



# ARBITRATION AWARD

Case No: **PSHS163-21/22**

Commissioner: **Teresa Erasmus**

Date of award: **7 September 2022**

In the matter between:

**NEHAWU OBO IAN POTTS**

Applicant

and

**DEPARTMENT OF HEALTH WESTERN CAPE**

Respondent

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This matter was set down virtually 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 virtually on 30 August 2020. The Applicant was represented by Mr Christopher Ventura from NEHAWU, whilst the Respondent was represented by Mr A Solomon, Labour Relations Officer at Respondent. Both parties handed in bundles. The proceedings were recorded mechanically.

## **ISSUE TO BE DECIDED**

2. I must decide whether the Applicant's dismissal was substantively fair, regarding the sanction of dismissal.
3. Procedural fairness is placed in dispute.

## **BACKGROUND TO THE DISPUTE**

4. The Applicant placed procedural fairness in dispute, based on their submission that the Respondent did not bring enough evidence to prove its case and the Applicant's evidence was not fairly viewed during the disciplinary hearing and the Respondent acted inconsistently in imposing the sanction of dismissal.
5. The Applicant was employed by the Respondent as an advisory compliance officer since November 2013. The Applicant was dismissed on the 10th of May 2022, she earned R2 5 000.00(net) at the time of dismissal. Applicant seeks retrospective reinstatement. He admits that he is guilty of the charges levelled against him, but he avers the sanction of dismissal was too harsh and must be replaced with a final written warning instead, the Applicant is currently unemployed.
6. The Respondent stated that Applicant was charged with three exceeding the speed limit with a GG vehicle on three different occasions on the 6th of September 2021, on the third occasion, he caused an accident and wrote off the GG vehicle. The Applicant exceeded the speed limit by more than 20kms per hour. There were no other vehicles involved in the accident, caused by his own negligence.
7. The Applicant's trip authority was only for traveling between work and home, traveling to institutions has been removed from his role. He travelled to Somerset Hospital, without authorization, as it no longer resorts under his jurisdiction. The sanction of dismissal is appropriate in this case. The Resolution on use of GG vehicles will show that dismissal is an appropriate sanction. The Respondent exercised the sanction of dismissal consistently in the past.

## **SUMMARY OF THE EVIDENCE AND ARGUMENT**

8. The parties agreed as follows:

### **COMMON CAUSE FACTS**

9. The Applicant was charged with three incidents of exceeding the speed limit with a GG vehicle on the same day (6 September 2022).
10. On the 6th of September 2021, on the third occasion, he caused an accident and wrote off the GG vehicle.

11. He exceeded the speed limit by more than 20kms per hour. There were no other vehicles involved in the accident.

### **FACTS IN DISPUTE**

12. The Applicant was without proper authorization and also caused an accident due to his own negligence on the 6th of September 2022, the Applicant believed that the previous limitation on his movements have been revoked.

13. The Applicant averred that the sanction of dismissal is appropriate in this case.

14. The Respondent submitted that the Resolution on use of GG vehicles will show that dismissal is an appropriate sanction under the circumstances.

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

15. Anthony Small testified that he is employed as the Deputy Director Compliance, responsible for compliance across the Western Cape Province. The Applicant used to be in his component.

16. The Applicant was dismissed for three charges for over speeding and also for causing an accident on the 6th of September 2021.

17. According to the organogram, the Applicant would have been responsible for a number of hospitals. The compliance manager is responsible for guiding the staff. The Applicant had a long period of absence, due to sick leave, he had just come back from Pillar leave for a long period, when he returned to work on the 6th of September 2022.

18. Small told the Applicant shortly after 11:00 that he had a meeting with treasury, therefore they had to conclude their meeting.

19. The Applicant agreed with Small that he was going to sit at the laundry office. The Applicant did not have staff reporting to him at the time. The Applicant's work was about 30 months behind, because of his sick leave.

20. The Applicant informed Small that Nick de Bruyn was at New Somerset Hospital, assisting Abrahms.

21. The Applicant only had a trip authority to travel from home to work and return.

22. The Applicant was obliged to sit at Stikland Hospital to finish his work.
23. Small received a telephone call from the Applicant at 13:45, he informed Small that he was involved in a motor vehicle accident. Small undertook to inform Mr Pick, to whom the Applicant reported.
24. They then arranged for Abraham Damons to assist the Applicant at the scene of the accident. Damons called Small and said they needed a supervisor to grant authority for the vehicle to drive the vehicle from the scene of the accident. Small granted telephonic authority. Damons asked permission to drive the Applicant home, which permission Small gave.
25. After everything settled, questions arose with Small why the Applicant was on the road at all. Small requested a trip report, it was his first day of driving the GG vehicle again.
26. Small referred to the charges against the Applicant:
27. - Charge 1 - the Applicant travelled 101kms in an 80km zone.
28. Charge 2 -the Applicant was travelling at 159 kms at one stage.
29. Charge 3 – the Applicant was travelling at 109km in an 60km zone.
30. In terms of the Respondent's disciplinary code, a final written warning is the appropriate sanction in case of a first offence and dismissal on further offences of a similar nature. Small testified that the Applicant rectified him in the past about what the policy states, therefore he was fully aware of what the policy states. It was about the duty to drive with your lights on even during the daytime, Small was not aware of this.
31. Small testified that a vehicle is assigned to an employee for an entire month. If there is a need to deviate from your trip, you need to request permission from your supervisor to deviate. The Applicant had to request permission from Mr Pick and in Pick's absence from Small, which he failed to do.
32. The Applicant had not reason to go to New Somerset Hospital, as Mr de Bruyn was already there, and he was more than to equipped to assist Mr Damons on the day.

33. The Applicant had garaging authority to park the vehicle at his house. The Applicant would require a trip authority or an email from his supervisor giving him authority to go to New Somerset Hospital, other than that, he would not have authority to go to New Somerset Hospital at all.
34. Small testified that Jovan Ruiters who was subpoenaed by the Applicant, was never charged with unauthorized use of a GG vehicle. Nigel Koeries, who also works in their component, was not charged for unauthorized use of a GG vehicle or exceeding the speed limit either or being involved in an accident either.
35. Small did not have sight of the functional and work assessment of the Applicant before. He is however aware that the Applicant was sent for a work assessment, as the Applicant complained at one stage that he was struggling to get through his work. The Respondent did two referrals to Metropolitan to try and assist him and to do a reasonable adjustment in the workplace.
36. The staff who reported to the Applicant, was taken away from him. The Respondent tried to get their wellness directorate on board to engage with his psychologist. The Applicant was booked into a facility in middle of January 2022.
37. Small testified that is not positive about the Applicant's request for reinstatement coupled with a final written warning, due to the severity of what happened. The Applicant not only ignored the rules of the road, but he also ignored the Respondent's internal policy and instructions. The Applicant's conduct amounts to a blatant disregard of authority. The Respondent cannot trust the Applicant not to repeat his behaviour.
38. The Applicant was served with a letter notifying him of for poor performance on the same date as when he received the letter of dismissal in respect of his misconduct.
39. The Applicant had a zero-work output in the past two years, whilst he was on full pay. The incapacity process stopped on the day he was dismissed.
40. Small confirmed under cross-examination that any deviation from the trip authority has to be approved by the supervisor by email, but it can also be done telephonically and followed up by an email.

41. Small confirmed that he was in the vehicle on the way to Beaufort-West when he spoke to the Applicant about speeding, another tracker report showed that the Applicant was speeding. This was not the first time that the Applicant was spoken to about speeding.
42. Small confirmed that the GG vehicle is fitted with a bleeper, which goes off when the driver exceeds the speed limit. Every passenger in a vehicle will have a trip authority – point 14 makes provision for a co-driver.
43. Small confirmed that the trust relationship between the Applicant and his supervisor has been broken down irreparably. The Applicant has always completed a trip authority in the past.
44. Deon Morris Pick testified that he is the Assistance -Director in the compliance finance accounting, had was the Applicant's direct supervisor. Pick was working from home on the 6th of September 2021, Small phoned him to inform him about the accident, late the afternoon.
45. The Applicant was working from Stikland Hospital at the time and his tasks were not completed. The Respondent withdrew him from all responsibilities, so that he could focus on getting his work done at the office. The Applicant previously complained that the work made him anxious, therefore the Respondent allocated some of his tasks elsewhere, so that he did not have to get anxious.
46. Pick was shocked to hear that the Applicant was at New Somerset Hospital, as he knew that the Applicant had no business at New Somerset Hospital. He also did not have a trip authority and did not apply for a deviation from his trip authority to be at New Somerset Hospital. Pick could have given authority for deviation.
47. Pick confirmed that the rule for deviation from a trip authority, is that the request must be on email and if the Applicant is not close to an email, he must phone Pick and follow up the request later with an email. Pick tried to phone the Applicant whilst he was still at the scene of the accident, but he could not answer. Pick met with the Applicant after the accident, where after Pick also held an Audi alteram partem with the Applicant.
48. The Applicant did not obtain permission from Pick to deviate from his trip on the 6th of September 2021.

49. Pick testified that he requested a tracker report and noticed from the report there was speeding as well. Pick concluded that the Applicant was reckless because the speed limit is 120km/h. The Applicant admitted that he exceeded the speed limit by as much as 49kms on one occasion.
50. Speeding is an offence, whether you are driving your own vehicle or a GG, it is wrong.
51. The Applicant had to be subjected to a disciplinary hearing, due to the severity of the offence.
52. Pick confirmed that he took the Applicant to Nova Ford, who said there was nothing wrong with the vehicle. The Applicant travelled with the same car for a while, and he never complained. Another official also drove the vehicle for a while after the Applicant, there were no complaints. No defects were indicated on the inspection form by the Applicant. The vehicle was in a perfect driving condition. On the inspection completed by the Applicant on 11 August 2022, he only reported a faulty battery. There was no indication that there was something wrong with the right rear wheel of the vehicle, as the Applicant is currently alleging. There is a workplace rule that one must make an appointment with the dealer to have it fixed, as it can be unsafe, should any faults be indicated on the inspection report.
53. The Applicant's previous complaint about the right rear tyre, was during the first service of the car at about 15 000kms. It was not close to the date of the incident at all.
54. The working relationship with the Applicant has broken down, especially since the Applicant told Pick that he would make his last years before my retirement hell. The working relationship with the Applicant will never be the same again. The Applicant's colleagues were also unhappy with him because his excessive absenteeism placed an extra workload and stress on his colleagues.
55. Pick was not aware that Damons called the Applicant on the 6th of September 2022, when he returned to work after a long absence, to come to New Somerset Hospital. The Applicant was well aware of the arrangement between him and Pick that he had to work at Stikland Hospital. The Applicant's trip authority was only for trips between his home and Stikland Hospital. (His workplace).
56. Pick had to performance management the Applicant, as he was unable to produce a single page of work he was supposed to do, that triggered Pick to look at performance management.

57. Pick confirmed that the other official that drove the GG vehicle during the Applicant's absence, also completed an inspection form, therefore she would have to report any defect to the vehicle and had it repaired. No defects were reported.

### **The Applicant's case**

58. Jovan Ruiters testified on behalf of the Applicant with regards to an issue that took place in 2019 regarding a trip from Beaufort-West to George. The Applicant was the driver of the vehicle. He needed a trip authority to drive. They went out to a club the evening, with the GG vehicle, Small also accompanied them.

59. The Applicant drove the vehicle the whole way and was never handed over to someone else. According to Ruiters the working relationship between the Applicant and Mr. Small had always good. Ruiters was subpoenaed by the Applicant, and he had no knowledge about the case.

60. Ian Tasswell Potts testified on in support of his own case, that his job description was changed. He initially worked over a wide area, including Central Karoo, Metropole, Knysna, etc. in 2019, he had a breakdown, as he could no longer manage the work pressure. The Applicant was then diagnosed with a stomach ulcer, stress, and anxiety. His performance was 100% prior to that, but his performance deteriorated since he started taking the medication. The Applicant told Mr. Pick that the medication is affecting his job. The Applicant asked Pick to allocate two people to the Central Karoo and Garden Route.

61. Mr. Pick and Small told the Applicant not to use the medication as an excuse, they showed him no empathy at all. The Applicant was then sent to Metropolitan for three days, it did not work for him, because of his condition, whereafter he was institutionalized in January 2022.

62. The OT report state that the Applicant was for work but was not allowed to drive more than 40kms. He told her that he is already driving more than that to get to work.

63. The Applicant referred to an incident that took place in 2019. According to the Applicant, before they all went to a pub they went to George.

64. The Applicant requested permission from Small to stay in Beaufort-West for another day and leave for George the following day, as he had been drinking the previous day, the alcohol could still have been in his system, but Small insisted that they had to leave for George.



According to the Applicant, Small drove the car up to that point. The Applicant however had to follow small's instructions, as he was his superior and he then drove the GG vehicle from Beaufort to George. Small also instructed me the evening to drop him and other people at the club and to fetch them at the club again later. There were no discussions about the issue after that on their return to Cape Town.

65. The Applicant testified that Damons, his colleague at New Somerset Hospital called him and asked me to come and assist him with something and the Applicant complied with the request.
66. On his return to Stikland Hospital something happened to the rear back wheel of the vehicle, and he put his foot on the accelerator instead of the break.
67. The Applicant conceded that he told Pick that he would make his life hell, until his retirement, he only said that, because of the medication he was on. It made him aggressive. According to the Applicant, Pick used to shout at him, during Microsoft Teams meetings. (This was not put to Pick under cross-examination).
68. The Applicant denies that there has been a breach of the working relationship with colleagues, as he receives daily calls from all his colleagues, apart from Pick and Small.
69. He scored low during his last performance appraisal signed in April 2022, he was scored between 1 and 3. The Applicant wanted to appeal against performance appraisal, but Pick would not allow him an opportunity to do so.
70. The Applicant stated that he has remorse, because he has been employed by the Respondent since 2009. He is of the believe that the sanction of dismissal was too harsh and that a final written warning would have been an appropriate sanction.
71. The Applicant conceded that he drove 109kms per hour, knowing that it was a 60km zone.
72. The Applicant averred that he did not know that he did not have trip authority to go to New Somerset Hospital, as he thought that everything was going to be the same as before. He believed that the staff who previously reported to him, will report to him again.
73. The Applicant however confirmed under cross-examination that he met with Small on the 6th of September 2021 about Pillar his leave and that he promised Small that he would work on the Stikland premises. The Applicant stated that he just took the car, because Damons said it

is urgent, he had a deadline at other hospitals. The Applicant does not think Damons knew that he had a work arrangement with his supervisor not to travel to other institutions.

74. The Applicant testified that there was nothing was wrong with the car when he went to Somerset Hospital.
75. The Applicant now avers that he went to labour before the accident to get a report (none of this was put to the Respondent's witnesses. The Applicant is not a dependable witness.).
76. According to the Applicant this took place about a month before the accident, but he was however not at work for a month before the accident.
77. The Applicant was challenged on his own testimony, where he said that the medication that he took, makes him drowsy, therefore he should not have been driving.
78. The Applicant testified that that it did not occur to him to ask for permission to go to New Somerset Hospital.
79. Shereen Stephanie Clarke testified with regards to the Applicant's state of mind when he came to New Somerset Hospital on the 6th of September 2022. The Applicant for compliance of the institution. On the 6th of September 2021 the Applicant came to her office, he was on crutches. He wanted to sit down, he emptied his pockets and dropped everything on the floor, which she picked up for him. Clarke asked him if he was ok, and he said he was on strong medication.
80. Clarke noticed that the Applicant was quite jittery, he told Clarke that the medication caused him to be jittery. Clarke did not think like he was in a state to perform his duties. Clarke asked him if he should be at work, she couldn't believe that he actually drove there. The Applicant told me that he asked to return to work earlier, as he was still supposed to be on sick leave.
81. Around 14:00 Damons asked permission to leave early, as the Applicant was involved in a motor vehicle accident. Usually when someone visits the facility, they send an email to her a couple of weeks beforehand in her capacity of Assistant-Director and just before the visit they would send a list of documentation they require for the audit. As per norm Damons send her the list and included his supervisor, Potts. On the day that Mr. Potts came to New Somerset Hospital, he informed her that Damons required his assistance.

82. Clarke was not aware that all the institutions were taken away from the Applicant and that he was supposed to be office bound or that the staff who previously reported to him, were taken away from him.
83. She also did not the Applicant when he returned from sick leave. The Applicant used the crutches during the entire time of his visit. It did not look like the Applicant should have been at work and he was in no condition to drive a motor vehicle on the day in question.

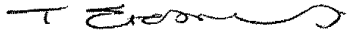
### **Survey of the evidence and argument**

84. The Applicant was charged with three charges with driving over the speed limit on the same day and in the last incident he caused an accident.
85. Charge 3, he drove the GG vehicle at 109km/h in a 60km zone, exceeding the speed limit by 49km/h, which is excessive. Any reasonable person who is guilty of excessive speeding is negligent and irresponsible, when traveling with a GG vehicle. Later on, the same day he travelled with the GG vehicle on the national road at a speed of 159km/h, exceeding the 120km speed limit by 39kms/h. he was irresponsible with the use of the GG vehicle. He went to visit Somerset Hospital, whilst his trip authority limits him to Stikland Hospital and his home address.
86. He was office bound, all staff were removed from him, and all institutions were removed from his jurisdiction long before the incident, therefore he knew he was not allowed to visit Somerset Hospital.
87. He did not inform Damons that he is no longer authorized to visit Somerset Hospital or to obtain permission from his supervisor. He was on a frolic of his own when he went to Somerset Hospital without a trip authority, which he could quite easily have obtained from his supervisor if he really needed to go to New Somerset Hospital to assist Damons. Damons is not to blame for the Applicant's disregard of the instructions of his supervisor or the rules of the road.
88. He made an accident on his return to Stikland Hospital, he was in the vehicle on his own, the GG vehicle was written off. The Applicant's defence was that the rear right tyre had a problem and that he heard a noise and according to him, that caused the accident, but when he testified, he said he had a panic attack at the time and that was also the reason for the accident.

89. The vehicle check form, dated 11 August 2021, was completed, and signed by the Applicant, no defects mentioned, other than the faulty battery, this was prior to the date of the Applicant's transgressions.
90. If he were a responsible driver, he would have stayed within the speed limit and not lose control over the GG vehicle. If he adhered to the speed limit, knowing there is a policy regarding transgression regarding the driving of GG vehicles, he would not have been charged at a disciplinary hearing and he also would not have caused an accident, due to his excessive speed, resulting in the vehicle being written off and subsequent financial loss to the Respondent.
91. In terms of the Respondent's disciplinary guidelines and procedures on "accidents and loss of the vehicle" the recommended sanction is that of dismissal if found that the employee drove the vehicle recklessly. Had it not been for the reckless driving of the Applicant, the Respondent would not have suffered any losses. The Applicant did not dispute Clarke's evidence that he was in no condition to be driving, especially in the light of his own evidence that the medication made him drowsy. This action on the part of the Applicant to get behind the wheel of a car in his condition, was reckless on its own, as he not only placed his own life, but also those of third parties in danger, let alone the damage he caused to the Respondent's property.
92. The Respondent was correct in charging the Applicant for his reckless driving and exceeding the speed limit. He visited an institution that he was not authorized to visit. If he adhered to his duties at the time and what he promised Small that he was going to work at Stikland hospital, the Applicant would not have been guilty of the transgressions to which he admitted. The Respondent cannot trust an employee who blatantly ignores the rules and instructions. The Applicant's dismissal was substantively fair under the circumstances.
93. Procedural fairness – the Applicant did not convince me that the Respondent failed to exercise progressive discipline or that it acted inconsistently with regards to the sanction. The Applicant's dismissal was procedurally fair.

**Award**

94. The Applicant's dismissal was procedurally and substantively fair. The Applicant is therefore not entitled to any relief.

A handwritten signature in black ink, appearing to read "T. Erasmus". The signature is fluid and cursive, with a long horizontal stroke at the end.

TERESA ERASMUS