



ARBITRATION AWARD

Commissioner: **KM Moodley**

Case No: **PSHS575-21-22**

Date of award: **8 July 2022**

In the matter between:

PSA obo Thirushan Govender

Applicant

and

Department of Health- KwaZulu Natal

Respondent

Details of the hearing and representation

1. The Arbitration was held at the boardroom of the Respondent, King Edward VIII Hospital, in Durban, over several days, and was concluded on 23 June 2022. The Applicant was represented by G. Hassan of trade union PSA and the Respondent was represented by its official RG Mncube.
2. As the proceedings were mechanically recorded, I will only make reference to those aspects of the evidence that are relevant to my findings. All the witnesses testified under oath. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter.
3. The parties tabled bundles of documents, ie Bundles A and B were tabled by the Applicant and Bundles C and D were tabled by the Respondent. The contents of the bundle were accepted by both parties as being what they purported to be. No points in limine were raised by either of the parties.
4. No objection was raised to me as the Commissioner presiding over the Arbitration.

Issue to be decided

5. The issue to be decided is whether or not the disciplinary action taken by the Respondent against the Applicant was unfair, and if not whether the sanction meted out to him was too harsh.

Common cause issues

6. There were no common cause issues.

Issues in dispute

7. The issue in dispute was whether or not the disciplinary action taken by the Respondent against the Applicant was unfair, and if not whether the sanction meted out to him was too harsh.

Background to the dispute

8. The Applicant was employed on 15 September 2005 as an Administration Clerk at King Edward VIII Hospital, in the Orthopaedic Ward.
9. At the time of the arbitration, he earned a gross salary of R14,000,00 per month.
10. The Respondent alleged that on 6 January 2020 and on 8 January 2020 the Applicant's supervisor requested and /or instructed the Applicant to assist the Orthopaedic Outpatients Department (OOPD) with the booking of patients.
11. The Respondent claimed that the Applicant did not comply with these 'instructions' and on 9 January 2020 charged the Applicant as follows:
" It is alleged that:
 - (a) On 6 January 2020, you deserted your workstation without permission from 11H30 to 12H29 without notifying your supervisor;
 - (b) On 6 January 2020 while on duty, you failed to carry out a lawful instruction whereby; you were instructed by your supervisor to go to work at OOPD to do patients bookings and you did not comply;
 - (c) On the 8th of January 2020, at 11H53 while on duty you were requested by Assistant Nurse Manager again to go and work at OOPD to do patients bookings, you refuse in that you have compromised service delivery and make the patients to wait long hours."
12. At a disciplinary hearing the Applicant was found not guilty of charge (a) but was found guilty of charges (b) and (c).He was issued with a sanction of a final written warning plus two months suspension without pay.
13. He lodged an appeal against the outcome with the Respondent, but was unsuccessful.
14. He then lodged a dispute with the Council for adjudication.

Survey of evidence and arguments;

Applicant: Witness: 1: Thirushan Govender (Applicant)

15. The Applicant testified that he is employed as an Administration Clerk in the Orthopaedic Ward at King Edward VIII Hospital, in Durban.
16. On 6 January 2020 he was working in the Linen Room of the hospital performing his duties eg checking stock, sorting drug books, patient books, labelling of books and cleaning of the linen room. As the room was dusty with old files he was wearing PPI's,(apron, gloves and mask). He left the door ajar to assist in ventilating the room. He was still there at about 11h50 when Counsellor Fikile Gwabe came into the linen room to seek his help.
17. He left the linen room to go and clean himself because of the dust in the linen room. He then went to nurse Hlongwane's office where she asked him if he could assist in the OOPD with the booking of patients. He told her that he had a problem with one nurse Zwane at the OOPD and that she called him 'lazy'. He was hurt by this. Hlongwane was not pleased and then told him to "...write me a letter so that I can charge you". He felt threatened by this and then left the office.
18. He testified that there was bad blood between Hlongwane and himself as his work performance was suffering because he was asked to assist in other departments. Doctors were complaining because of stock shortages. His current duties were ending up in backlogs. On one occasion he was called in early from leave to assist in the bookings. To date he was not credited with the 26 days leave that he did not take. He felt that this was unfair.
19. On 8 January 2020 he met Sister Ruth Abboo, (the Assistant Manager, Nursing of the Orthopaedic and Surgical department,) in passing, and she asked him if he could assist with the patient bookings.
20. He asked her to put the request in writing and that he would duly comply.
21. He testified that Abboo also threatened and bullied him to drop a grievance that he lodged with HR department.

Witness 2: Fikile Ngwabe

22. Ngwabe, a Lay Counsellor at King Edward VIII hospital, testified that at about 11h45 on 6 January 2020 she saw the Applicant inside the linen room of the hospital, as the door was open. She also saw ANM Abboo in the ward talking to other nurses. She told sister Hlongwane that she saw the Applicant in the Linen Room offloading some stock from a trolley and sorting them. He was wearing gloves, a mask and an apron at the time.

Respondent:

Witness 1: Ruth Abboo-Assistant Manager: Nursing-(Orthopaedic and Surgical)

23. Abboo testified that as Assistant Manager: Nursing she was responsible for the Orthopaedic section comprising 3 wards ie I4a, I4B and I2b wards, and a Clinic which operated 24 hours for emergencies.

24. In the Orthopaedic ward there were 2 administration clerks, the Applicant and one Mr Shange. The Applicant was posted at the Ward I4A and I4B whilst Shange was posted at the Clinic.
25. On 6 January 2020 Shange was on leave and the Clinic needed someone to assist with Shange's work i.e. with doing patient bookings. The booking of patients was computerised and the Applicant was familiar with the system as he had assisted previously. Abboo testified that she then decided to ask him to assist.
26. She looked everywhere including the wards for the Applicant but could not find him. She walked past the linen room but did not see him. At about 11h30 she left a message in the ward communication book/diary for the Applicant, informing him to please go and work in the Clinic.
27. At about 12h30 the Applicant came to her office where she informed him verbally of her request to assist with the booking of patients. The Applicant refused to assist with the bookings and told her that he wanted to speak to his union.
28. Abboo testified that on 8 January 2020 she requested the Applicant to assist with the booking of patients at the Clinic, but he told her that his union told him not to go to the clinic.
29. As a result of the Applicant's refusal to assist with the booking of patients, service delivery at the clinic was compromised.
30. She further testified that the Applicant's performance had gone from an amazing employee to someone whose performance dropped considerably. The Applicant could not refuse to perform the duties at the clinic as it was included in his Job Description under "Admin Support". She was of the view that as a manager she could deviate from the duties outlined in the Job Description, and the KPA's of the Performance Agreement. Therefore, she had issued a legitimate instruction to the Applicant and by not complying with this instruction the Applicant is guilty of insubordination.

Analysis of evidence and argument:

Charge (a):

31. The Applicant testified that on 6 January 2020 at about 11h30, he was performing duties in the linen room. He was wearing an apron, gloves and mask. The linen room door was ajar as there was lots of dust in the room and there was no air conditioning.
32. His version was corroborated by Gwabe who testified that at about 11h45 she saw the Applicant inside the linen room as the door was ajar. He was offloading stock and linen from a trolley inside the linen room.
33. Abboo on the other hand testified that she looked everywhere for the Applicant, and could not see the Applicant. She did not see him in the linen room as the door was not ajar. In addition she stated that the linen room was too small for anyone to be there for long.

34. I found that on the contrary an inspection in loco confirmed that 4 persons were inside the linen room and the linen room was not small.
35. Under the circumstances I accept the version of the Applicant that he was in the linen room performing his duties.

Charge (b)

36. Abboo testified that on 6 January 2020 she looked for the Applicant and could not find him. She then wrote a message in the ward communication book/diary informing the Applicant "...to please go and work in the Orthopaedic Clinic."
37. She later "...informed him verbally of my request", and he declined saying that he wanted to speak to his union"
38. The Applicant on the other had testified that he assisted the clinic previously but that sister Zwane at the clinic made false allegations against him and even called him 'lazy' and therefore he was reluctant to assist there again. In addition, sister Hlongwane had also threatened to charge him. She said "...write me a letter so I can charge you." He felt threatened by her behaviour.
39. He also testified that when Hlongwane told him "Do you mind if you could assist at the bookings" he construed this statement to be a request and not an instruction. As Hlongwane did not testify in support of her statement and as to whether it was an instruction or a request, I accept the Applicants version as the more probable version in that that he was requested to assist with bookings in the clinic, and not instructed to do so.

Charge (c):

40. Abboo testified that on 8 January 2020 she asked the Applicant whether he could assist in the booking of patients at the clinic but he told her that his union told him not to go to the clinic.
41. The Applicant on the other hand testified that Abboo met him in passing in the passage and asked him if he could assist with booking of patients at the clinic. He then asked her to put the request in writing and he will comply with the request.
42. Of the two versions put to me I find the version of the Applicant to be more probable for the following reasons:
 - a) The Applicant was being asked to "assist" in performing the duties of booking of patients at the clinic. This clearly implies that this was a 'request' to the Applicant and not an 'instruction'
 - b) If Abboo was issuing an instruction to the Applicant she should have said so clearly and not leave the Applicant confused, or to be in any doubt whatsoever, as to whether it was an instruction or whether it was a simply a request.

c) In order for an instruction to be carried out diligently the instruction must be clearly understood, be reasonable, be lawful, and be capable of being carried out. In this instance Abboo testified,

- that she decided "...to ask the Applicant to please go and *assist* in the orthopaedic Clinic in the booking office to make bookings for patients".
- 'I informed him verbally of my *request*...'
- 'I told him would you *please* go and work in the Ortho...'
- "It was a verbal *request* to the Applicant to *assist* at OOPD".

In all the above statements attributed to Abboo it is not clear whether she was instructing the Applicant, or whether she was requesting him to assist. If Abboo wanted to issue an instruction to the Applicant she should have done so without any ambiguity. The benefit of the doubt must therefore in my view, be given to the Applicant.

43. Abboo testified that the duties of booking of patients at the clinic fell within the job description of the Applicant therefore her request was a reasonable one. She pointed out that the Applicant's job description reflects as "...provides administrative support to the nursing staff" and therefore the duty of booking of patients at the clinic was one of his duties.
44. The Applicant argued successfully, in my view, that the only Outcome Indicator for this KRA in the Applicants job description is listed as "All faulty equipment are sent for repair. stock ordered". No mention is made in the job description of the duty of "booking of patients"
45. I therefore accept the Applicants version that the duty of 'booking of patients' is not one of the duties of the Applicant.
46. On the contrary, this function is listed in the job description of the post of a Senior Admin Clerk' a post previously occupied by M.Ramlall, and which is still vacant.
47. From this it appears as if Abboo is of the mistaken view that as a manager, she can impose additional duties and functions upon the Applicant without a fair process. She believed that she can deviate from the job description. This is not so. This tantamounts to a unilateral change to the Applicants duties without consultation and or agreement between the parties. This is grossly unfair.
48. The Applicant had good reason for requesting that Abboo make her request in writing. He was concerned that his performance in his existing duties would be compromised by his performing the duties additional to his current duties. If the request was reduced to writing he could then be able to motivate the reason why it was adversely affected should the need arise. In addition the Applicant testified that he was called in early from leave previously, in order to assist with booking of patients and that to date he was not credited with the 26 days leave that he 'lost'. If the request for him to

come back early from leave was done in writing he would not have been penalised. I therefore accept the reason for his request for it to be in writing, as a valid one.

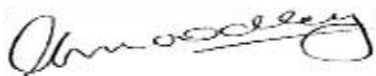
49. I find that Abboo was entirely responsible for the situation she found herself in. She knew in 2019 that Ramlall was retiring and that the post was not to be filled. She should not have approved the leave of Shange without making alternate prior arrangements.
50. It was only when she was faced with a problem about bookings at the clinic that she decided to request the Applicant to 'assist' with this function. She expected the Applicant to readily comply as he had willingly done so numerous times before. However, it was unreasonable to expect him to assist when she did not plan adequately. He assisted previously and forfeited 26 days leave as a 'reward' for his assistance. Therefore, his reluctance to do so again is understandable.
51. Abboo also testified that the Applicant was an asset to the Department. This was supported by the doctors' testimonials submitted to the chairperson in mitigation of sanction. His performance for the period in question was rated as satisfactory.

Conclusion

52. I find that the disciplinary action taken by the Respondent against the Applicant is unfair and I rule accordingly.
53. I note that the final written warning has expired by effluxion of time.

Award

54. I find that the disciplinary action taken by the Respondent Department of Health-KwaZulu Natal, against the Applicant, Thirushan Govender, is unfair.
55. The Respondent is hereby directed to reimburse the Applicant with an amount of R28,000,00 (R14,000,00 x 2 months' pay) by no later than 31 July 2022.
56. I make no order as to costs.



COMMISSIONER: KM MOODLEY