



ARBITRATION AWARD

Case No: **PSHS530-20/21**

Commissioner: **Samuel Baron**

Date of award: **20 April 2021**

In the matter between:

PSA OBO SANETTE LABUSHAGNE

Applicant

and

DEPARTMENT OF HEALTH- WESTERN CAPE

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was finalized on 31 March 2021 at the premises of the Alan Blyth Hospital in Ladismith, Western Cape Province. At the conclusion of the matter, the parties requested seven days in which to submit their closing arguments and they duly obliged.
2. The Applicant, Ms. Sanette Labushagne, was present and was represented by Mr. Johann Munro, a fulltime shopsteward from the trade union.
3. Mr. Cedric Jacobs, Assistant Director: Labour Relations, represented the Respondent, Department of Health- Western Cape.
4. Each party submitted a bundle of documents, the contents of which was accepted by the other party that it was indeed what it purported to be.

ISSUE TO BE DECIDED

5. I am required whether the dismissal was procedurally and substantively fair and if not, determine the appropriate remedy.

BACKGROUND TO THE DISPUTE

6. The Applicant commenced permanent employment with the Respondent in July 2007 and was working as an Assistant Director: Primary Healthcare and was earning a basic salary of R64 094,95 per month at the date of her dismissal, which occurred on 23 October 2020.

7. She was found guilty and dismissed on the following Charge:

That you allegedly committed an act of misconduct as contained in the Disciplinary Code and Procedures for the Public Service (Resolution 1 of 2003), Annexure A, in that you committed acts of fraud by intentionally and unlawfully submitting travel claims with false information as to passenger S Swanepoel while she was in fact on leave, thereby making a misrepresentation causing the department to overcompensate you with R3 605, 58 in terms of expense reimbursement for the following dates:

13/3/2015 – R132,12

29/6/2015 – R534,87

13/5/2016 – R248,76

27/5/2016 – R497,52

13/6/2016 – R505,26

3/10/2016 – R499,32

3/3/2017 - R254,16

15/5/2017 – R510,03

2/10/2017 - R423,54

8. The Applicant urged me to order her reinstatement in the event that I find in her favour.

SURVEY OF EVIDENCE

Respondent's case

9. Dr. Jaco Denkema, the Respondent's Medical Manager, testified that approval was granted by the Hospital Board for the Applicant to use her private transport from where she resided in Van Wyksdorp to Ladismith to not only give the nursing assistant, Ms. Sylvia Swanepoel a lift on the days she was working at the clinic in Ladismith, but also the medical supplies as well as the various samples that had to be brought to Ladismith. The Board decided this as the most cost effective manner to deal with the situation.
10. He testified further that he approved the claims of the Applicant based on a pack of documents that was placed before him. According to him, the leave forms of Ms. Swanepoel was not placed before him, so he was not aware that Ms. Swanepoel was on leave on certain days for which the Applicant also put in a claim. He would not have approved the travel claims for the Applicant had he been aware that she was on leave.
11. He testified under cross-examination that he wrote a letter to the Chairman of the Appeals Board wherein he stated that the Applicant did not intentionally defraud the Respondent and that he was of the view that there was no breakdown of trust between the Applicant and himself. He was however prepared to re-evaluate that initial stance if it is found that the Applicant submitted a claim while Ms. Swanepoel was on leave because in such instance Ms. Swanepoel was not on official duty.
12. Ms. Sylvia Swanepoel testified that she could not recall when she when she was on leave and whether she drove with the Applicant on the days she was on leave. She however testified that she drove with the Applicant on most days when she was on leave because she would do some work at the clinic even though she was on leave and she would then go to her mother in Ladismith and would drive back to Van Wyksdorp with the Applicant. She was further not sure whether she had medical supplies and / or samples with her during the periods she was on leave and took a lift with the Applicant. She however acknowledged the leave forms she signed.
13. Ms. Christelle Anta testified that she processed the travel claims in accordance with the prescripts of the finance department based on the source documents that was placed

before her. She testified that she would not have approved the claims for the days she was aware that Ms. Swanepoel was on leave.

14. Mr. Jerry Faas testified that the finance department became aware of the allegations and they did pre-liminary investigations for the full year of 2018. During such investigation information was sought from the sub-district and a spreadsheet was drawn up which was given to them towards the end of that year.
15. He testified further that it was decided that because it involved fraud, it must be referred to the Head Office in Cape Town. This was done during December 2018. It was however decided at Head Office that the District must handle the matter and it was send back to them during January 2019. During October 2019, the District decided that they will take action, but they struggled to find an investigator to investigate the case. They only managed to do so during January 2020.
16. Mr. Faas mentioned that they only found the 3rd Charge during that investigation. They found the leave forms of Ms. Swanepoel as well as the claim forms of the Applicant. This was towards the end of March 2020. He mentioned further that because of COVID-19, all disciplinary processes were stopped and only resumed virtually from 17 June 2020. The disciplinary hearing was postponed a few times and was finalized in August 2020. The Applicant appealed and the dismissal was upheld on 23 October 2020.
17. According to Mr. Faas, the investigation was a complex one. The initial documentation pack contained 84 documents and it was a financial investigation at first before it turned into an investigation for misconduct. He is aware that disciplinary action must be prompt, it must also be fair to the employee and they had to make sure that the Applicant had a case to answer.

Applicant's case

18. Mr. Johan Ellis testified that he was the Hospital Secretary at the time the decision was made that the Applicant and Ms. Swanepoel was needed in the Ladismith clinic on particular days. He reiterated that the approval for the travel claims of the Applicant was granted not only for the transportation of Ms. Swanepoel, but also of the medical supplies and the samples. According to him, the Applicant could claim for transport even if she

was on leave as long as Ms. Swanepoel brought with her medical supplies or blood samples. According to Mr. Ellis, this represented a benefit for the state, otherwise they would have to send a government vehicle at larger cost to fetch such. He retired in 2014 and was not *au fait* with the claims submitted after that period.

19. He stated that he was at times on leave, but would be requested to attend a meeting in George and he would then request official transport even though he was not on duty. He however agreed under cross-examination that attending a meeting would constitute official duty.

20. Mr. Ellis stated further that he was probably the most knowledgeable about the hospital procedures and he informed the Applicant how to claim. He was aware that she did not claim for a return trip when Ms. Swanepoel was not driving back to Van Wyksdorp with the Applicant. He argued that if the Applicant wanted to commit fraud, she would have done so even on those three occasions.

21. He mentioned further that all processes were followed during the claim process and the claims were forwarded to all the relevant people for approval. It was also audited every time and no discrepancies were found.

22. The Applicant testified that she was requested to transport Ms. Swanepoel, the medicines and the blood samples from Van Wyksdorp to Ladismith and she was given authorization to claim. She thus claimed as she was informed by the Management, especially Mr. Ellis because Dr. Denkema was only there for limited time during the week. It was Mr. Ellis's department and he was the expert and she did as she was told by him. She did not receive any previous training on the claims.

23. She testified further that she would claim for travel regardless of whether Ms. Swanepoel was on leave or not because Ms. Swanepoel would have boxes of medicine with her every time, she would drive with her to Ladismith.

24. She stated that she only claimed for a single trip on occasions when Ms. Swanepoel did not go back with her to Van Wyksdorp. She denied that she committed fraud because the fact that she claimed for travel was well-known by everyone. There were previous email queries on this aspect and she sought help and she claimed in the manner she

was told. She never claimed when Ms. Swanepoel was not in her vehicle or without any boxes with her containing medical supplies and / or blood samples.

25. The Applicant stated further that it was not about her *per se*, but it was about service delivery. She agreed to transport Ms. Swanepoel and the goods for the sake of the patients. Ms. Swanepoel worked in her leave period also to assist the patients. She mentioned that the trust relationship is not broken because everyone knew about her travel claims.

ANALYSIS OF EVIDENCE AND ARGUMENT

26. The Applicant challenges both the procedural and the substantive fairness of the dismissal. She argued that the long delay in the investigation constitutes a procedural flaw in the dismissal and she claimed that, on substantive grounds, she was not guilty of fraud as alleged.

27. The relevant reference document regarding the bringing is PSCBC Resolution 1 of 2003, the Disciplinary Code and Procedures for the Public Service ("the Code"). The following is an extract from the Resolution:

'2. Principles

2. The following principles inform the Code and Procedure and must inform any decision to discipline an employee

2.1 Discipline is a corrective measure and not a punitive one.

2.2 Discipline must be applied in a prompt, fair consistent and progressive manner

2.3 Discipline is a management function.'

28. The Applicant argues that the Respondent's undue delay did not constitute "prompt" action as espoused by the Code. On this aspect, a lengthy delay in the conclusion of the disciplinary proceedings, cannot *per se* lead to a conclusion of unreasonableness and unfairness. It does not automatically follow that the Respondent has aborted the disciplinary hearing simply because there was a long delay.

29. A distinction needs to be drawn between the delay in the investigation and any further delay after the Respondent has decided to bring disciplinary charges against the Applicant. The delay in the investigation was indeed lengthy and Mr. Faas testified

regarding the reason therefore. Even though I do not find the explanation for the delay entirely convincing, the critical issue is whether the Applicant suffered any material prejudice in the light of such delay.

30. In establishing the materiality of the prejudice, I have to make an assessment as to what impact the delay has on the ability of the employee to conduct a proper case. The Applicant did not testify regarding any difficulty she had in providing a proper defense against the allegations levelled against her. The Applicant stated that she was not aware that an investigation was ongoing. Therefore, with regards to the time it took for the Respondent to conclude its investigation, I find that no unfairness was visited upon the Applicant.
31. The time it took from the period the Respondent decided to charge the Applicant, to the date she was dismissed, did not constitute a lengthy period. She first received the notification to attend the hearing on 12 June 2020 for the hearing to be held on 23 June 2020. Mr. Faas testified that there were further postponements until the hearing was finalized during August 2020. There is no evidence regarding who requested the postponements, but the Chairperson of the hearing dealt with such requests and no issue was raised in this arbitration that the Chairperson had any ulterior motives in granting such postponements.
32. Also, the Applicant did not submit that she suffered any material prejudice during that period. Thus, having assessed the evidence regarding the delay in finalizing the disciplinary proceedings, I find the dismissal to be procedurally fair.
33. The Applicant denies that she is guilty of the misconduct for which she was dismissed. I thus have to determine afresh whether she was indeed guilty and if so, determine whether the sanction of dismissal was appropriate under the circumstances.
34. Fraud is the unlawful, intentional, misrepresentation of facts (distortion of the truth) calculated to prejudice another. In order to prove fraud, the employer must show that the accused employee was the one who committed the act and that he / she did so for gain.
35. There is no dispute that the approval was given for the Applicant to utilize her private transport from Van Wyksdorp to Ladismith and that she could claim for travel from the Respondent on the days that she transported Ms. Swanepoel to Ladismith. Both Dr.

Denkema and Mr. Ellis testified that the arrangement was also that she could claim in the event that she transported medical supplies as well as blood and other samples to Ladismith from Van Wyksdorp.

36. The Respondent took issue with the fact that the Applicant submitted travel claims even in the event that Ms. Swanepoel was on leave and thus fraudulently claimed for those days because Ms. Swanepoel was supposedly not on official duty. Ms. Swanepoel was unable to shed much light on whether she was in fact on leave on the specific days that formed part of the charge. She simply mentioned that she did drive most of the times with the Applicant to do some work at the clinic at times she was on leave.
37. Nevertheless, the Respondent produced the leave forms and claims that the Applicant even signed on some of the leave forms as the Supervisor of Ms. Swanepoel. It is therefore not in dispute that the Applicant claimed for travel with her private vehicle on the days in question. She admitted so herself. The Respondent's whole case hinges on that issue.
38. This however discounts the fact that the further part of the approval was that the Applicant should also claim when she transported medical supplies and blood samples from Van Wyksdorp to Ladismith because it was a convenient, cost effective and practical way to ensure that such reached Ladismith. The Respondent failed to prove that the Applicant made a claim for situations when Ms. Swanepoel was on leave and further had no medical supplies and / or blood samples with her. Had it done so, it would certainly have changed the picture considerably.
39. Both the Applicant and Mr. Ellis, the person with the most expertise on such claims testified that she was pertinently told that she should claim in that way and such claims were approved by the relevant delegates after close scrutiny. Admittedly, the leave forms of Ms. Swanepoel did not form part of the pack of documents submitted for approval, but the issue, as I said, is whether Ms. Swanepoel, even though she was on leave, brought boxes with her to the clinic in Ladismith. The onus was on the Respondent to prove that that was not the case.
40. During the cross-examination by Mr. Jacobs of the Applicant, he questioned the Applicant on whether there were registers where Ms. Swanepoel signed in every time,

she visited the clinic with the intent to place the onus on the Applicant to prove that Ms. Swanepoel was indeed at the clinic on the days the Applicant transported her. The Applicant bears no such onus.

41. The arrangement started in 2011 and continued after Mr. Ellis retired in 2014. The Applicant continued to claim in the way that she did as per the agreement and was not told to discontinue such practice once Mr. Ellis left. It does appear that Dr. Denkema as well as Ms. Anta was not informed by Mr. Ellis that the Applicant was in fact entitled that the Applicant could claim even when Ms. Swanepoel was on leave, but that does not automatically mean that the Applicant is guilty of fraud.
42. The request for claim for travel on the official documents only speaks of claiming for travel for a person, yet the evidence was that the Applicant could also claim for the transport of the medicines. The issue is not whether the Hospital Management rightly or wrongly approved such a claim (for the medicines and the samples), but whether the Applicant committed fraud in so doing. I cannot reach such a conclusion on the evidence. The Applicant even sought clarity on how to claim and she was told by the most clued-up person on that issue how to do it.
43. Furthermore, the Applicant made sure that she did not claim when Ms. Swanepoel did not make a return trip with her. In the end, the Respondent failed to prove on a balance of probabilities that the Applicant committed fraud and I thus find her not guilty on the offence. The dismissal was thus substantively unfair.
44. This brings me to the issue of remedy. The Applicant wishes to be reinstated. Reinstatement is the primary remedy for an employee that was substantively dismissed, unless certain factors exist that would prevent such reinstatement (see section 193 (2) of the LRA). I find no compelling reason why the Applicant should not be afforded the remedy of reinstatement.
45. Next is the issue of back pay. The concept of reinstatement does not necessarily include back pay and the discretion as to whether back pay is granted and the extent thereof is not statutorily prescribed. The discretion lies with the arbitrator arbitrating the matter. I am however of the firm view that back pay in this instance is entirely justified.

46. In determining the quantum of such back pay, I take the following into consideration: The Applicant is out of work from 23 October 2020. I fail to detect any reason why back pay from that period until the date of the award should not be awarded.

47. In the premises therefore, I make the following award:

AWARD

48. The dismissal of the Applicant by the respondent was procedurally fair but substantively unfair.

49. I order the Respondent to reinstate the Applicant on the same terms and conditions prior to her dismissal, by no later than 15 May 2021.

50. I order the Respondent to pay the Applicant back pay to the amount of R375 688.17 (R64 094,95 per month till date of the award), less statutory deductions, by no later than 30 May 2021.



Samuel Baron