



ARBITRATION AWARD

Case No: **PSHS267-20/21**

Commissioner: **Allan Kayne**

Date of award: **24 March 2021**

In the matter between:

PSA OBO VUYISILE PATRICK MPONDO

(Applicant/ Union)

and

DEPARTMENT OF HEALTH- NORTHERN CAPE

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

1. The Public Servants Association of South Africa (PSA) referred a dispute, on behalf of the applicant, Mr. Vuyisile Patrick Mpondo, to the Public Health and Social Development Sectoral Bargaining Council ("the Council"), in terms of section 191(1) of the Labour Relations Act 66 of 1995 ("the LRA"), regarding his dismissal related to misconduct. The arbitration took place virtually, using the Zoom platform on 29 January 2021 and was concluded on 09 March 2021 at the Robert Mangaliso Sobukwe Hospital in Kimberley. It was agreed that the parties could submit closing arguments in writing by 16 March 2021, which they subsequently did.
2. The applicant was represented by Mr. Russle Bindeman, a trade union official, while Mr. Jack Pudikabekwa appeared for the respondent.

3. Although an electronic bundle of documents was utilised during the virtual proceedings, the applicant provided hard copies of that same set of documents to be used during the in-person proceedings on 09 March 2021.
4. The proceedings were electronically recorded, and the record filed with the Council's administration.

BACKGROUND

5. Having considered a preliminary issue raised by the respondent during the initial sitting of 29 January 2021, I issued a jurisdictional ruling in which I found that the applicant successfully proved the existence of his dismissal by the respondent in terms of section 192(1) of the LRA.
6. He was re-employed by the respondent in the position of Professional Nurse pursuant to an order of the Labour Court, with effect from 01 June 2019 and, at the time of his dismissal, was earning a monthly salary of R35,217.97.

ISSUE/S TO BE DECIDED

7. I must determine whether the applicant's dismissal by the respondent was both procedurally and substantively fair and, if not, to order the appropriate relief.
8. The applicant seeks retrospective reinstatement.

SURVEY OF EVIDENCE AND ARGUMENT

9. The following constitutes a summarised version of the evidence of the parties and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

RESPONDENT'S EVIDENCE

Sheila Katz ("Katz")

10. Katz testified under oath that she was appointed to act in the position of Director:¹ HIV and AIDS/STI/TB (HAST¹) from 01 August 2019. At the first meeting with her team, she learned that the applicant ought to have been in attendance and arranged to meet individually with him. That meeting was cordial, and he explained to her why he was not coming to work. During a further meeting, he was advised to write a letter to the respondent setting out his request to be transferred out of the HAST Directorate. He continued not reporting for duty. On 09 December 2019, she issued him with a letter, known as an Annexure A letter, in which she instructed him to resume his duties and to furnish her with reasons as to his absence between 01 August 2019 to 06 December 2019 in order for the respondent to decide whether to deal with the matter in terms of its disciplinary code. He responded to her in a 3 or 4-page letter but still failed to report for work. He was issued with an Annexure B letter and continued to remain away from work. Subsequently, in several WhatsApp conversations, he indicated that he would return to work on 09 March 2020. However, his brother passed away around that time. Katz advised him, in writing, to officially respond to her indicating his date of resumption of duties after attending to the necessary arrangements regarding his brother and also that he submits an application for bereavement leave. He never returned to work, and she was advised by Labour Relations to freeze his salary and, ultimately, to recommend that his services be terminated.
11. During her discussions with the applicant, she learned that he was re-employed by the respondent with effect from 01 June 2019 but sought to be placed at the Galashewe Day Hospital ("GDH"). However, his last place of work was within the HAST Directorate. She also advised him that once he reported for work, she would issue him with the necessary "tools of trade" and allocate office space to him before trying to assist with his request to be transferred.

¹ HIV and AIDS/STI/TB

12. According to Katz, her Personal Assistant prepared attendance registers that needed to be completed daily by employees. Notably, the applicant's name was omitted but, at a later stage, she instructed her to ensure that it was included on the register. Using the registers as a guide, Katz would check in with each of her team members and noted where individuals were not in the office. It was based on these check-ins that she noticed that the applicant was never on duty. However, from time to time, it was brought to her attention that he was in and around the premises, but he never reported to her during those occasions.
13. The applicant never advised her that he had returned to work at the N8 border post during the hard lockdown. In any event, based on his compromised immune system, which he had alluded to, she would never have allowed him to work in such a high-risk environment, and she had, by that time, requested his salary to be frozen.

Cross-Examination

14. Under cross-examination, she testified that she issued the applicant several legitimate instructions to come to work, and if he could not, he was expected to provide an explanation. Those instructions took place telephonically, via WhatsApp and at the meetings called for him to explain why he was not at work. She pleaded with him to advise when he would return to work and, after his return, they could resolve his request to be transferred to GDH. None of the engagements were officially documented, although she recalled making notes in a book during 2019. The only documentation to hand was the official correspondence included in the bundle of evidence.
15. Asked why she did not proceed with disciplinary action against the applicant in response to his failure to comply with her instruction to report for work, she submitted that she attempted to persuade him and to correct his behaviour by engaging with him but that he was uncooperative and she was left with no alternative but to proceed to the next step of the absenteeism process which was to recommend to the Head of Department ("HOD") that the applicant's services be terminated in accordance with section 17(3)(a)(i) of the Public Service Act of 1994 ("the PSA") based on him being absent without authorisation for a period

of more than 30 days. She explained that the procedure she followed was based on a set of internal guidelines, issued by the respondent, relating to absenteeism and talked only to the Annexure A and Annexure B letters and no warnings. However, she conceded that absenteeism constituted misconduct on his part, especially as he agreed that he would return to work but never did.

16. Asked if he was not at work, at the respondent's premises or his workstation, Katz stated that he did not present himself to her, although she was informed that he was occasionally on the premises. As he failed to report to her, she could not finalise his job description and conclude a performance management agreement with him. Accordingly, she viewed him as unproductive and not rendering his service to the respondent when required. Katz went on to confirm that, on a daily basis, she noted that he was not present. She did not receive any weekly plans from him and could not account for him. She noted that his first day of absence was after she commenced acting in the Directorate on 01 August 2019, adding that he never advised her that if he reported for duty. Had he done so, she would have implemented her plan to accommodate him with a colleague in a shared office.
17. She denied that, based on the absenteeism guidelines on which she relied, she ought to have commenced the formal process immediately once she established that he had not been present for 30 days, explaining that she wanted to deal with the matter compassionately and, therefore, tried to engage and investigate his situation.
18. She disagreed with the applicant's version that he presented himself for work and would occupy a space wherever one was available. She maintained her position that he only ever came in to meet with her and would, thereafter, leave. She expected him to report to her as his superior and agree to the job description and performance agreement before he could productively render service. Even if he were present at the premises, he could not have been working as nothing had been agreed between them. She denied ever preventing him from rendering service. She indicated she did not know what transpired before 01 August 2019.

19. According to Katz, her interpretation of the applicant's feedback was that he did not want to work. She recalled that his word choice had been on the lines that he would not return to work for several reasons, that she possessed no knowledge of his situation and that Executive Management was required to resolve it.
20. She testified that the Labour Court order did not indicate that the applicant was to return to service anywhere other than where he previously worked. According to Ms Kgape, he was required to return to the HAST Directorate, where he was previously employed. All that she wanted was for him to report for duty, and then she would facilitate his transfer out of the Directorate. As the matter stood, she was still willing to assist him to go to work where he could be a productive employee and that she had only requested him to formally request a transfer out of HAST, supported by a letter from his doctor.
21. She denied that she had attempted to push him to work where he did not want to be without providing him with a reasonable explanation, reiterating that once he agreed to return to work, the next step would have been to manage his request to transfer out of the Directorate.
22. Asked how she would view a scenario where that applicant had reported to the respondent's premises via the security desk but had not reported to her, she submitted that her answer was still the same, and she questioned how he could come to work and in what capacity he did so as he was not productive at all and she was unaware of his presence. For all she knew, he could have been there to see somebody in Human Resources or being off duty but still going to work. She explained that if the applicant was present but not working, he was effectively not there and, as a public servant, he was expected to produce work. If she encountered such an unproductive employee in her team, she would have addressed it. Based on her experience, she believed that public servants were required to report to their manager in terms of some code of good practice in which it might be documented.
23. As a Deputy Director, she would deal with absenteeism in accordance with the respondent's policies, but that the first step would be to obtain the reasons for the absence, then to try and assist the individual, monitor their conduct and,

failing correction of the misconduct, to then issue warnings, culminating in formal disciplinary action which could result in dismissal. She maintained that she followed that policy and took the appropriate corrective disciplinary action by following the absenteeism guidelines in the case of the applicant, subsequently noting that that document did not refer to graduated warnings but only to the Annexure A and Annexure B letters. She advised that all records would have been placed on the applicant's personnel file in the Human Resources Department and, although she had not issued him with any warnings, the meetings she conducted with him ought to have been considered as such warnings and that Annexures A and B were implied warnings in themselves. She further submitted that the meetings could also have been considered part of the counselling process or verbal warnings.

24. She testified that, based on the letter of discharge sent to the applicant by the HOD, he was informed about the reasons for his dismissal, which were due to his absence from work between 01 August 2019 to 06 December 2019. The right to appeal the dismissal was not specified in the guidelines on which she had relied, but, in the letter, his right to make a formal representation was outlined. The correspondence issued by the HOD giving effect to her recommendation that the applicant be discharged was dated 30 April 2020, signed on 08 July 2020, issued on 09 July 2020 and was retrospectively effective from 01 August 2019. She reasoned that the dismissal was based on the applicant's continued absence from work between 01 August 2019 to 08 July 2020.
25. She expressed that she had no knowledge of the applicant working at the N8 border post during the lockdown and, on that basis, she could not accept that he had rendered service as she ought to have delegated work to him. According to her knowledge, he was never tasked with performing surveillance, nor did he request to do so, and even if he had, she would never have expected him to based on his compromised immune system. However, she acknowledged that she subsequently was made aware that he was working at the border post. Put to her that the applicant, through his attendance at the border post, had demonstrated his willingness to render service, despite his co-morbidities, Katz responded that he had done so of his own accord and not on her instruction.

26. Katz acknowledged that the dates of absenteeism listed in the HOD's discharge letter to the applicant were incorrect, given that he performed work between March and May 2020. She further conceded that it had never been difficult for her to reach the applicant, and he attended all meetings called by her punctually.
27. From February 2020 to June 2020, she submitted that their interactions via WhatsApp continued until she stopped them following her submission of the recommendation to dismiss him, which was also when his messages became abusive towards her. She could not explain why his salary was already frozen from 15 June 2020, despite his dismissal only being effected in correspondence dated 08 July 2020.
28. She believed that the applicant had been afforded sufficient opportunities to defend himself on numerous occasions when they met. She had acted strictly in accordance with the absenteeism guidelines, which had no requirement to hold a disciplinary hearing but that in any event, the applicant was well aware of his misconduct.
29. Katz reiterated that she was still willing to assist and work with the applicant and, if he were reinstated, she would do so.

APPLICANT'S EVIDENCE

Nono Kopang ("Kopang")

30. Kopang testified under oath that she was an employee of the HAST Directorate between August 2019 and June 2020, apart from assisting in Research and Surveillance during April 2020. She knew the applicant from GDH since 2009 and recalled how they subsequently both worked in the HIV/AIDS Directorate, him occupying office 101 and she, office 102, prior to his previous dismissal. She recalled that he returned to work in June 2019 and explained to her what had taken place leading to his reemployment.
31. According to Kopang, Katz started as the Acting Director on a Monday during August 2019 and arranged one-on-one meetings with her team, including the

applicant. Subsequently, she called staff meetings on 14 and 15 August 2019 as well as 07 October 2019, but the applicant was not part of them.

32. She recalled how the applicant would come to work, greet her and go to Tebogo's office. He was often to be found in rooms 101 or 122, but she did not engage overly with him. She went on to say that she periodically saw him at work during the period August 2019 to December 2019 but could not confirm that he was present each and every day during that time.
33. She served on one of the COVID-19 teams during the hard lockdown, recalling on one occasion that she saw the applicant's name on a list of employees who were to be paid overtime. He also came into the office occasionally while stationed at the N8 border post and, on one occasion, told her that he was stationed at a roadblock on the N8 at the provincial border.

Cross-Examination

34. During cross-examination, she reiterated that, although he may not have signed the attendance register, she had personally witnessed his presence at the respondent's premises and was not the only employee who could attest to this. She was, however, unaware of what the applicant did whilst at work.

ANALYSIS OF EVIDENCE AND ARGUMENT

35. For the sake of brevity, I shall not repeat my analysis of the evidence and argument presented by the parties on 29 January 2021, which culminated in a jurisdictional ruling wherein I concluded the following:

35.1. The respondent's reliance on section 17(3)(a)(i) of the PSA was misplaced, and the HOD's letter, dated 08 July 2021, issued to the applicant the following day was nothing more than a notice to the applicant confirming that the respondent had dismissed him with effect from the date of issue.

35.2. Therefore, jurisdiction vested in the Council to arbitrate the dispute in which the applicant claimed that his dismissal was unfair.

36. Accordingly, having determined that reliance on dismissal by operation of law in terms of the PSA was misplaced, parties were afforded an opportunity to address the fairness of the applicant's consequent dismissal by the respondent. Section 192(2) of the LRA provides that, once an employee has established the existence of the dismissal, the employer must prove that the dismissal is fair. In determining the fairness of a dismissal, section 188 of the LRA prescribes the following:

"(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove -

(a) that the reason for dismissal is a fair reason -

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

37. The applicant's version, adduced through the evidence he presented on 29 January 2021, can be summarised as follows:

37.1. He was re-employed by the respondent with effect from 01 June 2019 and, upon his resumption of employment, reported to Ngape, who attempted to facilitate his transfer to the District. Not only did she, as representative of the employer, fail to properly reintegrate into the position he formerly occupied prior to his previous dismissal in accordance with the order of the Court, but she failed to address or resolve his concerns regarding being accommodated elsewhere before moving on herself. Her replacement, in the form of Katz, similarly promised to address his concerns but repeatedly failed to do so, despite several meetings and WhatsApp communication with her.

37.2. He presented himself each day at the respondent's premises but was unable to sign in the register as his name had not been written in it. The only time when he was not physically in attendance was when his brother

passed away, and he attended to his family commitments, noting that this was brought to Katz' attention and that she had acknowledged that correspondence.

37.3. After Katz addressed correspondence to him in which she claimed that he had been absent from work between 01 August 2019 until 06 December 2019, he immediately responded to her in writing.

37.4. It was not disputed by the respondent that the applicant made several attempts to meet with other representatives of the respondent to resolve his concerns, including Mr Strydom and the HOD, to no avail.

38. Some of Katz' evidence supported that of the applicant with some marked differences at times. Her evidence is summarised as follows:

38.1. In order to deal with his matter compassionately, she made several attempts to engage with the applicant after she was appointed Acting Director. Having been apprised of the applicant's reemployment, the purpose of these meetings was to get him to commit to returning to work and provide her with a formal request to transfer out of the Directorate, supported by a letter from his doctor. Despite the ongoing engagement, he repeatedly failed to report for duty or send the letter.

38.2. Using the respondent's absenteeism guidelines, on 06 December 2019, she addressed correspondence to him requiring him to furnish reasons for his absence from 01 August 2019 to that date in order to determine if disciplinary action was warranted. She confirmed receiving a written response from him. Notably, neither party presented this into evidence.

38.3. Based on further engagements with him, she expected him to return to work in March 2020, but this was impacted by his brother's death, which she acknowledged was communicated to her by him.

38.4. The applicant never signed the attendance registers and failed to address any concern that his name did not appear therein, which could have quickly been resolved.

38.5. Since 01 August 2019, she never noticed the applicant being present at the respondent's premises during her daily rounds, but he promptly presented himself whenever he was called to meet with her.

- 38.6. She issued no instruction that he render service at the N8 provincial border post and only became aware that he was there when other employees told her.
- 38.7. She proceeded to freeze his salary sometime after March 2020, abandoned her engagements with him and recommended to the HOD that the applicant be dismissed as he had absented himself for more than 30 days. Although initially dated 30 April 2020, his discharge letter was only signed by the HOD on 08 July 2020 and issued to the applicant at his home the following day. However, she conceded that the dates referred to in the correspondence were incorrect based on the N8 attendance registers, which indicated that the applicant was rendering service for the respondent during a portion of that time.
- 38.8. Even if he was in attendance at the respondent's premises, he did not present himself to her, she did not allocate any work to him or conclude any performance agreement and, therefore, she deemed him to have been absent.
39. In the only additional evidence introduced by the applicant, Kopang testified to her first-hand experience of witnessing the applicant's presence between August 2019 and December 2019. Although she could not vouch for him being present on a daily basis, she recalled seeing him coming into work and going to Tebogo's office as well as him being seen in one of two offices. The applicant personally informed her as to where he was working during the hard lockdown.
40. Two of the concerning concessions made by Katz include her acknowledgement that employee absenteeism should be treated as misconduct and that even if he was present at the respondent's premises, she deemed him to be absent as he failed to present himself to her for work. By its very definition, the word "absent" means not present. Taking into account the undisputed evidence of Kopang that she witnessed the applicant's presence during the period he was alleged to have been absent, the conclusion reached by Katz that he was absent was irrational.
41. While Katz continues to hold firm that she followed the respondent's internal guidelines in dealing with the applicant's absence, the procedures that she followed were the incorrect ones, and the applicant's misconduct by failing to

comply with her instructions and/or to refrain from not reporting for work ought to have been addressed in terms of the respondent's well-established disciplinary code. Given the applicant's reemployment to remedy his previous unfair dismissal claim, the respondent ought to simply have addressed his concerns about his return to the James Exum offices (not necessarily resolve them as it was clear that he was re-employed to his former position) and deal with his insubordinate behaviour and/or absenteeism in accordance with the code. While I found in my earlier ruling that the respondent gave the applicant the proverbial run around by not addressing his request to transfer, initiated by Ngape, the applicant had no right to refuse to perform work allocated to him by his superior and, while I must accept that he was present, I question what work he actually performed between August 2019 to March 2020.

42. Katz' attempt to marry the process that she followed with the applicant to the concept of graduated warnings through progressive and corrective discipline, unfortunately, confirm that the procedure she adopted was totally inappropriate and incorrect in the circumstances.
43. Given that the true reason for the applicant's dismissal was related to his misconduct, section 188 prescribes that the guidelines established in the Code of Good Practice: Dismissal ("the Code") included in Schedule 8 to the LRA that must be taken into account when the fairness of such a dismissal is in dispute.

43.1. Item 4 of the Code, which was reinforced by the Labour Court in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* (2006) 27 ILJ 1644 (LC), recognises the components of a fair procedure to include an investigation into the reasons, advising the employee of the allegations in a manner that he/she can understand, providing the employee with a reasonable time to prepare a defence and to state a case in response to the allegations, the assistance of a fellow employee or trade union representative and communication of the outcome of the enquiry.

43.2. Item 7 of the Code sets out the factors to be considered by any person considering the substantive fairness of a dismissal. At the heart of these

factors is whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace. It specifically provides that:

"Any person who is determining whether a dismissal for misconduct is unfair should consider -

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not -

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

44. The respondent, in all instances, bears the onus of proving such a breach, followed by the subsequent assessments pertaining to the breach.
45. On the evidence to hand, it is patently clear that the respondent has failed to present any evidence whatsoever to show that its decision to dismiss the applicant was for a fair reason related to misconduct or was effected in accordance with a fair procedure. With it failing to discharge the onus required of it in terms of section 192(2) of the LRA, I am left with no alternative but to find the applicant's dismissal both procedurally and substantively unfair.
46. The relief sought by the applicant is one of retrospective reinstatement to his former position with effect from his date of dismissal. Katz was clear that she had no issue working with the applicant and even confirmed her willingness to continue assisting him with his request to be transferred out of the HAST Directorate. However, what weighs heavily in this regard is that the applicant's conduct throughout his tenure with the respondent appears to have been with a blatant disregard for authority. Despite being re-employed in terms of a Court order to his former position, he demanded to be transferred back to the District

when this was not a requirement of his reemployment. Although the respondent's conduct pertaining to him has been found to be unfair, he refused to comply with simple requirements such as adding his name to and signing the attendance register and even presenting himself to Katz to be allocated work, while his transfer request was being addressed. Accordingly, taking these factors into account, I am of the view that he should be reinstated with effect from his date of dismissal, but that the reinstatement not be of a retrospective nature and, thus, he will not be entitled to back pay for the period between the date of dismissal and the date of this award.

AWARD

47. Accordingly, the dismissal of the applicant, Mr. Vuyisile Patrick Mpondo, by the respondent, Department of Health- Northern Cape, was procedurally and substantively unfair.
48. The respondent, the Department of Health- Northern Cape, is ordered to reinstate the applicant, Mr. Vuyisile Patrick Mpondo, on terms and conditions of employment no less favourable to him than those that governed the employment relationship prior to his dismissal on 08 July 2020. The applicant is to resume his duties as a Professional Nurse within the respondent's HAST Directorate by no later than 15 April 2021.
49. There is no order regarding back pay.



Allan Kayne