



# ARBITRATION AWARD

Commissioner: **N Bantwini**

Case No: **PSHS899-18/19**

Date of award: **13 February 2019**

In the matter between:

NEHAWU OBO TYELOVUYO GOMBA

(APPLICANT)

and

DEPARTMENT OF HEALTH- EASTERN CAPE

(RESPONDENT)

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This arbitration was heard on 31 January 2019 at the respondent's premises in Aliwal North. It came before the PHSDSBC in terms of Section 191 (5) (a) read with section 186 (2) (b) of the Labour Relations Act, 66 of 1995, as amended (LRA) for an alleged unfair labour practice dispute based on the sanction of 30 days suspension without pay and a final written warning. Mr. Ernest Elefu an official from NEHAWU appeared for the applicant, Mr. Tyelovuyo Gomba. Mr. Luvuyo Busakwe appeared for the respondent, the Department of Health-Eastern Cape. Parties were allowed to submit written closing arguments on 06 February 2019. The last set of arguments from the applicant were received on 07 February 2019. The proceedings were electronically recorded.

## **ISSUE TO BE DECIDED**

2. I am required to decide as to whether the respondent committed an unfair labour practice based on sanction of 30 days suspension without pay and a final written warning or not.

## **BACKGROUND TO THE DISPUTE**

3. The applicant is employed by the respondent as EMS Emergency Care Practitioner and is based at Aliwal North. He referred a dispute through his union arising from the following allegation:
  4. (1) "On 24 November 2016, you left the patient (Mrs. S.C. Siyali) which you transported from Aliwal North Hospital to Frontier Hospital stranded for reasons known by you which is tantamount to gross negligence.
    - (ii) Your actions of neglecting the Patient (Mrs. Siyali) has brought the good name of the Department of Health, into disrepute, in that your actions on 24 November 2016 has portrayed a negative image about Emergency Medical Services and the entire Department of Health.
    - (iii) Your actions on the 24 November 2016 have violated the Patient's rights.
    - (iv) Your actions on 24 November 2016 have prejudiced the administration or efficiency of the Department of Health, in that the ambulance which was allocated to you was expected to be used for other departmental cases".
5. The dispute was conciliated and it remained unresolved. The applicant, through his union requested arbitration.

## **SURVEY OF EVIDENCE**

6. According to Mr. Elefu's opening statement, the applicant was not negligent and did not commit any form of gross negligence in his actions. The applicant seeks setting aside of 1-month suspension without pay and final written warning as a remedy.
7. The applicant, Mr. Tyelovuyo Gomba testified as follows:
8. On 24 November 2016 he resumed duties and Mr. Jan was the Supervisor who was present. There were transfers which had to be taken care of and the unit was short

staffed. Mr Jan instructed them to escort each other. The ambulance which he was driving was scheduled to transport a patient to Frontier hospital in Queenstown.

9. He was with Ms. Vivian Platye in the crew. They handed the patient over with her escort who was her son to the medical staff. Mrs. Mdandalaza, who was driving the PTV to East London, was alone and they (the applicant and Ms. Platye) accompanied her for purposes of assisting her as she was driving 21 walking patients alone. The section was short staffed and he was driving the patient with his son who was her escort.
10. Upon their arrival at Frontier Hospital they handed the patient over to the Nurses with a folder and told the Doctor that they will leave the patient as they had to proceed to East London. They left the ambulance he was driving at Frontier Hospital.
11. At about 14h00 while they were still in East London, Ms. Platye received a call from a person who was complaining about the patient who was left in Queenstown. He also received a complaint and the caller was complaining about the patient who was left in Queenstown and he explained the situation of being short staffed in the section to the section. They collected the patient at 18h00 and it was late.
12. At the disciplinary hearing he pleaded guilty to all the charges after they were read by the chairperson. He was advised by his representative to plead guilty promising that the sanction will be lenient. Initially he did not agree with the representative's advice explaining to him situations wherein Paramedics would go an extra mile in assisting the respondent. His sanction was a final written warning with 1-month suspension without pay. He seeks setting aside of the sanction as a remedy.
13. Under cross-examination, the applicant testified as follows:
14. Mr. Jan was the Supervisor on 24 November 2016 and Ms. Platye was his partner. Ms Mdandalaza was driving the PTV bus. The patient was taken to Queenstown, Frontier Hospital and was escorted by the relative. No EMS official was sitting with the patient or escorting the patient. Ms Platye was looking at the back as she was sitting next to him (the applicant).

15. Upon arrival at Queenstown, they handed the patient over to the Nurses. He did not wait for the patient as they had to proceed to East London. The PTV was driving 21 patients and had to be escorted by at least one official. Even if one of the officials had remained in Queenstown, he was not going to be able to drive the patient back to Aliwal North.
16. The applicant stated further that it is not conducive for the patient to wait in a parked ambulance. The wheel chair is supposed to be operated by the EMS personnel but he did show the patient's escort how to operate the wheel chair.
17. EMS personnel are supposed to operate the wheelchair and are supposed to escort the patient by sitting at the back of the ambulance to ensure that the patient is stable. It was not correct for both of them (the applicant and Ms. Vivian Platye) to sit at the front. Ms. Platye is senior to him according to the applicant and he takes instructions from her.
18. When a question as to whether the patient's rights were not violated or not, the applicant's response was that Ms. Platye was supposed to be with the patient as she was not driving. He pleaded guilty of the charges based on the advice of the union representative who said the sanction will be lenient if he pleads guilty of the charges. The sanction was harsh.
19. Under re-examination, the applicant stated that he was the Driver. EMS personnel have to escort the patient even in the presence of a relative. The patient complained of waiting until 18h00. He was not negligent and or gross negligent and it was not the first time wherein he had to drop patients in Queenstown and proceed to East London.
20. The first witness for the applicant Mr. Meluhlanga Mazomba testified as follows:
21. He knows the applicant as a colleague. On 24 November 2016, their supervisor was Mr. Jan. The staff reported on duty and Mr. Jan allocated duties to staff. The applicant drove an ambulance to Queenstown. There was staff shortage and his crew was instructed to proceed to East London.
22. The witness was not cross-examined by the respondent.
23. In closing, Mr. Elefu argued as follows:

24. The respondent is not certain as to whether the negligence is in relation to the patient that was taken to Frontier Hospital and returned at 17h45 on the crew for ongoing to Frere Hospital but there is no basis for both. There was no turn around time as to when the patient was supposed to be returned back to Aliwal North.
25. Mr Jan issued a reasonable instruction for the applicant's crew to escort Ms Mdandalaza to East London. The applicant's representative finally argued that the respondent's sanction was punitive instead of being corrective in nature. The applicant seeks setting aside of the sanction.

### **RESPONDENT'S CASE**

26. According to Mr. Busakwe's opening statement, the disciplinary process was fair and the respondent will prove that the sanction of 1-month suspension without pay and a final written warning was a fair sanction.
27. The only witness for the respondent Mr. Siyabonga Majeke testified as follows:
28. He works for the respondent as Manager: EMS and is based at Aliwal North. During the period of the incident, he was the Acting Sub District Manager at Aliwal North. He was informed by the Station Manager that the applicant and Ms. Platyie left a patient in Queenstown and proceeded to East London.
29. The crew left the telephone numbers to the patient's son, Mr. Siyoli who was the escort for the patient. The escort phoned the controller, shift leader and himself alerting them that they were finished. En route to Queenstown the patient was not escorted by the EMS personnel but only by her relative Mr. Siyoli. No medical supervision was made by EMS personnel. Both the applicant and Ms. Platyie were charged.
30. The applicant and Ms. Platyie proceeded to East London. The applicant pleaded guilty at the disciplinary hearing. He appealed to the Executing Authority and he lost the appeal. The patient's rights were violated as the crew which the applicant was part of abandoned the patient and left the ambulance parked at Frontier Hospital.
31. Under cross-examination, the witness testified as follows:

32. The crew left the ambulance which was to be used for other departmental cases parked in Queenstown for the whole day. The patient was left frustrated, hungry and stranded as she was pushed to casualty after she was attended to by Medical Practitioners at 12h00. The patient was picked up at 18h00 and brought back to Aliwal North. The witness stated further that there was no need for the crew to assist Ms Mdalamba to transport 21 patients to East London.
33. Under re-examination, the witness stated that the patient could have been transported back to Aliwal North immediately after 12. One of the crew members should have waited with the patient in Queenstown. The standard operating procedure is silent about the use of PTV. It is only now that it should be driven by two officials.
34. In closing, Mr. Busakwe argued as follows:
35. The applicant and Ms. Platyie failed to escort the patient on route to Frontier Hospital as they were both sitting at the front. The patient was sitting at the back with her relative. The patient's rights were violated as she was not cared for and this is tantamount to gross negligence.
36. The allegation to the fact that Mr. Jan instructed the applicant and Ms. Platyie to accompany Ms. Mdandalaza to East London is not true. It would not make sense for Jan to issue such an instruction while another PTV was instructed to drive patients to Bloemfontein with one driver and PTV to East London to be accompanied by the crew to Queenstown. Had the applicant's crew not left to East London, the patient could not have been left stranded and the ambulance which was parked in Queenstown between 10h00 and 18h00 could have been utilized for other departmental cases. The patient, as she was discharged at 12h00 and got transported at 18h00 was prejudiced; her rights grossly violated by trained professional who subscribes to HPCSA.
37. Mr. Busakwe finally argued that the sanction imposed by the chairperson was fair and appropriate and the fact that he pleaded guilty, he was acknowledging that he was indeed guilty.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

38. It is common cause that the applicant was charged and pleaded guilty of the 4 offences at the disciplinary hearing. The chairperson also found the applicant guilty of all the charges.
39. It is also common cause that the sanction imposed was 1-month suspension without pay and a final written warning.
40. It is furthermore common cause that Ms. Platye, the applicant's partner was also charged with the same offences and the same sanction was imposed.
41. It is the applicant's case that his crew was given an instruction to transport a patient to Frontier Hospital, Queenstown and escort Ms. Mdandalaza who was transporting patients to East London.
42. This allegation was disputed by the respondent through its witness, Mr. Majeke. The respondent's version is that Ms. Mdandalaza was supposed to drive alone to East London as the applicant's crew was supposed to transport the patient back to Aliwal North after being examined.
43. It must be noted that neither Mr. Jan nor Ms. Platye, his crew member was called by the applicant to corroborate his version.
44. It is common cause that the ambulance was parked at Frontier Hospital from 10h00 to 18h00 and patient was left with her son Mr. Siyali at the hospital, examined and finished at 12h00.
45. It is the respondent's case that although the patient was in the hospital premises, she was left stranded as she was later picked up at 18h00. This was viewed as violation of the patient's rights and gross negligence. I found the applicant guilty of the charges.

46. The applicant conceded that even on route to and from Queenstown; none of the EMS personnel was sitting at the back with the patient to monitor her stability, meaning the patient was neglected and not escorted by EMS Practitioner. The applicant also conceded that this was not permitted in terms of the EMS standard operating procedures.

47. It must be noted that although the applicant claimed that even if one of the Practitioners, had left behind with the applicant, the official was supposed to wait the PTV bus from East London, he (the applicant) could not dispute that the ambulance could have been used for other departmental cases. This means that the applicant's actions prejudiced the administration or efficiency of the respondent. I also find the applicant guilty of this offence.

48. The applicant has failed to discharge the onus to prove the claim of unfair labour practice against the respondent.

**AWARD**

49. In the circumstances, I deem it reasonable to make the following award;

50. I find the sanction a final written warning and 1-month suspension of the applicant, Mr. Tyelovuyo Gomba without pay issued by the respondent; the Department of Health-Eastern Cape was both procedural and substantively fair.

51. The applicant's claim is dismissed.

52. There is no order as to costs.



Signature .....

Ncumisa Bantwini