



ARBITRATION AWARD

Case No: **PSHS730-21/22**

Commissioner: **Theresa Erasmus**

Date of award: **26 April 2022**

In the matter between:

PSA OBO MOHAMMED ZAAHIR EMANDIEN

Applicant

and

DEPARTMENT OF HEALTH- WESTERN CAPE

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set down for arbitration.

ISSUE TO BE DECIDED

2. I must decide whether Mr Mohammed Zaahir Emandien (the Applicant)'s dismissal was substantively fair, regarding the sanction of dismissal. Procedural fairness was not placed in dispute.

SUMMARY OF THE EVIDENCE AND ARGUMENT

RESPONDENT'S CASE

3. The Applicant was appointed the 1st of October 2020 on probation. The Applicant was charged with unauthorised absence and not obtaining permission from his supervisor for the leave and the fact that he submitted the sick notes afterwards, all of this happened in his 12-month probation period. The Applicant would have been on probation until 2022 with the number of leave days he took. He was charged only with the periods from 26 May 2021 until early August 2021. The other periods before that

were dealt with in his probation and it raised a red flag with the supervisor. The Applicant was only at work for one day from the 26th of May 2021 until the 6th of July 2021 (in his probation period).

4. The Respondent had to follow the formal route, due to his history. He was a senior administrative officer in the HR department, he was previously an assistant-director in HR. The Applicant knows the rules if he is taking leave. For the aforesaid reasons and the length of the absence, the Respondent decided to follow a formal route.
5. The Applicant failed to attend the in-house referral to Metropolitan, he only went to Alexander Forbes on his own afterwards. The sanction of dismissal was an appropriate sanction.
6. **ETIENNE THOM testified on behalf of the Respondent (hereinafter referred to as “Thom”)**
7. Thom is a senior administrative officer, people management, responsible for the HR department, he was the Applicant’s supervisor. They worked together since 1st of April 2011 in the district office, he then went to George Hospital and Thom appointed him on the 1st of October 2020 in Harry Comay hospital. Thom had discussions with the Applicant since the start of his probation about his absence. The real problem started when was absent for about three months in total.
8. He sent a WhatsApp message to report his absence as per page 40 of the Respondent’s bundle, Thom recorded everything in his diary. Thom would have recorded it if he did not send a message. There is no entry in his diary on the 28th of May 2021. On the 11th to the 15th of June 2021, Thom wrote – “breeks sy belofte”- because the Applicant did not come to work as promised. On the 17th of June 2021 the Applicant send a WhatsApp message and said he would be in the office the next day. He did not come in the next day, he sends another message on the 18th of June (page 56), he requested for a day’s leave so that he could start fresh on the Monday. Thom once again mad a diary entry to the affect – “breeks y belofte”. The Applicant asked for leave, but he only had one day’s leave left. On the 18th of June 2021, Thom approved the leave, after lhe spoke to his CEO. On page 15 of the Respondent’s

bundle, Thom made the following diary entry: *“laat weet Shakira is siek en hy moet na die kinders kyk, sal definitief more op kantoor wees”*. The Applicant did however not report for duty the following day and Thom once again made the following entry in his diary: *“breeks sy belofte”*.

9. On the 23rd of June 2021, the Applicant informed Thom, that he could not wake up, and on the 25th of June he failed to send a message during his absence. The Applicant only send a message on Monday the 28th of June 2021. Thom did not receive any leave forms to justify the Applicant’s absence. when Thom send a message to the Applicant to furnish him with sick notes, the Applicant responded in a WhatsApp message to Thom by saying– *“really you could have brought it yourself”*. The next day, the Applicant brought all the sick certificates, that his wife issued. She is a doctor, but she was booked off for a period of approximately two years at the time.
10. On the 8th of July 2021 Thom received medical certificates from the Applicant for the whole period of his unauthorized absence. Thom testified with reference to page 84 of the bundle, being medical certificates submitted by the Applicant. All the details were not on the medical certificates as required. The Respondent did not accept the medical certificate, because of the following reasons:
 - No address
 - Issued by his wife, who was not practicing at the time
 - She did not have a practice number at the time, she wasn’t allowed to work from home
 - She wasn’t allowed to book her husband off
11. He also asked for an opportunity to resubmit the medical certificates with he corrects address, which was allowed. Bernice Klein, informed Thom that she was not prepared to accept the medical certificates, because the Applicant’s wife was not allowed to book him off, she was not practicing at the time. she was also off work for depression. The medical certificates were part typed and part handwritten.
12. Thom asked them to resend the WhatsApp message, as his WhatsApp crashed and he no longer had access to these messages. Thom didn’t receive any sick notes for this period from 6 - 10 August 2021. Thom compiled the recon, evidenced on page 41

of the Respondent's bundle. Thom did not receive any communication from the Applicant on the 13th of August 2021.

13. Thom referred to page 64 of the Respondent's bundle, being the probationary report signed on the 1st of March 2021. In the last column Thom noted that they have to address unpaid leave, the Applicant agreed and signed for it. He acknowledged that his leave was a problem on the 14th of April 2021 as per page 67 both them and the Applicant signed the report. Thom referred to page 32 of the Respondent's bundle, being the probation discussion, which Thom scheduled on OUTLOOK for the 2nd of July and the Applicant did not attend the meeting.
14. Reference was made to page 69 of the bundle, where Thom suggested that the Applicant should change his flexy time from 8:00 to 16:30.
15. Referral to Metropolitan, our service provider where we send staff if they have personal or financial problems. They also have therapists; it can be done online or they are referred to therapists.
16. There was clearly a problem, Thom got a lot of pressure from his superiors, his CEO came to his office every single day to ask him where the Applicant is, some days he did not receive any communication.
17. Mr Muller, Thom's deputy director did refer the Applicant to an occupational therapist, prior to this he was referred for independent evaluation, Thom do not know what the outcome of this functional assessment was.
18. The Applicant wants to be reinstated, but according to Thom it will affect the employment relationship in that the Applicant broke promises to him on so many occasions that he did not trust him. The staff of the hospital placed bets on whether he would be at work the next day.
19. The Respondent referred the Applicant to ICAS. The Applicant came to Thom's office and apologized for what he put him through, but his conduct did not improve. Thom still believed in him; they even went to offsite meetings at the mall where they spoke. Thom and the Applicant worked together for more than ten years. Thom is certain that

at any other workplace they would have started processes earlier, however his hands were tied.

20. Thom asked the Applicant whether there were personal problems, which the Applicant admitted, but he said that he was too embarrassed to talk about it, thus the Respondent sent him to ICAS.

21. The following ensued from cross-examination:

22. Page 13 of bundle A – The Applicant was not charged with the absence of not communicating the absence to the Respondent. The only time Thom saw the Applicant during the period of absenteeism was when he took packages delivered to him at work to his home or he would collect it from Thom's home. However, the discussions Thom had with him was when he was at work.

23. Not all probation discussions were completed. The Applicant did attend the ICAS, Thom sent the referral form to the Applicant to sign, which he failed to do at first, but he agreed at a later stage, he attended the first meeting and then the Applicant elected to go to a therapist of his choice.

24. The Alexander Forbes report only became available after the time of the disciplinary hearing, Thom was unaware of the existence of the report, until the date of the arbitration hearing.

25. The Applicant's dismissal was on the 28th of October 2021, the original disciplinary hearing was held on the 22nd of September 2021, whilst the Appeal Outcome is evidenced on page 5 and 6 of the Applicant's bundle. The Applicant did not refer to the AF report in his request for appeal. According to the Applicant he does not need Thom's permission to be absent.

26. It was put to Thom that the Applicant indicated that he was suffering from diabetes and depression and he expected the Respondent to understand his problems. Thom responded that until the 26th of May 2021, he was unaware that the Applicant suffered from diabetes.

27. The Applicant failed to follow procedures of which he is aware, as he was previously an assistant-director.

28. The Applicant did not follow process, regardless of his medical condition, thus the reason for the disciplinary hearing.

29. It was put to Thom:

- The Applicant did hand in leave forms
- The Applicant's medical condition was not considered when the decision was made to dismiss him.

30. Thom responded that he did not make the decision to dismiss him, as he was only a witness in the disciplinary hearing.

APPLICANT'S CASE

31. The Applicant was employed as a senior administration officer at the Harry Comay hospital on the 8th of July 2021 the Applicant was issued with an audi alteram letter to provide the Respondent with reasons why he should not be disciplined for taking leave without obtaining to obtain permission to his absence. He was then charged at a disciplinary hearing as per charge sheet – page 3 of the Applicant's bundle. The Applicant was found guilty on the 13 charges and dismissed as a result. The Applicant seeks retrospective reinstatement.

32. The Applicant acknowledged that the leave was not communicated by submitting the leave forms timeously, but he communicated telephonically. The employment relationship was not tarnished. The Respondent should have held an incapacity hearing instead.

33. The Applicant later submitted the relevant leave forms. He still attended a course whilst he was at home, clearly the Respondent had a good relationship with him. The issue in dispute is the Applicant's failure to obtain permission for his leave and not uncommunicated absence.

34. The Applicant testified in support of his own case.

35. The Applicant was employed as an administrative officer, HR from the 1st of October 2020. He was employed in HR for about 17 years in HR/People Development.
36. CHARGE 1 – The Applicant was not at work as per charge sheet, he communicated with his supervisor, Mr Thom, who said that he could hand in the documents when he returned to work.
37. The Applicant confirmed that he had to submit leave forms after two working days, and if not received, the supervisor must contact the employee and request leave forms. If not submitted in time, it will be deemed as unpaid leave.
38. The Applicant did not hand in leave forms timeously due to his uncontrolled diabetes and depression; his wife was also diagnosed with bipolar 2 and he had to manage the whole household, he was just not coping with everything. The department as a whole has a problem with leave forms not being submitted, it is well documented.
39. Charge 2 – same answer as to charge 1 – The Applicant saw Mr Thom informally when he dropped his packages at home, the first formal communication was when he received the Audi Alteram Partem notice. The Applicant communicated via WhatsApp with the Respondent during his absence.
40. Page 7 – charge 12 – charge 1 – 11.
41. Charge 13 – submitting non-compliant medical certificates.
42. Charges 1-11 and 14 is dealt with.
43. Charge 12 has been withdrawn.
44. The Applicant was found not guilty on charge 13, as the amended medical certificate was accepted by the Respondent at the time.
45. Reference was made to page 62 of the Respondent's bundle - probation – the Applicant does not recall the comment on unplanned leave at all. The Applicant stated that his absenteeism was related to his health condition. According to the Applicant,

Mr Thom was well aware of the Applicant's wife's situation, they were running into financial difficulties.

46. The Respondent only proposed ICAS during the period of the disciplinary hearing.
47. The Applicant testified that he told his supervisor that he was coming back to work with the hope that he was coming back to work, but then he did not feel any better the next day and couldn't go to work.
48. It was put to the Applicant that he has been in HR for many years and he should adhere to policy requirements, especially relating to leave, with which the Applicant agree in terms of the policy, he did not comply. In his experience is that the rule was not consistently applied throughout the department.
49. The Applicant was not given an opportunity to remedy himself. The Respondent should have addressed his situation as an incapacity matter, instead of a disciplinary process.
50. **The following ensued from cross-examination:**
51. The Applicant started employment with the Respondent on the 1st day of October 2020, his first day of absence was on 15 and 16 October 2020. Reference was made to pages 62 & 64 – 1st probation – he signed, but denies any knowledge that the 'leave issue' was addressed at that stage. The Applicant responded that Thom knew that he had family emergencies that he had to attend to at the time. It was put to the Applicant that he already took 25 days leave within the first six months of employment, therefore it is likely that the comment about unpaid leave was on the report.
52. It was put to the Applicant that the leave periods reflected in the charges were not captured on perusal, therefore it was not approved. Applicant responded that fact that the leave has not been captured on perusal does not mean that it has not been approved.
53. It was put to the Applicant that he was the supervisor at the Harry Comay Hospital and it was his responsibility to oversee that all leave is captured. The Applicant responded

that he is not allowed to capture his own leave, Mr Thom is responsible to ensure that his leave is captured.

54. It was put to the Applicant that the leave was not captured, because there were no leave forms submitted as testified by Thom. The Applicant responded that he submitted the leave forms, although it was submitted late.

55. It was put to the Applicant that he did not adhere to the leave policy, therefore the leave was unauthorised. The Applicant responded that in his experience in HR, many people went off on leave on depression, and they did not hand in leave forms, they took way more leave than he did.

56. From the 26th of May until the 8th of August 2021 the Applicant was only at work for one day, he was at home for 75 days. The Applicant responded that he went through a depressive episode, his supervisor didn't ask or tell him there was an issue, because he was off.

57. His diabetes and depression started long before the 26th of May 2021. He has since started getting treatment on his own and improved dramatically.

58. The 24th and 25th of February 2021 were the only days that he took sick leave. It is not correct to say that this was because of his depression and diabetes, as there is no sick leave application, this was denied by the Applicant.

59. It was put to the Applicant that there is no record to prove that he took any sick leave for diabetes or depression prior to the 26th of May 2021. According to Thom, the Applicant didn't always stay at home because of his own health, often because of his wife and his children, to which the Applicant conceded.

60. The Applicant is aware of the rule when it comes to probation, his probationary period should have been extended for those 75 days.

61. ICAS – 15 July 2021, was still in his probationary period.

- Absenteeism
- Reclining in work performance – my work was up to standard

- Pressure on the component and supervisor. The Applicant was continuously in contact with his colleagues and on his return, he asked them how his absence impacted them. They said there were no problems.

62. The Applicant disagrees that Thom was not even aware that he went to ICAS, as he went in working hours and there is no way that Thom was not aware (this was not put to Thom under cross-examination). Thom testified that the Applicant didn't sign the forms and he weren't prepared to go to ICAS.

63. The Applicant didn't keep his promises when he told Thom that he would come to work but testified that he would have come to work if he felt better. The Applicant envisaged that he would return to work when he sent the message, but then he didn't feel better.

64. Mr Muller referred the Applicant to Alexander Forbes, according to Alexander Forbes he can still perform his duties. Alexander Forbes gave an opinion and said provided that his management of leave and diabetes is kept under control he wants to be at work.

65. Page 30 – leave record - There is a pattern of numerous one-day's leave taken. This pattern continued beyond this period. The Applicant denies that it continued at Harry Comay Hospital.

66. The assessor recommended that the Applicant should be referred to an occupational therapist for rehabilitation, that would mean that he is not rehabilitated at the moment.

67. The Applicant responded that this was during the disciplinary process, at no time was he given an opportunity to discuss this with his supervisor, he is happy to go to an occupational therapist. As an HR person, looking at someone with such a leave record the Applicant would recommend the permanent appointment of such a person.

Analysis of evidence

68. Applicant was charged with 13 charges of unauthorised absence and failure to obtain permission from his supervisor and hand in sick notes. The Applicant were still within 12 months' probation period, the period from 26 May 2021 until 6 July 2021 became a problem as he was only at work for one day during this period.

69. The Applicant had a senior position in the human resources department. The Applicant was also previously employed as a human resources Manager by the Respondent in a different department for a period of 17 years, therefore the Applicant was well aware of the rules, namely that sick notes must be handed in within five days from absence.
70. The Respondent tried to assist the Applicant by referring him to metropolitan which is the Respondent's wellness service provider. The Applicant only consulted with Alexander Forbes new service provider but Tom was not aware of the outcome of this report or that the report was indeed issued as this report was not before this disciplinary or chair person or appeal chairperson.
71. The Applicant made contact with Thom, his supervisor, to report his absence and promise to report for duty the next day which he failed to do. He didn't hand in sick note either. The Applicant's excuse was that he was hoping to report for duty at the time when he made the promise hoping that he would feel better the following day. He did not feel better the next day therefore he felt to report for duty as promised.
72. Tom's evidence that Applicant broke his promise in this respect on various occasions, namely, his failure to report for duty the following day was not challenged under cross-examination at all. Clearly a pattern of unauthorized absence had been formed by the Applicant's conduct.
73. The Applicant eventually handed in medical certificates issued by his wife, who was a medical doctor and was also booked off for approximately two years at a time for major depression, but she was also employed she was employed by the Respondent. The Applicant's wife, a medical doctor, was not practicing at the time. These certificates were not deemed valid by the Respondent. For all practical purposes Applicant did not hand in any medical certificate at all in support of his absence, nor completely reforms to justify his absence.
74. The Applicant signed the probation form on 14 April 2021, where it was stated that leave was a problem, yet the Applicant disputed this in his evidence in chief.
75. The Applicant did not dispute Thom's evidence that the staff made bets on whether the Applicant would be at work the next day. The Respondent referred the Applicant

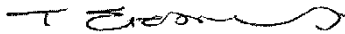
to ICAS, the Applicant only attended one session but elected to go to his own therapist thereafter instead.

76. The Applicant was dismissed on the 28th of April 2021 after a disciplinary hearing as well as an appeal hearing.
77. There was no evidence that the Respondent was made aware that Applicant was suffering from diabetes or depression to the extent that he could not perform his duties. The reasons for his absence were often related to his wife or children's illness and not to his own illness especially not associated with diabetes or depression.
78. The Applicant commenced employment by the Respondent on the 1st of October 2020, he was already absent from 15 to 16 October 2020. Applicant use the excuse that Thom knew he had family issues, this is however irrelevant as it remains Applicant responsibility to hand in leave forms and sick notes.
79. The Applicant testified under cross-examination that he handed in leave forms although it was late, therefore he conceded that he transgressed the rule of which he was well aware in his senior position in the human resources department as well as having filled a human resources manager position for 17 years.
80. There's no indication in Alexander Forbes recommendation that the Applicant would be able to report his duties. There is also a comment in the Alexander Forbes recommendation that the Applicant should consider his attitude towards sick leave. The Alexander Forbes report was not brought under the intention of the appeal chairperson at all, it is clear that the Respondent exercised a progressive discipline towards the Applicant.
81. Thom also testified that he had various informal sessions with the Applicant to assist the Applicant to prove his absenteeism, this was not disputed by the Applicant under cross-examination.
82. The Applicant conceded that he did not have time to obtain permission from his employer to be absent but averred that permission from a supervisor is not a requirement. It is clear that the Respondent went to the greatest extent to assist the

Applicant and had a lot of patience with the Applicant in his conduct. This kind of behaviour cannot be tolerated and it's most certainly not expected of a senior employee with the necessary the knowledge regarding sick leave and absenteeism. I therefore find the Applicants dismissal was substantively fair, procedural fairness was not placed in dispute.

Award

83. I find that the Applicant's dismissal was substantively fair, procedural fairness was not placed in dispute, therefore the Applicant is not entitled to any relief.



Theresa Erasmus