



# ARBITRATION AWARD

Commissioner: **Khehla Khanyile**

Case No: **PSHS712-19/20**

Date of award: **3 September 2020**

In the matter between:

**RIKESH SINGH**

Applicant

and

**DEPARTMENT OF HEALTH – KWAZULU NATAL**

Respondent

---

## **DETAILS OF HEARING AND REPRESENTATION**

1. This arbitration was scheduled for 06 March 2020, 03 June 2020, 09 July 2020 and 12 August 2020. The applicant appeared in person and was initially represented by an attorney Ms. Nelisiwe Madlala, who stood in for Mr. Bhamjee who appeared for the applicant on 03 June 2020. The respondent was represented by a Senior Human Resources Officer, Mr. Lusanda Tshobeni. Ms. Nelisiwe Madlala brought an application for postponement on 06 March 2020. The proceedings were digitally recorded and I also took down notes.

## **Preliminary issues**

### **Issue to be decided**

2. I am required to decide whether to grant the application for postponement or not.

### **The applicant**

3. Ms. Nelisiwe Madlala stated that the applicant was not ready to proceed with the matter as she was standing in for Mr. Bhamjee, who was attending a part-heard arbitration at CCMA in Pietermaritzburg. She submitted that the applicant was requesting for postponement as Mr. Bhamjee was assigned to deal with the matter.

### **The respondent**

4. Mr. Tshobeni opposed the application for postponement in that Mr. Bhamjee had not yet brought an application for legal representation. He further submitted that the respondent was ready to proceed with the matter.

### **Ruling**

5. The applicant party did not bring the application for postponement timeously. The application for legal representation had not been granted. Both parties were present at the hearing. The council had incurred costs in scheduling this matter. In my view, the applicant failed to provide a plausible reason for a postponement application. Therefore, the application for postponement is hereby refused.

### **Issue to be decided**

6. I am required to decide whether to grant the application for legal representation or not.

### **The applicant**

7. Mr. Yunus Bhamjee stated that the applicant required the legal representative in that the applicant does not have the necessary experience in labour law to enable him to run this matter. He submitted that the respondent's representative, Mr. Tshobeni (Senior HR Officer) had extensive labour law litigation experience. He further submitted that the nature of the question of law raised by the dispute involves the interpretation of a legal nature, which cannot be done by the applicant.

### **The respondent party**

8. Mr. Tshobeni opposed the application for legal representation in that he is not an attorney and the application was brought late for the respondent to source an attorney.
9. It is common cause that the applicant is a layperson, and the respondent's representative, Mr. Tshobeni has extensive labour law litigation experience. I am

enjoined to exercise discretion so as to maintain a balance regarding the comparative abilities of the parties to deal with the dispute. In my view, it would be unreasonable to expect the applicant to deal with the dispute without legal representation as the playing field will not be leveled in this matter.

10. In light of the above, the application for legal representation is hereby granted.

### **Ruling**

11. The application for legal representation is hereby granted.

### **Issue to be decided**

12. I am required to decide whether the applicant was dismissed and if so, whether the dismissal was fair or not, and if unfair, determine the appropriate relief.

### **BACKGROUND TO THE DISPUTE**

13. The applicant was employed by the respondent as a paramedic on 04 June 2007. He was earning R15 000.00 monthly at the time of termination 07 May 2019. It is applicant's contention that the respondent unfairly terminated his services. It is the respondent's contention that the applicant was deemed to have been dismissed from his employment by operation of law in terms of section 17(3)(a) of the Public Service Act.

### **SURVEY OF EVIDENCE AND ARGUMENT**

#### **Respondent's case**

##### **Witness 1**

14. Mr. Siyabonga Khambule (Sub district manager) stated that he started working with the applicant in Umzimkhulu since 2012. He submitted that the applicant was moved to Pietermaritzburg call centre to perform light duties. He further submitted that the respondent instructed the applicant to return back to his original post in Umzimkhulu and he reported for duty on 01 October 2018. He testified that the respondent allocated him duties to drive a bus transporting patients to Pietermaritzburg, but he did not report back for duty the following day. He further testified that the applicant knew the protocol to follow when he was not well and unable to report for duty.

15. He stated that the applicant did not report for duty from 6 May 2019 to 12 June 2019 and also failed to submit medical certificates.

## **Witness 2**

16. Mr. Tobias Mkhize (District Emergency Services Manager) stated that the applicant came to lodge a Grievance at Harry Gwala Health District office, and he had a meeting with him on 06 May 2019. He submitted that Mr. Tshobeni handed him with a letter instructing him to report back for duty with immediate effect. He further stated that the applicant did not report back for duty within one calendar month, and subsequently his services were terminated.
17. Under cross examination it was put to him that the applicant had a medical certificate from Dr Chite recommending he be reassigned to a light duty.
18. Under clarity questions he submitted that had the applicant reported for duty, the respondent would have given him the light duty.

## **Witness 3**

19. Mr. Lusanda Tshobeni (Senior HR Officer) stated that the applicant came to lodge a grievance at Harry Gwala District office on 06 May 2019. He submitted that the respondent discovered that the last valid sick note for the applicant was from 02 January 2019 to 04 January 2019. He further submitted that he gave the applicant the letter instructing him to report back for duty at Harry Gala District office with immediate effect. He testified that the applicant was made aware should he fail report for duty, the disciplinary procedure would follow. He further testified that the applicant absented himself for more than one calendar month from 06 May 2019 to 12 June 2019. He stated that the respondent then invoked section 17(3) (a) of the Public Service Act, and termination letter was sent by registered mail to the last known address of the applicant on 18 June 2019. He further stated that the applicant was deemed to have been dismissed from his employment with the Respondent by operation law.

## **Applicant's case**

20. Mr. Rikesh Singh stated that he was involved in the vehicle accident and sustained serious injuries in 2015. He submitted that he was on and off duty as he was sick. He testified that he was moved to Department of Health call centre in Pietermaritzburg where he performed light duties from 2015 until September 2018. He further testified that the

EMRS Director, Mrs. BN Zungu instructed him to return back to Umzimkhulu, and he reported for duty on 01 October 2018.

21. He testified that he had a medical certificate from Dr Chite dated 21 November 2018, which recommended that he be reassigned to his call centre duties again as he was still unfit for active duty. He stated that he also submitted the medical certificate dated 02 January 2019, confirming that the doctor booked him off sick from 02 January 2019 to 04 January 2019. He further submitted that he was off sick, but he did not submit the medical certificate for the period from 05 January 2019 to 06 May 2019.
22. He stated that he applied for incapacity leave, but it was never approved. He further stated that he went to lodge the grievance at Harry Gwala District office, and Mr. Tshobeni handed him the letter dated 06 May 2019 which reads: " According to our records, your last sick note was valid for 2 January 2019 to 04 January 2019. You are hereby ordered to report back on duty with immediate effect and report to the EMRS District Office". He further stated that his attorney, Udes Ramesar sent an email dated 10 May 2019 to Mr. Tshobeni, and also referred him to the medical certificate dated 21 November 2018 from Dr Chite, who booked him off work indefinitely. He testified that the respondent did not respond to his attorneys. He further submitted that he did not report back for duty from 06 May 2020 to 12 June 2020.
23. He submitted that he became aware that his services were being terminated when Gems informed him telephonically that his debit order was reversed thereof. He further submitted that he then contacted Mr. Khuboni (HR Officer), who also informed him that his services were being terminated. He stated that the aforesaid Khuboni handed him the termination letter on 09 July 2019 which reads: "Your services as the Emergency Care Officer Grade 3 have been terminated due to abscondment in terms of Public Service Act section 17 (3) (a); your termination date is 07 May 2019. You may make representations via Harry Gwala District Office in an attempt to apply to Executive Authority (Head of Head) for reinstatement.
24. Under cross-examination he conceded that he did not have the medical certificate for a period from 5 January 2019 until 06 May 2020.

25. Under clarity questions he submitted that he did not inform Mr. Tshobeni that he had applied for the incapacity leave on 06 May 2019.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

26. The applicant referred an unfair dismissal dispute in terms of section 191(1), 191(5) (a) of the LRA to the council. It appeared on evidence that the applicant was deemed to have been dismissed from his employment by the operation of law. I am required to decide whether the council has jurisdiction to arbitrate the matter.

27. In terms of section 17(3) (a) (i) of the Public Service Act provides: an employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

28. In this instance, the respondent gave the applicant the termination letter dated 12 June 2019 which reads:

“Your services as the Emergency Care Officer Grade 3 have been terminated due to abscondment in terms of Public Service Act section 17 (3) (a); your termination date is on 07 May 2019. You may make representations via Harry Gwala District Office in an attempt to apply to the Executive Authority (Head of Health) for reinstatement”.

29. I also had regard to two cases cited by the applicant: *PSA obo Matshoba HOD Department of Health and another LC Capetown – 15 November 2017 (saflii)* case no c62/15, *D Gangaram Garam v MEC for Department of Health – KZN and another*, Labour Appeal Court of South Africa, Durban 13 June 2017 (SAFLII), Case No DA 9/16. I would like to bring to attention of the applicant that the aforesaid cases were never referred to the council as it lacked jurisdiction to hear the matter. In this case, the applicant was also not dismissed from his employment as contemplated in section 186 of the LRA. In my view, the council lacks jurisdiction to hear the matter as the applicant was deemed to have been dismissed by operation of law. The application is hereby dismissed.

**AWARD**

30. The council lacks jurisdiction to hear the matter. The application is hereby dismissed.

31. There is no order as costs.

A square image containing a handwritten signature in black ink on a light-colored background. The signature is stylized and appears to be a cursive name.