour. Walter had discussed this with his psychiatrist and they had agreed that less medication would make Walter look better by the HPCSA. The reduction had also been intended to be on a trial basis and had been initiated by Walter. In the initial period Walter had done well which was from March 2019 to November 2019. It was put to Walter that he was on a trial period and if he felt the need to change this again why did he not return to his psychiatrist and tell her he needs those medications again. It was put to Walter that the medication was stopped in March 2019; he could not concentrate in November 2019; had said the trial period was over but no trial period time plan had been agreed. Walter explained he was scared it would reflect badly on his psychiatrists report to HPCSA and then he could lose his job. It was put to Walter that it was easier to ask to get the medication back than to go the disciplinary route when his health had declined. Walter explained that he saw his psychiatrist once a month and his psychologist twice a month. Walter and his psychiatrist had never got along. In addition, she had been in contact with Sonderup and the HPCSA. Walter explained that the HPCSA wanted to know and he did not want to say anything. It was put to Walter that the HPCSA was concerned about his health and hence wanted the quarterly reports. Walter differed and said the HPCSA wanted the quarterly reports

as he was an impaired practitioner. Walter explained that any change in his medication would be reflected in the report and would indicate either progression or deterioration. It was put to Walter to then rather get what he needs and not put his job at risk. Walter confirmed that lots of medication had already been signed off and agreed that either way his job was at risk. In paediatrics Walter still had to work in one month. Sonderup had signed off only on internal medicines for Walter. Walter was reminded that he had not put this to Sonderup when he had the chance. Walter stated that Sonderup was in contact with his psychiatrist. Walter had no problems up to November 2019. Walter had been hospitalized in May 2019 which had been after the April 2019 report had been submitted to the HPCSA. Referring to ER bundle 1 page 50 Walter confirmed that this was the last letter he had received from the HPCSA which is dated 15 April 2020 which contained the same five provisos. It was pointed out to Walter that this letter meant that five days prior to the incident he had been reminded of the provisos. It was put to Walter that today he could perform but two days later that could change. Walter explained that the script he had written in April 2020, when he had added oxycodone, he had his suicide in mind. Walter was reminded that he had prescribed his own medication since November 2019. It was further put to Walter that this had been the chance for him to stop as he was aware that what he was doing was wrong. Walter explained he was under stress and could lose his job every three months and it is difficult to explain how he lacked judgement at the time. It was put to Walter that he had the chance to go back to his psychiatrist for the medication if it was needed. Walter could not say if a change in his medication would affect his internship. With reference to ER bundle 1 page 48 it was put to Walter that the Health Committee had invited him to a meeting in Durban on 25 July 2019. Walter explained that they only summon you to a meeting to suspend you. Walter confirmed that he had not been suspended. It was put to Walter that the meeting had not come as a surprise as the letter in which he was invited to said meeting is dated 3 July 2019. Walter was reminded he had been charged for six fraudulent scripts. Walter explained that he was aware as an adult asking for a prescription by another doctor for himself was wrong. Walter explained that he wrote to the pharmacist at Clicks who had caught him and admitted that he had been rude to her. It was put to Walter that he had been ill yet found the time to tell her she was interfering with his career. Referring to ER bundle 2 page 53 Walter was reminded that his complaint had been received by Clicks on 21 April 2020. It was put to Walter that then he still thought the scripts were not fraudulent as otherwise he would not have complained. Walter did not recall writing any email to Clicks.

(19) In re-examination Walter emphasised that his misconduct was linked directly to his mental



health as at the time he had lacked any judgement. Walter said he had lots of stressors in his life and had been honest in that he never deviated from his story. Walter wanted to complete his internship. Walter explained his finances were in a mess; he could not afford treatment and he was living with his mother. His dismissal nullifies one year of therapy. Walter stated that he could manage if he kept up his treatment. Walter became impaired in 2016 due to a self-harm incident.

(20) Both parties agreed to send in their closing arguments by no later than 17h00 on 11 March 2021. Closing arguments were timeously received from both parties, the contents of which have been noted. I would be remiss not to pass a few pertinent comments on the closing arguments submitted to me by Walter. It seems not to have sunk in that the misconduct perpetrated by Walters over a six-month period is what gave rise to the charges of gross dishonesty and fraud. No-one testified to anything other than that the performance of Walter had been satisfactory bar for a couple of interventions which Sonderup had to make to make on his behalf. I have noted the background of Walter starting from age 7 but am precluded from entertaining this as the employer was not given the opportunity to cross-exam these claims as they were never raised during arbitration. I have at all material times been conscious of the fact that the entire future in a medical career was on the line for Walter. This was demonstrated by me questions in clarification at the conclusion of the testimony of all three of the witnesses called by the employer. I am acutely aware that seven years had been spent by Walter on getting his doctorate (with honours). I also acknowledge that Walter claims an entire year of costly medical treatment and therapy will be for nothing if this arbitration is not decided in favour of Walter. I further acknowledge that this may temporarily be a financial set-back and again point out that his problem lay in his gross dishonesty and the fraud perpetrated.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

(21) Walter pleaded guilty to all twelve charges which he faced relating to him fraudulently issuing medical prescriptions on the prescript of Groote Schuur Hospital to himself and submitted them to a number of pharmacies to obtain medicine supplies for personal use on 6 separate occasions over the period 28 November 2019 to 20 April 2020. Further that Walter used the credentials of Doctor L M Chait on such Groote Schuur Hospital Medical prescripts with a fictitious Practice Number. Walter is challenging his dismissal on the grounds that the sanction

was too harsh given his medical condition. Walter seeks to have his dismissal exchanged for any sanction short of dismissal in order to allow him to complete his internship.

- (22) Following an incident of self-harm in about 2015 / 2016 the HPCSA regarded Walter as being an impaired practitioner. Therefore, in all further communications with Walter the Health Committee of the HPCSA there were five provisos that had to be met for him to continue in his internship to become a medical practitioner. The most relevant proviso in this case being “(1) The Committee maintains its resolution to restrict you from procuring, ordering, prescribing and administering of medications contained in schedules 5, 6, and 7 of the Medicines and Related Substances Control Act (Act No. 101 of 1965)”. This and the other provisos were repeated many times over. This proves that Walter was aware of his restrictions in terms of issuing prescriptions for scheduled medicines in the categories of schedule 5 to 7 medication. In short Walter was prevented from issuing any prescription for medication in schedules 5 to 7 regardless of for whom the medication was intended. That much is abundantly clear and the actions of Walter amounted to misconduct.
- (23) A great deal of thought and perhaps a little research had to have been done by Walter to find the name of a doctor he could use when forging the prescriptions. As it turns out Dr. L M Chiat is not registered to practice medicine in South Africa which precludes that doctor from issuing prescriptions. It would have been easier for Walter to falsify the Practice Number as the investigation had found he had done. This scheming requires rational thought, some cunning and Walter proceeded despite knowing what he was doing was contra to the restrictions imposed on his practice of medicine by the HPCSA. Walter was only caught out at the time when he proffered the fraudulent prescription on the sixth occasion when he also added a schedule 6 medicine when previously there had only been schedule 5 medicines on the fraudulent prescriptions. The misconduct was knowingly perpetrated. Walter then, without thinking of the consequences, stole pages out of the prescription pads belonging to GSH (Pain Clinic) to enable him to write out the fraudulent prescriptions on six occasions. This brought the name of the institution into disrepute as evidenced by the pharmacists at the two Clicks Pharmacies stating that any further prescriptions received from GSH would be treated with extreme caution regarding their validity and legality. This misconduct continued over a period of approximately six months. Walter claims he was lacking in judgement and he made up for this lack in his cunning and modus operandi. These actions of Walter were dishonest, fraudulent and amounted to misconduct.

- (24) The ethical guidelines for good practice in the Health Care Professions issued by the HPCSA in section 17 Regarding the Issuing of prescriptions in point 17.2 states: “A practitioner authorized in terms of the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965), to prescribe medicines shall issue handwritten prescriptions for medicine scheduled in Schedules 5, 6, 7 and 8 of the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965), under his or her personal and original signature.” In this instance Walter chose a not so random doctors’ name to use and being aware that he was prevented from writing out prescriptions to himself used a name of a doctor who was unable to practice medicine in South Africa. The dishonesty of Walter extended to him not upholding the Code of Ethics expected from all practitioners in the fields of medicine. In terms of the provisos, he was prohibited from issuing any prescriptions of schedule 5 to 7 medicines.
- (25) In the fourth quarter of 2019 the report provided by Sonderup included the result of a urine toxicology test in which the presence of the sedative group of drugs (benzodiazepine) had been detected. The psychiatrist and Walter put this down to his other prescribed medicines he was taking at the time. It seems this may not have been the case. The previous urine toxicology reports had all been negative despite the evidence of Walter that he had requested his psychiatrist to reduce his medicine in March 2019. The toxicology report was for the first time in November 2019 positive with the presence of a sedative drug being detected which ties in with the first fraudulent script dated 28 November 2019. This then on a balance of probabilities was after Walter had prescribed schedule 5 drugs to himself in a dishonest and fraudulent manner. This action of Walter amounted to misconduct.
- (26) The recommendation of the treating medical team of Walter was that he be placed on a period of three months temporary incapacity leave which the employer then did for the period in July 2020 and to return to work on 5 October 2020. In any event Walter was still on suspension by 5 October 2020 and could not return to work prior to his disciplinary hearing which took place on 15 October 2020. There is no doubt that Sonderup had given more attention to Walter than he had for other interns and as Sonderup testified he would have liked to ask Walter what more he would have expected from him. A further recommendation was given by the treating team that reasonable accommodation be given to Walter by transferring him to a different hospital where he would not have to do any shift work. That request is very difficult in that the hospital needs to be a training hospital for Walter to complete his internship and since time immemorial health care workers and hospital employees have always worked shifts.

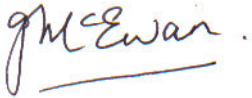
- (27) In essence there can be no doubt that the employer in this case had lost trust in Walter due to his wilful, deceitful, dishonest and fraudulent actions over a period of some six months. The acts were knowingly and cunningly carried out by Walter in order to secure for himself medicine that at his request had been stopped earlier in 2019. We only have the word of Walter in this regard as no corroborating evidence was submitted during arbitration. Walter should have gone back to his psychiatrist and asked her to change his prescription to put back those medicines which he claimed had been stopped at his behest seven months earlier if that were the case. In this case Walter posed an operational threat to the Department of Health as the trust relationship had been irrevocably broken. It should be pointed out that this was the second chance given to Walter to complete his internship, he was consistently reminded by the Health Committee of the HPCSA that he was not permitted to prescribe or procure, order and administer medication which falls into Schedules 5 to 7 and Walter wasted the second chance that he had been afforded when he perpetrated the transgressions that he did over the six-month period. The medical field is a discipline where high levels of trust are needed when dealing with the health care of the people of South Africa. In the circumstances I find on a balance of probabilities that the dismissal of Walter was appropriate in these circumstances and is a decision that a reasonable person would make and his dismissal if found to be substantively fair.
- (28) It should be noted that I am not bound by an award made by another commissioner although bound to follow the decisions of the Courts. In the case of *Autozone v Dispute Resolution Centre of Motor Industry and Others [2019] JOL 41073 (LAC)* the Court had to decide whether an act of dishonesty would lead to a breach in the trust relationship so as to render the continuation of employment intolerable. The court held that in cases where the offence reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably will lose trust in the employee, who by reason of his misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the employment relationship intolerable or unfeasible. It was further held that employees who engage in dishonest or deceitful conduct pose an operational risk to the employer's business. This operational risk alone would suffice to justify dismissal. The LAC decision illustrates that an employer need not always present evidence of a breakdown of the trust relationship in order to justify dismissal for dishonesty. If the nature of the offence is such that it would lead to a breakdown in trust, no further evidence would be required.

## AWARD

(29) The dismissal of the employee was substantively fair.

(30) Consequently, the employee's claim is dismissed.

(31) There is no order of costs.

A handwritten signature in blue ink that reads "Gail McEwan". The signature is written in a cursive style and is underlined with a single horizontal line.

Gail McEwan