



# ARBITRATION AWARD

Case No: **PSHS922-19/20**

Commissioner: **T Erasmus**

Date of award: **15 July 2020**

In the matter between:

**PSA obo TASWELL ANDREW SCHEEPERS**

Union/ Applicant

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

Respondent

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## **Details of hearing and representation**

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 191(5)(a) of the Labour Relations Act 66 of 1995 (“the LRA”) and was heard at the offices at the First Floor Boardroom, Western Cape College of Nursing, Klipfontein Road, Athlone on 7 July 2020. The Applicant was represented by Mr. Craig Appels from PSA, whilst the Respondent was represented by Mr. M Ngqame, Labour Relations Officer at Respondent.

## Issue to be decided

2. I must decide whether the applicant's dismissal was substantively fair. Procedural fairness is not placed in dispute.

## The respondent's case

3. The applicant was dismissed for the charges as set out on pages 1 and 2 of the respondent's bundle. Charge 6 is related to false entries made into the attendance register during the period 18 June to 7 August 2019. The applicant was served with a notice to attend a disciplinary hearing, which was initially set down for 30 September 2019, but was postponed as the applicant was not present at the hearing and the hearing eventually took place on 3 October 2019. There was no valid reason for the applicant's absence and the hearing proceeded in his absence on 3 October 2019. The applicant was assisted in the ICAS programme in the past, he did not attend all the sessions, he was also assisted by a social worker who stopped assisting him, as he failed to give his full co-operation.
4. **NOLAN MARSH testified on behalf of the respondent (hereinafter referred to as "Marsh")**
5. Marsh is the chief porter at the Mitchells Plain District hospital and he was the applicant's supervisor. Marsh referred to:

Charge 1 in terms of which the applicant was charged with failure to communicate his absence from duty, by arriving late for work during the period 18 June 2019 to 7 August 2019. The charge which was confirmed by Marsh, confirmed that he did not give the applicant permission not to be on duty.

Charge 2 – failure to communicate his absence from duty by taking unauthorised leave on 31 July 2019. Marsh did not give him permission not to be on duty. The applicant asked for ten (10) days leave, but he failed to complete a leave form.

Charge 3, relating to failure to communicate his absence from duty on 19 and 20 August 2019: the applicant did not report for duty, nor did he phone.

Charge 4: failure to communicate absence from duty and unauthorised leave on 29 August until 6 September 2019: he did not communicate with Marsh and he was absent without leave.

Charge 5: failure to communicate his absence from duty on 12 to 18 September 2019: the applicant did not have permission to be absent and he did not inform Marsh that he was not going to be on duty.

Charge 6: making false entries in the register for the period 18 June 2019 until 7 August 2019: when the applicant came on duty, Marsh told him that he must sign the time of arrival. The applicant signed for 07:00, although he only arrived at work later.

6. The applicant was suspended for two (2) months during 2015 due to unauthorised absence, in respect of which he received a warning. Marsh sent various letters to the applicant in the past to ask him to report for duty.
7. Reference was made to page 7, being a final written warning which was served on the applicant on 10 April 2019, valid for six (6) months, therefore this warning was still valid at the time when he was absent from work as per the present charges. The applicant was referred to ICAS, after he informed Marsh that he had a problem and Marsh's manager, Mr Roberts arranged for the applicant to attend ICAS.
8. Reference was made to page 17, being a letter from Renata Booysen to Clara Johnson, in terms of which it is clear that the applicant was referred to ICAS, which referral took place on 18 May 2016. The reason for the referral to ICAS as per page 19, was the same as the reason for his dismissal, namely unauthorised leave and at that time it was also a due to substance abuse.

9. Reference was made to page 23, which is the outcome of the ICAS process, whereby it is apparent that the applicant was not willing to co-operate. Reference was also made to page 25, being the confidential social worker's report.

**The following ensued from cross-examination:**

10. It ensued from cross-examination that the applicant did make contact with Marsh on 1, 8, 11 and 29 July 2019 communicating his absence, although he did not have a valid reason or permission for these days. Marsh confirmed that the applicant participated in some of the ICAS sessions, although he did not participate in all the sessions. Marsh handed over the request to his supervisor, Roberts, who handled all the requests to ICAS after the applicant informed him of his problems.

**The following ensued from re-examination:**

11. On 18 June 2019 as per page 31 of bundle R, the applicant arrived just after 09:00 and did not communicate the fact that he was late. On page 32 on 20 June 2019, the applicant was late for duty, which he did not communicate. On page 34 on 24 June 2019, the applicant arrived late at work, just after 09:00, he did not communicate his absence. On page 34 on 25 June 2019 he arrived late at work, just after 08:00, without communication. On page 25 on 26 June 2019 the applicant arrived at work at 09:00, without saying a word. He did not communicate with his supervisor on that day.

**The applicant's case**

12. The applicant was charged with the following charges:

**“CHARGE 1**

*That you allegedly transgressed a rule contained in Resolution 1 of 2003, read with rule C.4.3 of the Code of Conduct for the Public Service, in that you have failed to communicate your absence from duty when you arrived late at work during the period **18 June to 07 August 2019.***

**CHARGE 2**

*That you allegedly transgressed a rule contained in Resolution 1 of 2003, read with rule C.4.3 of the Code of Conduct for the Public Service, in that you have failed to communicate your absence from duty thus taking unauthorised leave on **31 July 2019**.*

**CHARGE 3**

*That you allegedly transgressed a rule contained in Resolution 1 of 2003, read with rule C.4.3 of the Code of Conduct for the Public Service, in that you have failed to communicate your absence from duty thus taking unauthorised leave on **19 to 20 August 2019**.*

**CHARGE 4**

*That you allegedly transgressed a rule contained in Resolution 1 of 2003, read with rule C.4.3 of the Code of Conduct for the Public Service, in that you have failed to communicate your absence from duty thus taking unauthorised leave on **29 August to 6 September 2019**.*

**CHARGE 5**

*That you allegedly transgressed a rule contained in Resolution 1 of 2003, read with rule C.4.3 of the Code of Conduct for the Public Service, in that you have failed to communicate your absence from duty thus taking unauthorised leave on **12 to 18 Sept 2019**.*

**CHARGE 6**

*That you allegedly transgressed a rule contained in Resolution 1 of 2003, read with rule C.4.3 of the Code of Conduct for the Public Service, in that you were dishonest when you made false entries into the attendance register during the period **18 June to 07 August 2019**.”*

13. The applicant pleaded not guilty to the charges. The applicant was employed on a permanent basis by the respondent since 26 March 2010 in the capacity as a

porter. He earned R9 205.50 on the date of dismissal, being 9 October 2019. The applicant seeks reinstatement.

14. **TASWELL ANDREW SCHEEPERS testified in support of his own case (hereinafter referred to as “the applicant”)**
15. The applicant confirmed that he was employed as a porter by the respondent since 2012. The first time the applicant arrived late, he spoke to Mr Nolan Marsh and informed him of the reason for his lateness. The applicant is a single parent and could not leave his child at home alone and this was the same answer he gave Marsh every time he asked him about his lateness. Cara, from Human Resources asked him to try and come in a little earlier. She is also the manager of all the porters.
16. The applicant received a final written warning, although he was referred to ICAS. He chooses not to speak about his past. He had problems which he discussed at ICAS. He was earlier involved in gangs and he had to protect his children, he was often robbed on his way to work. His cellular phone was also stolen from him and nobody else would allow him to use their phones. Therefore he could not phone the workplace due to his gangster involvement. He sought help as per page 25 from ICAS, Marsh did not want to help him, therefore he went on his own.
17. He confirmed that he did not come to work on 31 July 2019 as set out in charge 2. He took unpaid leave as he could not come to work as he got robbed at gunpoint. On 19 and 20 August 2019 as per charge 3 he phoned Marsh and told him that he would not be at work, he went to Human Resources and to Marsh, they wanted him to take unpaid leave. Charge 4: he did not phone on 29 August 2019, it was written in his book, another book to the one he had here today, it was a blue book. When he asked for the book to prepare for the hearing it was denied. (I record that none of this was put under cross-examination to Marsh).

### **The following ensued from cross-examination:**

18. The applicant conceded that he was assisted by the respondent, as per page 17 he was referred to ICAS by Clara, although the applicant did not attend all the ICAS sessions.

### **The respondent's closing argument**

19. The applicant came late on many occasions without communication, except for the few days pointed out by the applicant's representative. Charges 2 to 6 are all undisputed. The only concerns raised are related to charge 1. The respondent's case must stand. The respondent referred the applicant to ICAS in the past, but he failed to co-operate. The applicant was found guilty on the charges and dismissal was the appropriate sanction. Marsh had no reason to lie, he may have said incorrect things relating to charge one. The respondent proved its case on the balance of probabilities. The respondent asks for dismissal of this application.

### **The applicant's closing argument**

20. Charge 1: the applicant did communicate with the respondent. He made it known to the employer that he had serious difficulties in communicating. The applicant knew he could not leave his child alone, especially due to his own history with gangsterism. It caused him to be late, there were times when he did not have a phone, he had been robbed. There were times he could not get out of the house, due to his previous involvement with gangsterism. The employer did not say the relationship was so tarnished that the applicant cannot be accepted back. The applicant asks for a sanction short of dismissal, such as suspension without pay.

## **Replication**

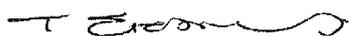
21. Anything short of dismissal will not be possible, as the department has filled all the positions, including that of the applicant. The respondent cannot condone the applicant's conduct, it set a bad precedent and the respondent applied the same sanction in similar situations in the past.

## **Analysis of the evidence and argument**

22. It is common cause that the applicant is guilty of all six charges levelled against him, with exception of 1,8,11 and 29 July 2019 where he did make contact with Marsh to explain his absence or late-coming.
23. There was a workplace rule again unauthorised and uncommunicated absence. The applicant received a final written warning (page 7 of the respondent's bundle) on 10 April 2019 in respect of unauthorized and uncommunicated absence, valid for six months. Therefore not only was the applicant aware of the rule, but the final written warning was still valid at the time of the transgressions with which he is charged in the matter before me. I find it to be a reasonable workplace rule. The applicant transgressed the rule, the applicant showed a flagrant disregard for workplace rules. I find that the applicant's dismissal was substantively fair. The applicant did not dispute the procedural fairness.

## **Award**

24. I find that the applicant's dismissal was both procedurally and substantively fair.
25. The applicant's claim is dismissed and he is therefore not entitled to any relief.



**COUNCIL COMMISSIONER: TERESA ERASMUS**