JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the CCMA had jurisdiction to hear this matter.
2. The arbitration hearings were held on 21 July & 21-22 September 2017 at the CCMA offices, Anton Lembede St, Durban. The applicant represented himself while the respondent was represented by Mr …………….(ER officer). The latter has 8 years of experience representing parties at arbitration. Throughout the process, the applicant being a layperson without any experience of an arbitration, was given guidance on the procedural aspects of the arbitration and in ensuring that he puts his version to the respondent’s witnesses. The applicant indicated that he did not need the services of an interpreter.
3. With the consent of the parties a pre-arb was conducted on 21 July 2017. For this purpose a checklist containing the issues that one normally encounters in alleged misconduct related arbitrations was distributed to both parties. A typed minute thereof was distributed to the parties and after minor amendments were made thereto, was read into the record on 21 September 2017. The parties were advised to keep the minute handy to remind them constantly of the disputed issue and to ensure that their witnesses deal with them.
4. At the commencement of each new hearing day the parties were advised as follows: “*Witnesses will be subjected to cross-examination. The purpose of cross-examination is to test the credibility and reliability of evidence and to show that your version is more probable. It is important to bear 3 things in mind when cross-examining – You must put your version to the opposing witness; If an opposing witness has left out an important fact then that should be put to the witness; If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously*.”
5. The concepts of self-defence, provocation and necessity were explained to the parties by way of examples at the outset. They were asked to deal with “necessity” as a defence if they considered it to be applicable.

ISSUE TO BE DECIDED

1. Whether the applicant was dismissed fairly. He sought reinstatement with back-pay. No statutory claims were made.

BACKGROUND TO THE DISPUTE

1. The applicant is ……………………(male age 36), a paramedic. He commenced full-time employment – and served a 3-month probation – with the respondent in terms of a written indefinite term contract on 1 January 2013. (There is a dispute whether he was placed with the respondent by a TES for the period 2011–2013. Nothing however turns on this dispute.) He was dismissed on 21 April 2017 but paid until 21 May 2017. He earned R8900 per month for working 15 shifts / 180 hours. The applicant has not obtained alternative employment despite making attempts, nor has he earned anything from casual work. His highest standard of education is Gr 12. As breadwinner he had 3 dependants (1 adult and 2 children).
2. The respondent is ……………….(PTY) LTD, a private emergency medical services provider. It has approximately 1000 employees at 29 branches throughout the Republic. It is a large employer.
3. The applicant was given a notice to attend a disciplinary hearing on 18 April 2017 containing the following charge: “*Unauthorised use of company vehicle in that on 28 March 2017 you have breached company policies and procedures when you used an …………….. ambulance without permission or authorisation*.”
4. The charge was based on the following item in the contractually binding disciplinary code: “*Unauthorised removal, possession or use of property of the Company, colleagues or clients*.”
5. The hearing was held on 21 April 2017. The applicant attended; represented himself; pleaded not guilty; did not call any witnesses; heard the respondent’s witnesses and questioned them; and gave evidence in support of his case. He was found guilty and dismissed. The respondent maintains an appeal procedure, but the applicant chose to refer an alleged unfair dismissal dispute directly to the CCMA. The matter was set down for conciliation (after the respondent objected to con/arb) on 23 May 2017. The matter remained unresolved. Hence the referral to arbitration.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following witnesses in support of its case: ………………(operations manager for Outer West for 4 years and employed by the respondent for 17 years. He held the position of media liaison officer before he assumed his present position. He was the investigator of the alleged misconduct and the initiator at the disciplinary hearing. He also possesses an ILS – intermediate life support – qualification); and …………….. (branch manager for 3 years and the applicant’s immediate superior. He has been employed by the respondent for 5 years and held the position of events co-ordinator before assuming his present position). Only the applicant gave evidence in support of his case.
2. The applicant did not raise any procedural issues.
3. Before the evidence is surveyed it must be remarked that a large part of the evidence presented by the respondent dealt with the applicant’s alleged unauthorised possession of the ambulance, and his failure to inform the respondent of a deviation on 28 March 2017. I note that the applicant was not charged with unauthorised possession. I must therefore assume that this was a deliberate decision on the part of the respondent because the charge was based on an item in the disciplinary code that expressly provides for unauthorised possession.
4. The following was either common cause, agreed to, undisputed or conceded in the pre-arb or the arbitration proper:
   1. It is usual to impose the sanction of dismissal on anyone found guilty of the offence;
   2. The applicant completed a basic life support course at the ………. College. As such he performs the function of BLS paramedic. He worked in a team with a crew member …………….who was an ILS paramedic (intermediate life support);
   3. When working as a team the applicant would be subject to the direction of an ILS paramedic;
   4. The applicant and his crew used an ambulance valued at R1.5m (and fitted with valuable advanced life support equipment). It was to be used for official business purposes;
   5. The ambulance in question was a back-up vehicle for the night shift crew;
   6. The ambulance is fitted with a tracking device and its movements and location can be monitored at all times;
   7. The ambulance may not be stationed at any place other than a branch or approved stand-by point;
   8. If one deviates from any route, one must inform the branch manager or the advanced life support office of such deviation;
   9. The applicant was aware of these rules; and considered them to be reasonable and valid;
   10. The applicant possesses a C1 class driving licence together with a PDP (public driver permit);
   11. The applicant was permitted to drive the ambulance;
   12. The respondent maintains base stations at various hospitals in Durban. The base stations of relevance are those at …………Hospital and ………… Hospital;
   13. The ambulance must be returned to ………….Hospital at the end of the shift;
   14. The applicant routinely takes possession of the ambulance when commencing his shift at Ethekwini Hospital;
   15. The applicant usually works day-shift from 6am – 6pm;
   16. The applicant uses his own private transport to go to and return from his workplace;
   17. The applicant lives in Fyfe Road, Morningside, Durban. The premises consist of a gated complex, with electric fencing, CCTV cameras and security personnel;
   18. The applicant suffered an episode of nosebleed on 27 March 2017 towards the end of his shift and reported this to his manager Prinsloo. Prinsloo had seen a drop of blood on the driver’s door on that day;
   19. The applicant suffers from hypertension (aka high-blood pressure) and he was on prescribed medication to treat this condition. It was undisputed that nosebleeds are one of the effects of hypertension;
   20. The applicant returned to work on 28 March 2017 and performed duties as normal until about 17h50;
   21. The applicant dropped off his crew member at …………Hospital at 17h44 on 28 March 2017. The applicant thereafter proceeded in the direction of ………. Hospital in order to return the ambulance to the base station there;
   22. While en route to …………Hospital the applicant stopped off at his home at 18h02. The applicant did not inform anyone of this deviation;
   23. The ambulance remained at his premises until the early hours of 29 March 2017;
   24. Prinsloo was informed by the night shift crew late in the evening of 28 March 2017 that the ambulance was not at the ……….Hospital premises;
   25. Prinsloo tracked the vehicle and found that it was located at Fyfe Road within the applicant’s gated complex;
   26. Prinsloo proceeded at around midnight to the premises with the trauma counsellor …………and the SAPS;
   27. The applicant was found at his flat;
   28. The SAPS asked the applicant to accompany them to the police station where Prinsloo and the applicant both made statements;
   29. The applicant suffered an episode of nosebleed while at the police station;
   30. The ambulance was removed from the applicant’s premises at 1h05 on 29 March 2017 by Prinsloo;
   31. The ambulance is fitted with a device referred to as the PTT (push-to-talk). It enables the crew to make contact with the call centre. It is also a cell-phone;
   32. The respondent was rightly concerned about the applicant’s whereabouts and the location of the ambulance on 28 March 2017;
   33. That deviating from the route is a serious matter and that there was a duty on the applicant to inform the respondent immediately of the deviation;
   34. The applicant had not jeopardised the health or safety of any patient on that day. However it was agreed that is necessary that the ambulance be parked at the base station in order that emergencies may be promptly attended; and
   35. The applicant had been admitted to City Hospital from 8 April 2017 to 13 April 2017 including having to spend 4 days in the ICU.
5. Both parties made oral submissions in closing.
6. On the probabilities, I find on the disputed issues as follows:
   1. Whether nosebleed is a serious condition: The respondent submitted that it is a minor or trivial condition. It was however agreed that nosebleed is a symptom of hypertension. It is not clear whether that condition is serious or not. The applicant’s evidence that he considered nosebleeds to be serious because he took rugby players who suffer from nosebleeds to hospital was not disputed. He further stated that when his own attempts at self-medication were unsuccessful he consulted his doctor who immediately hospitalised him for the hypertension. Even though the respondent disputed that the hospitalisation was linked to the nosebleeds / hypertension, I find that it was because there was no other reason suggested by the respondent for this issue to be fabricated.
   2. Whether the steering wheel, dashboard and the side door panel were blood-stained, and whether the applicant cleaned these on 27 March 2017: It is not necessary to resolve this dispute suffice to say that it was common cause that the applicant suffered from an episode of nosebleed on 27 March 2017.
   3. Whether the applicant suffered an episode of nosebleed on 28 March 2017 at about 17h50 whilst driving towards …………..Hospital: The respondent disputed that the applicant had an episode while travelling alone but did not offer a reason, competing version or an ulterior motive on the part of the applicant to fabricate this fact. With only one version on this issue, I have to find for the applicant. In any event this nosebleed episode fitted into a pattern: he had one on 27 March and another on 29 March at the police station.
   4. Whether the applicant went home to fetch his hypertension medication on 28 March 2017 while on his way to …………Hospital: This is a further issue that the respondent disputed for no particular reason. Only the applicant’s version is available on this issue. I do not find it strange that a person who is experiencing a medical condition would try and relieve that condition by way of self-medication. I accordingly find for the applicant on this issue.
   5. Whether free medical treatment was available to the applicant: Banks suggested that the applicant could have been afforded free treatment at one of the hospitals. Prinsloo did not agree with his colleague that treatment was free. His submission was that paramedics are given *preference*. (There was also a difference between them about which hospitals provided the service.) The applicant for his part submitted that he had never been told either about free or preferential medical treatment. It is not necessary to make a finding on this issue because applicant was not obliged to make use of these alleged facilities: he was entitled to seek medical assistance from any service provider of his own choice.
   6. Whether the applicant was found at around midnight on 28/29 March 2017 slumped on his couch fast asleep still in his bloodied uniform: It is not necessary for me to make a finding on this issue, suffice to say that the applicant was found at home when the police knocked on his door. There was no evidence that the ambulance had been used from the time that the applicant arrived at home at 18h02 on 28 March 2017 until the police knocked at his door. (This issue would have been relevant had the respondent charged the applicant with unauthorised possession.)
   7. Whether the ambulance was exposed to any risk on 28 March 2017 while it was parked within the applicant’s residential complex: The respondent submitted that the ambulance was exposed to risk of theft or damage while it was at the applicant’s premises. I find that such submission would be true of any property regardless of where it may be kept. Having regard to the numerous security features in existence at the applicant’s premises, I cannot find that the ambulance was exposed to any additional risk while it was at his premises.
   8. Whether the respondent suffered any loss, damage, prejudice or harm: It was common cause that the ambulance did not suffer any damage or loss. There was also no evidence that use of the ambulance was required during the night in question for any business purpose. This question is therefore answered in the negative.
   9. Whether the applicant is guilty of the offence: The applicant was charged with the unauthorised use of the ambulance. I have found that the applicant went home to fetch his medication on 28 March 2017. He did so without informing anyone or seeking authorisation. I find therefore that the applicant did indeed make unauthorised use of the ambulance. I however find that that the use can be excused due to necessity: he went home to fetch his medication to deal with the nosebleed.
   10. The applicant’s disciplinary record and the weight to be attached to the final written warning (FWW) given to the applicant on 25 August 2016: The applicant had received 2 warnings: a warning for AWOL in October 2016 and a FWW on 10 August 2016. What follows deals with the FWW because the respondent submitted that it was “final.” In other words it submitted that dismissal must inevitably follow a FWW in case of further misconduct. The FWW reads as follows: “*Serious misconduct in that on the 10 August 2016 you delayed response time to a call. On the way to the call you decided to stop at a petrol station to fill tyre pressure and fuel without notifying the contact centre that you will be delayed. This resulted in a complaint from the client Europ-Assist*.” I find that the weight to be attached to the FWW must be reduced considerably, alternatively the applicant ought to have been given a written warning for the following reasons:
       1. It was common cause that on 10 August 2016 the applicant and his senior crew member …………… (ILS paramedic) worked as a team;
       2. Both the applicant and ……….. were given an identical FWW;
       3. It was common cause that the applicant as a BLS paramedic is subject to the direction of his senior …………while performing his duties;
       4. I find that stopping at the petrol station would probably have been either directed to by ………… or have been approved by him;
       5. I find accordingly that proportionately, more blame ought to have attached to the conduct of …………… than the applicant. In other words the applicant was less to blame for the delay on that day; and
       6. When giving the FWW to the applicant, Prinsloo failed to indicate to him that he would be dismissed if he engaged in any irregular conduct again.
   11. Whether the respondent was consistent in the application of discipline: While it was agreed during the pre-arb that it was usual for the sanction of dismissal to be imposed for this offence, the evidence showed that that outcome was not inevitable. The applicant made reference to inconsistencies. He complained that others viz ……………and ………….. had engaged in similar conduct and had received FWWs and continued to work for the respondent. It was common cause that while being used by Freeze, the ambulance had its mirrors damaged and starter motor stolen. The respondent submitted that Freeze received a FWW for the following reasons: he had shown remorse; he had paid the costs of repair to the vehicle; he had paid the towing costs; he had submitted himself to polygraph testing at his own cost; he had a clean record; he had 10 years of service; and that he had pleaded guilty. For purposes of this award I only deal with the case of Freeze. I find that the respondent has been inconsistent for the following reasons:
       1. I find that the misconduct of Freeze is significantly more serious because the ambulance suffered damage whereas there was no damage in applicant’s case. In other words Freeze’s case ought to have been dealt with more stringently by the respondent;
       2. I agree that it is a mitigating factor if one offers to pay for damage cause to the employer’s property. But there is no evidence that Freeze offered to pay: he was *ordered* to pay by way of a sanction that was imposed on him. It is therefore not clear to me why the respondent considers this to be a mitigating factor;
       3. In any event the issue of payment is not applicable to the applicant: the ambulance did not suffer any loss or damage while in his possession;
       4. The respondent submitted that the applicant had not shown any remorse because he had pleaded not guilty. I agree that pleading guilty is often a sign of remorse. But where an employee considers that he has a good reason for engaging in some or other conduct then he or she is well within his rights to plead not guilty and have his case fully ventilated. I have already found that the applicant had a good reason for the unauthorised use. The finding of the respondent that the applicant did not show remorse is also incorrect: the record (p 18 of the bundle) shows that he apologized for his conduct after being found guilty;
       5. I have already made a finding on the FWW and the reduced weight that must be attached to it; and
       6. It is not clear to me why 10 years of service was considered to be a mitigating factor for Freeze. If anything it should have been taken as an aggravating factor because Freeze ought to have known better having had this length of service.
   12. Whether there were any aggravating circumstances: The respondent submitted that there was an aggravating factor because the applicant had been dishonest during the disciplinary hearing because he had denied having the ambulance at his residence on 22 March 2017. It submitted that it had conducted an investigation between 18 April 2017 (being the date when the applicant was given the notice of hearing) and 21 April 2017 (being the date when the hearing was conduct). Between those dates it was discovered that the applicant had allegedly taken the ambulance home on 22 March 2017. I am not prepared to make a finding on dishonesty for the following reasons:
       1. The respondent could not say why, if further misconduct was discovered in the course of the investigation, the applicant was not charged with those alleged instances of misconduct;
       2. I find that such further instances could easily have been added to the charge in question and the hearing postponed by a day or two to give the applicant an opportunity to prepare; and
       3. By simply putting to an employee during a hearing that he had engaged in misconduct as if it was an established fact, is unfair and prejudicial to an employee. It is akin to an ambush.
   13. Whether the applicant ought to have informed the respondent that he had taken the ambulance home: It was agreed that the applicant must inform the respondent if he intends to deviate from the route. On 28 March 2017 he did deviate from the route but did not inform anyone even though the PTT (means of communication) was available. I find this to be a lapse on the part of the applicant that cannot be excused: the respondent was rightly concerned about the whereabouts of the ambulance valued at over R1.5m. I note that paramedics have to think and work fast in emergency situations. As such the applicant ought to have had the presence of mind to call the respondent to inform it of the deviation. I intend to sanction the applicant for this lapse by depriving him of a large part of his back-pay so that a loud and clear signal is sent to him to obey the rules.
   14. Whether dismissal was a fair sanction: I have already found that the applicant’s conduct can be excused for good reason; and that the respondent has been inconsistent in the application of discipline. I accordingly find the dismissal to be substantively unfair.
   15. Whether progressive / corrective discipline was fair and appropriate: The respondent submitted repeatedly that a strong message needed to be sent out to other like-minded employees. I agree. Had the applicant been charged correctly, a fair sanction would have been the imposition of unpaid suspension for the unauthorised possession of the ambulance and the failure to inform the respondent of the deviation.
7. Reinstatement is the primary remedy when a dismissal is found to be substantively unfair. I find that there are no obstacles to this remedy being afforded to the applicant for the following reasons:
   1. Whether there was a breakdown of trust serious enough to warrant dismissal: With the dismissal found to be unfair, I find that the applicant was wrongly perceived by the respondent as being untrustworthy;
   2. Whether the employment relationship had been rendered intolerable: The same considerations apply as in the previous paragraph;
   3. Whether a good working relationship could be restored if the applicant was reinstated: The respondent’s submissions on this issue were premised it having lost trust. I have already found such premise to be wrong. In passing it may be mentioned that the applicant’s evidence that he had received messages of support from his colleagues was undisputed;
   4. Whether reinstatement would impose a disproportionate level of disruption or financial burden on the respondent: I intend depriving the applicant of a significant portion of his back-pay. As such the financial burden will not be disproportionate. (No evidence was led by either party on disruption, hence I do not make a finding on that issue); and
   5. Whether another person had been appointed in the applicant’s place: The respondent led evidence that the applicant’s position has been filled. The applicant for his part disputed this issue. For purpose of this award, I do not see this posing an obstacle to the applicant being afforded the remedy of reinstatement.
8. When all is said and done, this case is about the refusal of an employer to show to its own employee – afflicted by a medical condition – qualities that one normally associates with a medical services provider: care, compassion and empathy.
9. The applicant was dismissed on 21 April 2017 but paid until 21 May 2017. In other words he has not earned anything for a period of 18 weeks. As already indicated, the applicant will not be afforded his full back-pay: it will be equivalent to the amount that the applicant would have earned in a month ie R8900.

AWARD

1. The dismissal of ………………..is found to be unfair.
2. …………………(PTY) LTD is ordered to reinstate ……………as from 28 August 2017 on the same terms and conditions that applied on the date of his dismissal.
3. ……………..(PTY) LTD is ordered to pay ……………R8900 within 14 days of being informed of this award.
4. ………………….is to report for duty within 48 hours of being informed of this award.

Dated at DURBAN on this the 28th day of SEPTEMBER 2017.

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R J PURSHOTAM

*Commissioner*