



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Of interest to other judges

Case no: C 761/2021

In the matter between:

MEC: DEPT OF HEALTH (W.C.)

Applicant

And

**PUBLIC HEALTH SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

First Respondent

ALTA REYNOLDS (N.O.)

Second Respondent

A KLEINHANS

Third Respondent

Heard: 19 June 2024

Delivered: 2 April 2025

Summary: (Review – Dismissal of medical doctor – Admission of hearsay evidence – error of law in admitting evidence then effectively finding it inadmissible - Factual findings untenable on the evidence before the arbitrator)

JUDGMENT

LAGRANGE, J

Nature of the application

[1] This is an opposed review application launched by the Western Cape Department of Health ('the department').

[2] The arbitrator found that the dismissal of the third respondent, Dr A Kleynhans ('Kleynhans') on 29 February 2020 was substantively and procedurally unfair and awarded him six months' remuneration as compensation.

[3] Kleynhans was originally issued with two charges of misconduct, but at the disciplinary inquiry the second charge was withdrawn owing to the absence of a witness of the employer. The withdrawn charge related to an incident in which he had allegedly incorrectly inserted a drip into a patient's arm on 31 August 2019.

[4] The first charge read:
"You allegedly committed an act of misconduct as contained in Annexure A of the Disciplinary Code and Procedures for the Public Service (Resolution No.1 of 2003) in that you on or about 07, 23 and 31 August 2019 came to work acting irresponsibly due to the use of a substance with an intoxicating effect (Code of conduct 4. 5.2 and capital C4.4). Further you brought the name of the government into disrepute by the observation [sic] of patients staff and the public."

[5] At the disciplinary hearing, Kleynhans pleaded guilty to the charge but claimed that at the time he was under the influence of medication he was taking. The transcript of the disciplinary inquiry was included as part of the evidence in the arbitration after the arbitrator decided it was admissible.

[6] During the arbitration hearing, a nurse of twenty-two years' experience gave evidence that it had been necessary for her to prevent Kleynhans performing a lumbar puncture on the wrong patient. Eventually, after her persistent advice that he had mixed patients up, he did not proceed with the lumbar puncture. The nurse also testified that there had been another incident when patients' prescriptions had been mixed up by Kleynhans. She further related that, on the same day as the prescription confusion, he advised that he was going to refer all the patients back to the clinic because there were 24 of them, whereas there were no more than six waiting for treatment.

[7] An expert witness gave evidence on the medication which Kleynhans said he was taking for epilepsy and mood disorder. The expert's evidence was that, on a maintenance dose, the medicine Kleynhans said he was taking would not cause drowsiness even in combination with another drug. The investigator, the Assistant Director at Hermanus Provincial hospital, confirmed that Kleynhans had pleaded guilty to the charge and that he conceded that his conduct endangered the lives of patients and himself. Kleynhans had also confirmed that he had used cocaine on occasion, however the charge did not concern whether the substance affecting his behaviour was an illegal one but simply that it had an intoxicating effect on him.

[8] The nursing manager at the Uniondale Provincial hospital, with thirty-five years' service, testified that on two separate occasions she had observed that Kleynhans was unsteady on his feet and was walking around in a confused state. She was aware that he took medication but was unaware of the specific drug prescribed. He had never told her that his observed condition was due to the medication he took. On all occasions when she had observed him in this condition, he had a white substance around his mouth and he was unsteady on his feet, his pupils were dilated, and his speech slurred. Three other incidents of this nature occurred and were dealt with by requiring Kleynhans to sign a leave form and require that he went home. She was aware that Dr H Louw ('Louw'), the Medical Manager for the George Sub-District, had offered him help and the use of the employee assistance programme.

[9] Additionally, the manager related an incident where two patients had complained about the way Kleynhans had treated him and that they had observed he was unsteady on his legs. At one point the clinic doctor was asked to take a blood sample from Kleynhans but he was not willing to provide a sample. In relation to Kleynhans's explanation that the white substance observed on his lips was as a result of chewing peppermints, she testified that everyone at the hospital chewed peppermints but that did not result in a white powder residue on their lips.

[10] Amongst other things, Kleynhans testified that he had been medically boarded for epilepsy when he had worked as a doctor in the Navy. He testified that because of the amount of overtime that had to be worked it was rare to get proper uninterrupted sleep particularly on the weekends. He claimed that he ate mint sweets owing to the dryness in his mouth caused by his medication. According to him, it was well known in the hospital that he was on medication for his condition. He admitted he had been confused about which patient was supposed to receive a lumbar puncture but had respected and followed the nurse's guidance in that respect. Kleynhans agreed he had pleaded guilty at the disciplinary inquiry but maintained that this was conditional on the basis that it was caused by his medication. What he did not admit to was that his condition was owing to him taking an illicit substance. He did not dispute that he had once used cocaine at home.

[11] Kleynhans did not advise doctor Louw on 11 September 2019 that he was taking medication which resulted in him having "a perceived intoxication effect" but only identified the medication he was taking. He conceded that he had not been truthful in stating that he had not taken any habit-forming substance in the past and that he should have provided corroborating evidence of his prescriptions to support his version at the arbitration. His explanation for not taking a blood test was because there was no illegal substance in his blood. Kleynhans also conceded that it was a symptom of using cocaine that a person's eyes and pupils became dilated and white powder residue could be seen around the mouth and nose and that users' hygiene habits deteriorated. He further agreed with Louw's evidence in the disciplinary inquiry that his

hygiene and appearance had deteriorated and that she had spoken to him many times as his supervisor asking if he needed her assistance and whether he needed rehabilitation.

[12] He also made reference to a verbal warning he was issued with on 13 November 2017.

The arbitrator's reasoning

[13] The arbitrator noted that the evidence of all the employers' witnesses showed that Kleynhans was using cocaine and that he had never told the chairperson of the inquiry that he had only used it in December 2015. The arbitrator concluded that *"the inference could be drawn that he was most likely intoxicated during the incidents of 2019 based on the observations of the employers witnesses"* and that it was possibly due to his use of cocaine, these circumstances being that the applicant refused to subject himself to a urine/blood test and his failure to present a medical script for the medication he was taking, nor a medical certificate confirming his illnesses. The arbitrator accepted the evidence that the medication Kleynhans allegedly took would not have caused him to behave as if he was intoxicated.

[14] The arbitrator acknowledged the employer's submission that Kleynhans's job at the hospital emergency ward required him to provide patient care to very ill or severely injured patients and that he had conceded he had become a danger not only to patients but himself. Moreover, he had only appealed against the sanction of dismissal, not the finding that he was guilty of the misconduct.

[15] The arbitrator found that the reason for Louw's non-attendance was not substantiated and that Kleynhans was deprived of the ability to cross examine her on her evidence. The same applied to the evidence of other witnesses who testified at the disciplinary inquiry but were not called to testify at the arbitration.

[16] At this juncture, it is important to note that the arbitrator had in fact decided to allow the admission of the hearsay evidence of transcript of the

disciplinary enquiry after hearing extensive argument from both parties on the question.

[17] Nevertheless, for the reasons mentioned, the arbitrator decided only to have regard to the evidence given during the disciplinary inquiry of those witnesses who also testified at the arbitration. She accepted that the employers' witnesses were in the main truthful and credible and there were few contradictions in their evidence. She concluded that Kleynhans, by his own admission, was under the influence of intoxicating drugs at work at the time of the incidents he was charged with he had transgressed a reasonable and relevant workplace rule. The arbitrator that he had not contested his guilt even on appeal. She also found, in all likelihood, he had been under the influence of an illicit substance.

[18] Turning to the question of the appropriate sanction, the arbitrator considered Sub-items 3(4) and (5) of Schedule 8 to the Labour Regulations Act, 66 of 1995 ('the LRA') which describes aggravating and mitigating factors to be taken into account in deciding if dismissal was appropriate¹. In aggravation, the arbitrator found the following factors relevant -

18.1 Kleynhans had admitted to past use of cocaine and raised the suspicion that he might still be using the drug because he displayed conduct consistent with such use.

¹ *Dismissals for misconduct*

"(4) Generally, it is not appropriate to dismiss an *employee* for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow *employee*, client or customer and gross insubordination. Whatever the merits of the case for *dismissal* might be, a *dismissal* will not be fair if it does not meet the requirements of section 188.

(5) When deciding whether or not to impose the penalty of *dismissal*, the employer should in addition to the gravity of the misconduct consider factors such as the *employee's* circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself."

18.2 He was unwilling to undergo a test to prove he was not under the influence of an addictive drug.

18.3 He failed to provide proof of his prescriptions for medication and there was expert evidence that his use of the medication he claimed to be taking would not have caused him to display the kind of intoxication he did.

18.4 He could be a danger to himself colleagues and patients if he was under the influence of an intoxicating substance at work, irrespective of the nature thereof.

18.5 The employer could be guilty of an offence under the Occupational Health and Safety Act 85 of 1993 if it allowed an employee who was under the influence of alcohol or drugs onto its premises.

[19] In mitigation, she took account of these factors -

19.1 It was known that Kleynhans was receiving treatment for epilepsy and taking medication to control it.

19.2 He had no prior disciplinary record aside from a verbal warning from doctor Louw in November 2017 when he was suspected of being under the influence of a substance and was warned that any repetition of such conduct would result in disciplinary steps being taken against him, but no record of that oral warning existed.

19.3 He had been allowed to return to work when his suspension had to be uplifted and reportedly performed his duties satisfactorily during that period prior to his dismissal;

19.4 He had only been found guilty of the incidents on 7 and 23 August 2019, which related to his appearance, his mistake concerning the lumbar puncture, his exaggeration of the number of patients in the waiting room and his inability to recall to whom he had just given an envelope containing his leave application forms.

19.5 It was the incident concerning the incorrect insertion of a drip on 31 August 2019 which was the most probable reason for initiating a disciplinary enquiry and, but for that, no disciplinary steps would have been instituted. That charge had not been pursued because the relevant witness could not be obtained by the department.

[20] After simply listing these factors, the arbitrator concluded that dismissal was too harsh a sanction in the circumstances and a lesser one would be more appropriate. In this regard, she noted that the investigating officer had anticipated that the possible outcome of a disciplinary hearing might not result in dismissal, and cited the following from the investigator's report:

"Should disciplinary action be instituted?"

YES. The seriousness of the matter should be addressed as a matter of urgency, however the possibility exist [sic] that he will get off on a technicality of progressive discipline that was not applied and that the matter was not addressed in quarterly reviews. Stronger supervision should have been applied."

[21] On the question of procedural fairness, the arbitrator found that the chairperson could have been influenced by evidence being led on incidents unrelated to the only charge before him and the fact that Kleynhans was unrepresented might have caused him to misunderstand the processes such as how to plead in the hearing which the chairperson assisted him with. In consequence, she found his dismissal was procedurally unfair as well.

[22] When it came to relief the arbitrator decided that, given the effluxion of time and that his medical condition could continue to have an impact on his work performance and working relationship, she was reluctant to order reinstatement or compensation. After considering these factors and the fact that he had been employed for only four and a half years she awarded Kleynhans six months' remuneration as compensation.

Grounds of review

[23] Firstly, the department contends the arbitrator ought not to have excluded the testimony of Louw in the disciplinary enquiry that she had previously counselled Kleynhans and given him a formal oral warning for similar transgressions and warned him of the risk he was placing himself, his

colleagues and patients in by reporting for work in a state of intoxication and that he had conceded this himself.

[24] In doing so, the department argues that the arbitrator also failed to account for the fact that Louw had resigned for health reasons and the department had tried unsuccessfully to get her to testify at the arbitration.

[25] Secondly, the arbitrator also failed to take account of Louw's evidence that Kleynhans's lack of awareness about what was happening exacerbated the danger of him practising even if it had been a first offence.

[26] In deciding on the procedural unfairness of the enquiry, the department submits that the arbitrator impermissibly decided that the chairperson had been influenced by evidence of incidents unrelated to the charge when this was not even canvassed in either the enquiry or the arbitration.

[27] Similarly, she impermissibly found that Kleynhans might have misunderstood the proceedings when this was not even advanced as an issue by him in his evidence. Moreover, she ignored the procedural challenges he did raise relating to the chairperson deciding he should be dismissed and relating to the upliftment of his suspension.

[28] In relation to the sanction, the department argues that the arbitrator ignored the previous steps taken by Louw to correct Kleynhans's conduct and the steps that had to be taken to avoid the possible risks of him remaining at work, by sending him home. She also failed to consider Kleynhans's his own admission of the risks he posed when he arrived at work in that condition and his admission of the risks he exposed patients to by mixing up patient files. Allied to this, in taking account of Item 3(4) of schedule 8 of the LRA, the arbitrator, omitted to consider that it states that prior disciplinary steps are not warranted if "*the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.*"

[29] The department also claims that the arbitrator considered that consistency was not proven, when it was not put in dispute in the first place and, by implication, was not even a matter she was required to determine.

Evaluation

[30] On the question of the relevance of Louw's evidence in the enquiry, the arbitrator's approach was somewhat confused. She heard argument about whether it ought to be admitted or not as part of the transcript and decided it should be. In arriving at that ruling she was obliged to have considered all the factors for and against admitting the evidence in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1988 ('the EAA'). Having decided to admit such evidence, she then excluded it on the basis of Louw not testifying in the arbitration proceedings. However, the arbitrator never indicated that she was admitting the transcript provisionally under section 3(3) of the EAA, in terms of which the hearsay evidence is admitted on the basis that it will be confirmed by the relevant witness in subsequent testimony. No undertaking was furnished by the department that it was intending to call Louw and other witnesses to confirm the hearsay evidence. In excluding the hearsay evidence of Louw the arbitrator committed an error of law. If indeed, the arbitrator had intended to only admit the hearsay evidence provisionally in terms of section 3(3) she did not make this clear to the parties when she made her ruling, as she ought to have.

[31] In any event, the critical portions of Louw's evidence that she had issued two warnings to Kleynhans about him attending work in an incapacitated state was not disputed by Kleynhans. He also agreed that the understanding was that if he had to be sent home because of his condition he would have to apply for leave and disciplinary action could follow. Even though this was not reduced to writing, he was aware he had been cautioned and that disciplinary action could follow further infractions. He was not a junior illiterate employee but a health professional who was well aware of the standard of professional conduct he was supposed to provide. Accordingly, the arbitrator's reliance on a concern voiced in the investigator's report about a technical issue being raised over

whether the requirements of progressive discipline were met was misplaced, quite apart from it not being canvassed during the arbitration.

[32] In passing, it must be noted that the arbitrator was selective in relying on the investigator's report. Following his expression of concern about progressive discipline his report continued thus:

"8.4 Should a counselling programme for incapacity poor work performance be instituted?

Alternatively, the doctor cannot perform his duties in the condition in which he come to work. Patients' lives are at risk. The reputation of the Government is put into disrepute due to his having to lean against the wall, his slurred speech, falling asleep while attending to a patient, writing out scripts which incorrect, Dilated pupils. He should be reported to the HPCSA.

8.5 Should a counselling programme for incapacity ill-health be instituted? No."

[33] In light of the above, there was no basis for the arbitrator treating Kleynhans's enquiry and subsequent dismissal as premature disciplinary action, which should have been preceded by less serious disciplinary action. His misconduct was inherently serious and posed an imminent threat to patients, the liability of the department and himself. Item 3(4) of Schedule 8 identifies gross negligence as sufficient reason for dismissal in the absence of prior disciplinary steps being taken. It is untenable on the evidence of the high risks Kleynhans's posed, that the arbitrator could have formed a view that Kleynhans's conduct was less serious than that, and that dismissal was an unfair sanction for the department to impose.

[34] On the question of the procedural fairness, Kleynhans's main complaint was that he did not get a letter from the department, as distinct from the decision of the chairperson of the disciplinary enquiry, that he was dismissed. However, as was pointed out in the arbitration, section 17 read with section 16B (1) of the Public Service Act of 1994 gives the power to pronounce a sanction to the chairperson of the enquiry, so there was no reason for Kleynhans to doubt

its finality. The fact that some other documentation might have been required for UIF purposes is not relevant to the procedural fairness of the enquiry. Secondly, he appealed but his complaint was about the sanction, not procedure. The arbitrator impermissibly considered Kleynhans had misunderstood certain processes, such as how to plead, when it was not advanced as a reason his dismissal was procedurally unfair. In any event, it was clear he did admit to having been under the influence of intoxicating substance, but qualified his admission by stating it was his prescription medication which was the cause of his condition. The arbitrator also found that the chairperson might have been influenced by evidence which was not directly related to the single charge Kleynhans was facing, which she considered a relevant factor in determining the procedural fairness of the enquiry. However, in so far as this might have been the case, that would have been relevant to the substantive fairness of the dismissal. The arbitrator's findings on procedural fairness give an overall impression that she was searching for material to bolster her finding.

[35] In light of the discussion above, the arbitrator's findings on the substantive and procedural fairness of the dismissal are ones that no reasonable arbitrator could have reached and the award must be set aside.

Order

1. The arbitration award of the Second Respondent dated 2 November 2021 in case number PSHS1282-20/21 is reviewed and set aside.
2. The Second Respondent's findings and relief in paragraphs 104 and 105 of the aforesaid award are substituted with a finding that the dismissal of Dr A Kleynhans by the Applicant was substantively and procedurally fair.
3. No order is made as to costs.

R Lagrange
Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Adv F Rodriques instructed by State Attorney Cape Town

For the Third Respondent: Oliff D'Oliviera attorney for the Third Respondent

LABOUR COURT