



ARBITRATION AWARD

Commissioner: **KM Moodley**

Case No: **PSHS655-21/22**

Date of award: **02 August 2022**

In the matter between:

Pragasen Narainsamy Moodley

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, at Osindiswini hospital in Osindiswini, over several days, and was concluded on 18 July 2022. The Applicant was represented by M.Lazarus of Leo Govender Attorneys and the Respondent was represented by its official SN Ndabeni.
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 a common bundle of documents, i.e., Bundle A. 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 dismissal of the Applicant procedurally and substantively, was unfair, and if not whether the sanction meted out was too harsh.

Common cause issues:

6. It was common cause that the gate at the entrance to the Osindiswini hospital premises was damaged by the private motor vehicle driven by the Applicant.

Issues in dispute:

7. The issue in dispute was whether or not the dismissal of the Applicant was procedurally and substantively unfair.

Background to the dispute:

8. The Applicant was employed on 1 June 1982 as an Administration Clerk-Supervisor at Osindiswini Hospital. At the time of the arbitration, he earned a gross salary of R27,510,25 per month.
9. At a disciplinary inquiry the Applicant was charged as follows:

Count 1

Theft in that on the 06th of May 2020, while on duty, at approximately 16h00 at Osindisweni Hospital, he was seen by security staff loading brown envelopes full of employer's masks into his personal vehicle without permission and with the intention of stealing them thereby contravening section 4.4.5 of the Public Service Code of Conduct which reads "An employee does not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties"

Count 2

Refusal to be searched by security staff, forcefully pushed the hospital main gate and damaged it on the 6th of May 2020, when he was about to leave the Hospital Premises, at approximately 16h00, at Osindisweni Hospital. By so doing he contravened section 4.3.1 of the Public Service Code of Conduct which provides that "An employee cooperates fully with other employees to advance the public interest and Control of Access to the Public Premises and Vehicles Act No.53 of 1985.

10. The Applicant was found guilty of the charges and was dismissed on 14 September 2021.
11. He lodged an appeal against the outcome with the Respondent, but was unsuccessful.
12. He then lodged a dispute with the Council for adjudication.

Survey of evidence and arguments:

Respondent: Witness: 1: Mzikayise Jabulani Mthembu

13. Mthembu was a senior security officer at Osindisweni hospital. He testified that on 5th May 2020 he was performing security duties at the hospital gate. Whilst at the gate he noticed the Applicant putting a brown envelope into his private vehicle.
14. After a while he saw the Applicant remove the brown envelope from inside his car and he then went back to his office.
15. At about 16h00 the Applicant got into his car and drove towards the gate. He allowed the security to check the boot of his car and then drove off.
16. Mthembu also testified that on 6th May 2020 he was not on duty at the hospital. That afternoon he received a report from the other security officers as to what had transpired at the gate. He then took some photos of damages at the scene of the incident.
17. He testified that on the 7th May 2020 he was on duty at the gate. He was called by Mr Shobane (CEO) and Mr Mthethwa (systems manager) to go to the Applicant's office. They searched the Applicant's office and found a box full of masks. They opened the box and found masks and A4 brown envelopes with masks inside them. Shobane questioned the Applicant about the masks being found in his office. The Applicant replied that the masks were ordered for the laundry, the gardens and grounds to use. Shobane then confiscated the box and all the masks and instructed that an investigation be conducted into the matter.

Witness 2: Mbongeni Mdletshe: Supervisor

18. Mdletshe testified that on the 5th May 2020 the Applicant arrived at work in a Polo Vivo. He noticed the Applicant in the parking lot carrying two brown envelopes. The Applicant put the envelopes into his car and then went back to his office.
19. At around 15h30 he saw the Applicant open his car and take out the two envelopes and go back into the building. At about 16h00 the Applicant drove out of the

hospital gate after being routinely searched by the security at the gate.

20. Mdletshe also testified that on 6 May 2020 he was on duty at the hospital gate when the Applicant arrived in a Bantam bakkie. He stated that the Applicant reported to the security second-in-charge that the rear door of his bakkie was not opening.
21. At about 13 h00 he noticed the Applicant carrying a brown envelope. He saw the Applicant open the driver side door of his vehicle and put the envelope inside it. The Applicant then returned to the casualty department.
22. At about 15h30 Mdletshe saw the Applicant walking to his car carrying another envelope. The Applicant then took out the envelope from the driver's side of the vehicle and put both envelopes inside the back of the vehicle.
23. At around 16h00. the Applicant drove to the main gate where Mdletshe told him that he wanted to search the vehicle. The Applicant refused to allow him to search the vehicle as he claimed that he had reported earlier that morning that the lock of the vehicle was not working.
24. Mdletshe then told the Applicant to park on the side of the driveway so that others could pass. While Mdletshe was allowing a matron Madondo to exit the gate the Applicant followed behind her vehicle to exit as well. It was then that the security closed the gate.
25. It was also then that the Applicant knocked the gate and drove off. Mdletshe then reported the incident to supervisor Mthembu.

Witness 3: Nkosinathi Shabane: CEO

26. Shabane testified that at about 16h00 on 6 May2020 matron Thusi informed him that the Applicant forcefully knocked the hospital gate with his vehicle and drove off.
27. He then proceeded to the gate where the security told him that the Applicant had forcefully opened the gate after refusing to be searched.
28. The following morning, 7th May2020, Shabane together with Mthethwa and Mthembu met the Applicant in his office to enquire about the incident. The Applicant told them that at the time of the incident there was a misunderstanding with the security. As he felt unsafe, he then decided to leave in order to avert any conflict.

29. Shabane testified that they then searched the office and found five boxes of masks in the cupboard. The Applicant replied that the masks were kept for use by the general workers. Shabane then confiscated the five boxes of mask and ordered that the matter to be instigated further.

Applicant:

Witness 1: Pragasan Narainsamy Moodley

30. Applicant testified that on 5th May 2020 he arrived at work as usual in his Polo Vivo.

31. At no stage during this day did he go to his vehicle and neither did he put any brown envelopes into his private vehicle on that day.

32. On 6th May 2020 he arrived at work in a Opel Corsa bakkie as his Polo Vivo went in for a service.

33. At about 16h00 as he was getting ready to leave work, a colleague Mr Shange requested for a lift into Verulam. Shange got into the passenger seat of the bakkie with him. The Applicant and Shange stopped at the gate where the security asked him to open the back of the bakkie. The Applicant told the security that he was unable to open the bakkie as there was a problem with it. The key could not turn the lock open.

34. He also told the security that he had reported the faulty lock to a female security officer at the gate when he arrived that morning.

35. The Applicant then offered the key to the canopy rear door to the security guard to open it and search, but the security refused to accept the key. The Applicant then suggested to the security guard to come inside the bakkie from where he would be able to see the back of the canopy clearly from the inside window. The security guard refused to do this and instead told the Applicant to park his vehicle on the side of the entrance.

36. The Applicant complied with this request and waited on the side for about half an hour. When the Applicant saw that the security was not attending to him, he decided to follow matron Thusi out the gate as she was driving out.

37. Whilst he was driving out the gate the security pushed the gate to close it. It was then that his vehicle damaged the gate.

38. The Applicant further testified that on 7th May 2020, Shabane together with Mthethwa and Mdletshe searched his office in his presence, and found a box which contained boxes of masks inside them. The Applicant told them that he had found

these masks in the storeroom and that they were left there by a previous general orderly.

39. The CEO then confiscated the box with the masks inside them.

Witness 2: Nkosinathi Shange: Clerk;

40. Shange testified that on 6th May 2020 at about 16h00, he asked the Applicant for a lift to Verulam and the Applicant agreed. He got into the front passenger seat and they drove to the front gate.

41. When they got to the front gate the security asked the Applicant to open the back of the bakkie. The Applicant then told the security that the lock to the canopy back door was not working. He then gave the security a bunch of keys to try and open the door. The security refused to accept the keys. The Applicant then suggested to them that they could look from the inside of the bakkie through the inside window, and they would then be able to see what was inside. The security refused to consider this suggestion. They then asked the Applicant to park his vehicle on the side of the driveway and the Applicant duly complied with this request.

42. When the Applicant saw the gate opening for another vehicle to exit the gate, he followed that vehicle. However, the security closed the gate whilst the Applicant was still exiting. It was then that the Applicant knocked the gate and drove off.

Analysis of evidence and argument:

43. I did not find Mdletshe and Mthembu to be reliable witnesses. Their evidence differed on crucial aspects of the incident.

Charge 1

44. Charge 1 reads, inter alia, as follows, that "*... on the 6th of May 2020...he was seen by security staff loading brown envelopes...into his personal vehicle...*"

45. However, the Respondent led no evidence to show that such brown envelopes, were in fact found in the Applicant's personal vehicle.

46. Charge 1 also states, inter alia, that the brown envelopes were "*...full of employer's masks...*"

47. On the contrary, Mthembu testified that he did not witness the loading of brown envelopes full of employer's masks into the Applicant's private vehicle, as he was not on duty on the 6th of May 2020, and
48. Mdletshe testified that he saw the Applicant put a *brown envelope* into his car. He later saw the Applicant arriving with a second envelope and then put both envelopes into the back of the vehicle. I found this version hard to accept for the following reasons:
1. No envelopes were found in the Applicant's personal vehicle.
 2. The Applicant's vehicle was parked in the Applicant's parking bay which was some 20 metres away from the hospital entrance where the security guards were stationed. The Respondent in its closing arguments described the distance as being "...less than a kilometre".
 3. An inspection in Loco conducted by the parties with the Commissioner, revealed that it was very difficult to see if the Applicant was "loading" anything into his personal vehicle because of the great distance to each other.
 4. In addition the Applicant's vehicle was parked behind a medium height brick wall which effectively prevented anyone stationed at the hospital main gate from having a clear view of the Applicant's vehicle.
49. The Applicant on the other hand denied that he was at his vehicle and that he was loading envelopes into it.
50. Therefore, I find the version of the Applicant that he did not load anything into his vehicle, to be more probable in this regard.
51. The Applicant's vehicle was parked facing the hospital entrance with the canopy door facing the opposite direction. It would be very difficult if not impossible, to see if the Applicant was loading something into his personal vehicle.
52. From this it also follows that it would have been virtually impossible for Mdletshe to see that the brown envelopes were "*...full of employer's masks...*" In fact no evidence was led to show that the envelopes were "*...full of employer's masks...*"
53. On the contrary, Mthembu, under cross examination, admitted that "*I did not see what was inside the envelopes.*"
54. In addition, Mdletshe, under cross examination, also admitted that "*I have never seen what is in the envelope*"

55. Mthembu testified that on 5th May 2020 he saw the Applicant put a brown envelope into his car.
56. Mdletshe on the other hand, contrary to Mthembu, testified that on the 5th May 2020 he saw the Applicant putting two brown envelopes into his car.
57. In matters of this nature the onus is on the Respondent to prove that the dismissal of the Applicant was not unfair. No evidence was led by the Respondent to show that the brown envelopes were full of the employer's masks. No brown envelopes full of the employer's masks were found in the Applicant's private vehicle. Therefore the Respondent has failed to show that the Applicant committed "theft" and or that he had "...the intention of stealing..."
58. In the final analysis the Respondent, in its closing arguments, admitted that although it was unable to prove theft, or an intention to steal, it "...relied on circumstantial evidence in proving charge ,1"
59. However, the Respondent failed to discharge this onus.
60. Under the circumstances I find that as the version of the Applicant in respect of charge 1, is more probable than that of the Respondent, the dismissal of the Applicant substantively, is unfair.

Charge 2:

61. The Applicant admitted that he "nudged" the gate when he attempted to follow matron Thusi through the gate and therefore he was accountable for his action. However, he stated that this was not intentional but rather because of the circumstances he was faced with.
62. He testified that he had informed the security on the morning of his arrival at work that the lock on the canopy door was not working. He then handed over his keys to the security for them to try and unlock the door but they refused. He also suggested that the security guard look through the window from the front seat of the vehicle so that they could inspect the back of the vehicle but they refused. This version was confirmed by the Applicant's witness Shange.
63. In my view this was not an example of someone attempting to steal.
64. As he was made to wait for about 30 minutes without being attended to, he followed matron Thusi out the gate, as he had to fetch chronic medication for his wife before the pharmacy closed during the Covid period.

65. From the above it can be seen that although the Applicant, in his view, had acceptable reasons for his actions, he cannot be condoned for damaging the Respondent's front gate and should be sanctioned accordingly.

Award:

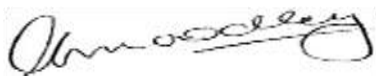
66. I find that the dismissal of the Applicant is procedurally fair but substantively unfair.

67. The Respondent, Department of Health-KwaZulu Natal, is hereby directed to reinstate the Applicant, Pragasan Narainsamy Moodley, to his previous post of Administrative Clerk/Supervisor at Osindiswini hospital, this reinstatement to be with retrospective effect, and on the same terms and conditions as governed the employment relationship prior to his dismissal.

68. The Applicant is hereby directed to tender his services to the Respondent on 15 August 2022.

69. As a result of the retrospective nature of this award the Respondent is directed to pay into the bank account of the Applicant, the full backpay due to him from date of dismissal, 14 September 2021 to date of award, 2 August 2022, in the amount of R297,974,76 (gross salary of R27,510,25 per month x 10 months and 18 days) and this is to be paid by no later than 31 August 2022.

70. The Respondent is hereby directed to issue the Applicant with a Final Written Warning as an appropriate sanction for damages caused by the Applicant to the front gate of the Osindiswini hospital.



COMMISSIONER: KM MOODLEY