



# ARBITRATION AWARD

Commissioner: **Khehla Khanyile**

Case No: **PSHS743-19/20**

Date of award: **26 August 2020**

In the matter between:

**PSA obo NJABULO PHAKATHI**

Applicant

and

**DEPARTMENT OF HEALTH- KWAZULU NATAL**

Respondent

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## DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was scheduled for 05 February 2020 and 11 August 2020 at E G Usher Memorial Hospital in Kokstad. Mr. Njabulo Phakathi (“the applicant”) appeared in person and was represented by the Union Official, Mr. Zamani Nhlangulela from PSA. Department of Health- KwaZulu Natal (“the respondent”) was represented by an Assistant Director Labour Relations Officer, Mr. Sipiwe Sithole. The proceedings were digitally recorded and I also took down notes.

## ISSUE TO BE DECIDED

2. I am required to decide whether the dismissal of the applicant was fair or not.

## BACKGROUND TO THE DISPUTE

3. The applicant was employed by the respondent as an enrolled nurse on 02 January 2018. He was earning R16000, 00 monthly at the time of dismissal on 21 August 2018.
4. The respondent preferred one charge against the applicant as follows:

*Misuse of state property*

5. It is the applicant's contention that the respondent dismissed him for no plausible reason. It is the respondent's contention that the dismissal of the applicant was fair.

## **SURVEY OF EVIDENCE AND ARGUMENT**

### **The respondent's case**

#### **Witness 1**

6. Ms. Thobeka Mhlongo (Acting Coordinator) stated that the respondent hired a Nissan double cab vehicle for a HPV campaign in 2018. She submitted that the applicant collected the vehicle from Avis as the main driver and responsible for the vehicle. She further submitted that the applicant was orientated on the use of the vehicle that was allocated to him and he attended the orientation where everything was explained to him relating to the use of the state hired vehicle. She further testified that she was informed that the applicant, Mr. Blessing Ngcongco and one other employee were involved in the vehicle accident and being treated at OPD. She stated that she then called and asked him what had happened, and the applicant replied to her that they were involved in the accident with the state hired vehicle. She testified that according to Avis report, Mr. Ngcongco was driving the vehicle under the influence of alcohol at the time of accident on 18 March 2018. She further testified that the applicant was not authorized to utilize the state hired vehicle on the date of the accident. She testified that the hired vehicle was involved in an accident on the weekend on 18 March 2018 and the trip sheet was not authorized.
7. Under cross examination she submitted that the applicant was not authorized to utilize the state hired vehicle on the date of the accident.

#### **Witness 2**

8. Mrs. Wendy Ann Rosewall (Retired Operation Manager and Acting Assistant Nursing Manager) stated that she was informed in the morning of 19 March 2018 that the applicant, Mr. Ngcongco and an intern from HR department were involved in the vehicle accident and were being treated at the casualty department. She then went to the OPD and found them there, and they informed her that they were involved in the accident while driving the state hired vehicle. She testified that the applicant was not authorized

to utilize the state hired on the date of the accident as the vehicle was only meant for a school health programme during the week. She further testified that the applicant and Mr. Ngongo informed her that they were coming from the wedding in Pietermaritzburg when the accident occurred.

9. Under cross examination it was put to her that the applicant was not a passenger in the state hired vehicle and was never admitted at EG Usher Memorial Hospital. It was also put to her

### **The applicant's case**

10. The applicant stated that he was not a passenger in the state hired vehicle which was involved in the accident on 19 March 2018, and was never hospitalized at EG Usher Memorial Hospital. He testified that he did not write and append his signature on the statement which was confirming that he was in the vehicle at time of the accident. He further testified that he did not attend and sign the orientation attendance register on 28 January 2018.

11. Under cross examination it was put to him that he made a written statement which was the confession. It was further put to him that his appended signatures were identical on the induction attendance register, Avis report and written statement.

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

12. The applicant referred an unfair dismissal dispute to the council. I am required to decide whether the dismissal of the applicant was fair or not.

13. In terms of section 185 of the Labour Relations Act 66 of 1995 ("the LRA") every employee has a right not to be unfairly dismissed. In terms of section 192 (2) of the LRA, the respondent bears the onus to prove the dismissal of the applicant was fair. In terms of 188(1) (a) of the LRA, the respondent must prove that the reason for dismissal was fair and that the dismissal was effected with a fair procedure. Item 7 of Schedule 8 states that any person who is determining whether a dismissal for misconduct is unfair should consider-

- (a) Whether or not the employee contravened a rule or standard regulating conduct in, or relevance to, the workplace; and
- (b) If a rule or standard was contravened, whether or not –
  - (i) The rule was a valid or reasonable rule or standard;
  - (ii) The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
  - (iii) The rule or standard has been consistently applied by the employer, and
  - (iv) The dismissal was an appropriate sanction for the contravention of the rule.

14. Before I proceed with the analysis of evidence, I would like to bring to attention of the parties that I had regard to all the evidence before me and the closing arguments.

15. It is common cause that the state hired vehicle was utilized for the private purpose at time of the accident. It appeared as common cause that the state hired vehicle was allocated to the applicant as the main driver. It also appeared as common cause that the accident occurred on the Sunday.

16. The applicant argued that the respondent dismissed for no plausible reason as he was not a passenger in the state hired vehicle, and he did not apprehend signature on the statement or Avis accident report. I reject the applicant's evidence to be less probable than that of the respondent. The applicant did not put this version to the first witness of the respondent, Ms. Mhlongo that he would dispute that it was his signatures that reflected on the written statement and Avis accident report. He also failed to put his version to the first witness that he was not a passenger in the state hired vehicle during cross examination. In my view, the applicant's version stands to fail. I further noted that the applicant was orientated about the usage of the vehicle and was aware of the rules that the aforesaid vehicle was only allocated to him. In this instance, Mr. Ngongo was driving and damaged it at the time of the accident. The applicant compromised the service delivery. The applicant showed no remorse. I find that the applicant committed the serious offence which warranted a dismissal.

17. I accept the respondent's contention that the applicant misused the state property in that he was not authorized to utilize the state hired vehicle on the date of the accident. The evidence led by the respondent's witnesses, Ms. Mhlongo and Mrs. Rosewall was consistent and credible. Ms. Mhlongo and Mrs. Rosewall evidence corroborated each

other's version that the state hired vehicle was allocated to the applicant. The respondent orientated the applicant about the usage of the state hired vehicle. The applicant, Mr. Ngcongco and the intern from the Human Resource were involved in the state hired vehicle, and admitted at the casualty department. The respondent's argument that the applicant was not authorized to utilise the state hired vehicle on the date of the accident stands to pass.

18. In light of the above, the respondent on the balance of probabilities proved that the dismissal of the applicant was substantively fair. I make the following award:

**AWARD**

19. The dismissal of the applicant was substantively fair.

20. The applicant's claim is hereby dismissed.

21. There is no order as costs.



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KHEHLA KHANYILE