



ARBITRATION AWARD

Commissioner: **Grace Mafa-Chali**

Case No: **PSHS821-20/21**

Date of award: **14 June 2021**

In the matter between:

NPSWU obo Thanyani Makhado

APPLICANT

and

Department of Health- Limpopo

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. This matter was scheduled for arbitration hearing on 23 April 2021, 10h00 at Tshilidzini Hospital in Thohoyandou, Limpopo Province and finalised on 18 May 2021 at the same venue.
2. The Applicant was present on both occasions and represented by Mr Risimati Chabalala, NUPSWU official. The Respondent was represented by Mr N Ramavhoya in both sittings.
3. The proceedings were manually and digitally recorded.

BACKGROUND TO THE DISPUTE

4. The Applicant referred an unfair dismissal dispute in terms of sections 191(1) of the Labour Relations Act 66 of 1995 (LRA) relating to misconduct.
5. At the end of the proceedings parties requested to submit their closing arguments in writing and they were directed to submit by 25 May 2021. Both of them obliged. I have considered the closing arguments in my analysis hereunder.
6. In narrowing the issues both parties agreed that the following issues were common cause: that the Applicant was employed by the Respondent on 01 April 1986 and at the time of termination of her services she was Assistant Director: HRD Level 10; earned a basic salary of R42 829.50, was charged for two acts of misconduct relating to threat and in the alternative intimidation and prejudicing the discipline, administration and efficiency of the department. The Applicant was subsequently found guilty of all the charges and subsequently dismissed on 30 November 2020 following a disciplinary hearing.
7. The Applicant lodged an appeal to the dismissal which was rejected by the Respondent due to its defectiveness and non-compliance with the Respondent's Circular 11 of 2020.
8. The Applicant challenged the substantive fairness of the dismissal in that she denied the commission of the offences, raised inconsistency in the application of discipline as well as the appropriateness of the sanction.
9. The Applicant sought retrospective reinstatement as a relief. The Respondent prayed for dismissal of the Applicant's claim.
10. The Respondent submitted a Bundle of documents I marked Bundle A and the Applicant's Bundle of documents I marked Bundle B.

ISSUE TO BE DECIDED

11. I am required to decide whether the Applicant's dismissal was substantively and procedurally fair or not.
12. If so, to grant the appropriate relief.

SURVEY OF PARTIES' EVIDENCE

Respondent s' Evidence

Hlengane Moses Mabasa testified under oath as follows:

13. He was the Deputy Director Level 11 in HRD. He was appointed on 01 June 2011. The Applicant was his subordinate on Level 10 working at Tshilidzini Hospital. He came to the Hospital in February 2019 on a temporary transfer on the same level with the intervention team brought by the MEC together with 6 other people.
14. On 11 July 2019 he was booked off sick but was forced to go to work for the completion of the Corporate Services report which the office of the CEO complained it was not submitted. During his absence he called the Applicant whom she tasked with the report. When he arrived in the office he telephoned the Applicant and asked her about the report. The Applicant was very angry and he told her that the template report was forwarded to Ms Nevughalo and she had to facilitate consolidation of the corporate section.
15. The Applicant replied that she was not going to complete the report and dropped the phone down. After a few minutes the Applicant walked into his office and found him busy consolidating the report with information from the HOD.
16. The Applicant gave her the report and started shouting and mentioned that she will kill him and the CEO, Ms Ndwammbi before December 2019.
17. He asked the Applicant with who was she going to start killing and she replied that she will start with him and then go to CEO. She also mentioned that before she kills him she would paralyze him in the manhood. She was shouting and making noise. Afterwards she left his office. He continued to complete the report with the information that was required.
18. After the scene since the Applicant made a noise in his office, he saw the CEO coming to his office and asked what happened as she heard the noise. He then explained to CEO what happened.
19. He furthermore called the District Hospital Services Mr Makhwanya and the Chief Director Mr Sirwali and Mr Sirwali came to his office to get the full report from him.
20. He went to open a criminal case at the Police Station because of the death threat after management meeting. The Case no allocated is CAS 238/07/2019. The case

was investigated by Constable T J Tshiwana and it was later withdrawn by him as he was not comfortable since he was a man of God. He also felt pity for the Applicant due to her age as he saw that the Department was taking the matter serious and taking action.

21. After the Applicant's threat he also wrote a letter on Page 44 of Bundle A requesting for the withdrawal of his transfer. It was not safe for him to be at Tshilidzini Hospital every day. He wanted the Department to allow him to go back to his post. Even on that day he wanted to go back as he was not gaining anything and he did not see the reason why he should still be there and receive the threat as sometimes a threat can be true.

Emmanuel Justice Rhangane testified under oath as follows:

22. He was the Deputy Director: Security Management Services, stationed at Vhembe District. His responsibilities are physical and security personnel, information security and ensuring business continuity planning. He also investigates security breaches and allegations of misconduct of employees if requested to do so and appointed as an investigator. He has been at Security Management Services since 2004.
23. He came to know the Applicant at the time he was doing an investigation around July 2019. He and Mr Machaka were appointed by the hospital to investigate allegations of threats made by the Applicant to Mr H M Mabasa. In accordance with the statement from the complainant, Mr Mabasa, he said that on 11 July 2019 the Applicant threatened to kill him before the end of December 2019, and afterwards she would kill the CEO and would also paralyze his manhood.
24. The evidence of Mr Mabasa was corroborated by Ms Maladzi, the CEO's PA who said that he overheard the conversation between the Applicant and Mr Mabasa due to the proximity of Mr Mabasa's office to Ms Maladzi. When interviewed she confirmed the threat to kill and paralyzing of Mr Mabasa's manhood by the Applicant.
25. There were also insinuations by Mr Mabasa that the Applicant even said what has happened at Seshego some previous years ago will happen at Tshilidzini. Given the fact that people lost their lives in Seshego, they found that it was being

insensitive of the Applicant to utter those words, and it made them to conclude that she could carry out the threat as alleged.

26. Ms Maladzi also wrote a letter requesting the tightening of security personnel as she also felt threatened by the utterances made by the Applicant to Mr Mabasa. Her request was acceded to by management since at the entrance of the CEO's office and Mr Mabasa's offices a security officer has since been posted there.
27. During the investigations, they did interviews with the witnesses and when they requested Ms Maladzhi to submit her written statement she summersaulted to what she initially told them verbally. It was a very strange circumstance and they felt she could have been influenced either internally or externally when she wrote her statement.
28. They found corroboration of the Applicant's statement as she conceded the telephonic call she made to Mr Mabasa on 10 July 2019 and 11 July 2019 and after the conversation on 11 July 2019 she went to the office of Mr Mabasa as indicated by Mr Mabasa. There was on 10 and 11 July 2019.. A further concession by Applicant was that Mr Mabasa was on sick leave.
29. They made findings and recommendations that the Applicant must be charged with misconduct through an internal disciplinary hearing in terms of the disciplinary code. The recommendations appear in their investigation report.

The Respondent closed its case.

Applicant s' Evidence

Thanyane Lillian Makhado testified under oath as follows:

30. She started working for the Respondent on 04 January 1986 as personnel officer. At the time of her dismissal she was the Assistant Director on Level 10.
31. On 10 July 2019, Mr Mabasa was on 3 days sick leave and delegated to her to check the HRMD, Corporate Services report which was given by Mr Mabasa to L Nevhughalo by email on 09 July 2019. The report was on the new template.
32. She phoned Nevhughalo on the landline and asked her if she knew anything about the report on a new template and she said that she knew nothing about it and that it was a lie as Mr Mabasa normally lied. She then requested Nevhugalo to come to

her office and also requested other employees under Corporate Services including Mr Ramavhoya and Mr M A Muvhali who also came. Only 1 person did not come, Mr Thabela the Assistant Director: HRM.

33. When they were in her office Nevhugalo continued to stress that Mr Mabasa was lying as he has never emailed the report to her. She then phoned the CEO as agreed with others and asked her if she was aware of the Corporate Services report to be completed on the new template and the CEO seemed to be very much uneasy to respond directly and said that she did not understand. They then concluded that the report was not there but to her surprise Mr Ramavhoya indicated that he has the new template of the Labour Relations given to him by Ms Makhahanise. The three left her office.
34. She was left with many questions when the colleagues left her office and she phoned Mr Mabasa from her landline phone to his cell number and it went to voicemail several times.
35. On 11 July 2019, at about 12h45, she received a call from Mr Mabasa on his landline in the office and she was shocked and she asked him if he was back to work. To her surprise he told her that the HRD and Training report was outstanding as others had already sent him their reports.
36. She tried to tell him that she could not get hold of him on his cell number to ask where did others get the new template as he heard that the other guy who was not in her office when she met with the other 3 was given the new template by the CEO on 10 July 2019. Mr Mabasa told her that he has the new report template with him and she asked him if she could go to his office to complete her portion on the new template with his assistance.
37. She went to Mr Mabasa's office and when she arrived he told her that he has a concern that he was recalled from sick leave and he was still not well. He furthermore mentioned his reservations about the dictatorial management and how the CEO did not understand the principle of management; that she managed by hearsay from the Acting Clinical Manager; that he wanted to go back to his post in the district office since he was not gaining financially and although he was promised to be given Level 12 post and travelling allowance but when he complained to Mr Sirwali that he wanted to go back he refused and told him that the project was not finalised. Those were his everyday concerns whenever she

met with him and she was aware that Mr Mabasa told others as well about those concerns. When she asked him which project, Mr Mabasa told her that she will be removed.

38. She gave Mr Mabasa her report and he told her that he had a problem to sit but he sat and captured the report. They sat nicely in the office talking and had cordial discussions and she did not make remarks of any consequences. After completing the report she went to her office.
39. Ever since Mr Mabasa was deployed by the MEC, every day she reported for duty, she must go to his office so that he can see her face. After the alleged incident on 12 July 2019, she went to his office and he was not there. On 15 July 2019 she also went to his office and he was not there and she left the leave forms to be approved with the CEO's Secretary. On 16 July 2019, she visited Mr Mabasa's office and found the security on the passage and asked to see Mr Mabasa who was in the office of Sindi, the Nursing Manager. She went there and found Sindi, and Mr Mabasa and she greeted them. Mr Mabasa did not respond to her and she left them.
40. Within 3 minutes Mr Ramavhoya came with a letter of suspension escorted by Risk Manager Mr Nevhondo. She thought it was a letter on her grievance she lodged regarding termination of his acting allowance. The letter was not signed by one of the authorities at the hospital but by the Director in the district. She asked them to whom to make enquiries with as the letter did not have enquiries, but they said to her if she knew her fate she should just get out because the province wanted her out. She phoned Adv Ndlovu of Public Service Commission that she was suspended and Tshepo, the Director of Labour Relations who advised her to leave.
41. On 23 July 2019, Mr Ramavhoya and Ms Makhananisa phoned her and wanted to know where she was and she told them that she was not in Thohoyandou but in Mpumalanga and they wanted her physical address but they never came back to her for the address.
42. Mr Mabasa cancelled his criminal case on 24 July 2019. On 31 July 2019, she met with the investigators who told her about the allegations of Mr Mabasa. She was surprised to be asked if she knew powers of the MEC and how she received the intervention team and her relationship with Mr Mabasa.

43. She met with Mr Mabasa after 11 July 2019 and in October 2019. In January 2020 she saw Mr Mabasa at the district office seated at the lounge. They hugged each other; spoke about families, children and church. They also met on 28 September 2020 and they sat and spoke for more than 45 minutes. Mr Mabasa told her that she has brought a letter to HR informing them that he did not want to work at the hospital anymore as the CEO and Tabela were not working with him very well. He even told her that he went to report the criminal case against her because he was told by Mr Sirwali to do so as the MEC wanted the report. Further that Mr Ramavhoya was forcing him to be a witness in the disciplinary hearing otherwise if he did not oblige he would be fired.
44. The manner in which she was removed by the MEC was unfair. She acted for 5 years and dedicated herself to her job. Her acting allowance was stopped.
45. She denied that she threatened Mr Mabasa. It was a ploy and modus operandi of removing women in that office. She was dismissed because she wrote to the HOD to investigate the corruption happening at the hospital. All that happened has damaged her reputation. It was not good at all and it has affected her family especially her children.
46. On procedural defects she testified that she requested an investigation report and the witnesses' statements but Ms Makhananise refused to give to her. She saw them for the first time at the disciplinary hearing.
47. Mr Makhwanya sent her the sanction on Whatsapp. She did not expect to be given her sanction on Whatsapp. No documents were given to her to sign but her union representative did sign on her behalf.

Risimati Chabalala testified under oath as follows:

48. He lodged an appeal on behalf of the Applicant as it appears on Page 21 of Bundle B by email on 09 December 2020 at 16h22 to Mr Maseleme, cc NUPSWU and Mokgadi Makhananise, Labour Relations Officer Vhembe District. The appeal was sent on time within 5 working days from date of dismissal as stipulated in PSBC Resolution 1 of 2003.

49. Firstly, the outcome of the Appeal showed that they dealt with a different appeal. The date of appeal outcome of 14 December 2020 is incorrect and must have been mixed with another one.
50. Secondly, the appeal was dismissed due to non-compliance with Circular 11 of 2020 on Paragraph 7. 2 Page 19 of Bundle B. This reason is not acceptable since the unions are part of the conclusion of the PSBC Resolution 1 of 2003, and the Respondent has never communicated with unions regarding Circular 11 of 2020 on procedure for lodging appeals and the circular was never served on the unions.
51. Paragraph 3 of the said circular requires compulsory attachments of documents mentioned therein. The Respondent cannot be allowed to expand the provisions of the collective agreement. The Applicant cannot be able to even submit the aggravating factors submitted by the Respondent at the disciplinary hearing since she did not have them. The merits of the appeal were not considered due to the appeal not being entrained because it alleged that it was not in compliance with Circular 11 of 2020. This decision was prejudicial to the Applicant.
52. In his understanding a Circular can only serve as a Guideline and cannot be binding and rigid. The outcome of the Applicant's disciplinary hearing on Page 31 of Bundle B advised her to lodge an appeal within a period of 5 working days after receipt of the outcome in terms of Clause 8.2 of the Disciplinary Code and Procedures of the Public Service.
53. The ruling not to entertain the appeal was therefore procedurally unfair.
54. The Respondent was not consistent in the application of the rule. Reference was made to Page 52 of Bundle B which has the disciplinary record of one Ms Tlakula of Kgapanne EMS, who was charged and dismissed for assault and intimidation, and intimidation was later withdrawn and remained with assault charge only. Ms Tlakula assaulted her supervisor who was rescued by breaking door in the office she held her. The outcome of her disciplinary hearing by the presiding officer appears on Page 72 of Bundle B -75, which was final written warning, 1 month suspension without pay and counseling besides the Chairperson indicating that the misconduct committed by Ms Tlakula was serious and warranted a dismissal. He represented Ms Tlakula The Chairperson on Page 74 of the outcome report further cited a similar case of another employee of Lebowakgomo, Ms Kekana who was

also charged with assault of her supervisor by slapping her on the face with an open hand and was given the same sanction as that of Ms Tlakula.

55. The witness indicated that he represented Ms Tlakula during the disciplinary hearing as it appears on Page 72 of Bundle B and believed that the Applicant in this case is alleged to have committed threat and intimidation which were not as serious as an assault of a supervisor. There was not actual assault by the Applicant to Mr Mabasa.
56. The Respondent was inconsistent in dismissing the Applicant where no assault took place but did not dismiss the employees who committed violence with actual assault on their supervisors.

ANALYSIS OF PARTIES' EVIDENCE AND ARGUMENTS

57. In terms of [Section 192\(1\)](#) of the [Labour Relations Act No 66 of 1995](#) [the "Act"]:

"In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal." In the present case the existence of the dismissal was a common cause issue.

"In terms of [Section 192\(2\) of the Act](#): "If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

58. The Applicant in this case is challenging the substantive and procedural fairness of her dismissal in respect of the commission of the offence, inconsistency and the appropriateness of the sanction.
59. I have to determine on a balance of probabilities if the Respondent has been able to discharge the onus of proof that the Applicant committed the offences and whether dismissal was an appropriate sanction under the circumstances.
60. The employer led testimonies of two witnesses, the complainant, Mr Moses Mabasa and the investigator Mr Emmanuel Rhangane. The Applicant led her own evidence.
61. Mr Mabasa gave evidence on how the Applicant arrived at his office after he was called back from sick leave to come and attend to the outstanding report the Applicant should have submitted. He testified that he called the on the landline to

enquire about the report the CEO wanted and the Applicant was angry and dropped off the phone; and later came to his office and started to threaten him telling him that she will kill him and the CEO before the end of December 2019, and furthermore that she would paralyze his manhood. He furthermore led evidence that after the Applicant left the CEO came to ask what was happening as she heard the noise. He continued completing the report. He went to the police to lay criminal charges as he wanted protection but later withdrew the charges.

62. Mr Rhangane's evidence supported Mr Mabasa's evidence in terms of the investigation of his threats complaint against the Applicant. The investigators interviewed certain people including the Applicant and came to a collusion that the complaint was valid as it was also supported by the oral statement made by Mr Maladzi, who later made a different statement to the original one when interviewed. Furthermore, they also believed Mr Mabasa and Ms Maladzi as a few days after the incident, Ms Maladzi wrote a letter requesting that security at the CEO be tightened which was done.
63. The Applicant testified and conceded that Mr Mabasa did call her on his landline asking her about the report and she asked him to go to his office. She denied the allegations that when she arrived at Mr Mabasa's office she threatened to kill him and CEO before December 2019 and to paralyze his manhood. The Applicant testified that his dismissal was a ploy since Mr Mabasa told her that he was told to remove her following the intervention team placed by the MEC at the hospital. The Applicant was aggrieved because her acting allowance was just stopped immediately without any valid reasons. She believed that she was removed as a result of the corruption reports she gave the HOD.
64. The Applicant further testified that after her suspension she met with Mr Mabasa number of times and they had a very cordial chat about family, children, church and others and Mr Mabasa shared with her that due to the fact that he did not have a good relationship with the CEO and did not agree with her management style, he requested to go back to his original position in the district but his request was refused; because he did not finish his project which was to ensure that the Applicant was removed.
65. The Applicant furthermore led evidence by Mr Risimati Chabalala to challenge consistency in discipline by the Respondent in that the Applicant was dismissed

for allegations of threat whereas the Respondent has not dismissed other employees namely, Ms Tlakula of Kgapane EMS and Ms Kekana of Lebowakgomo who were both charged of same offences as the Applicant which also included assault of their supervisors. Documentary evidence was also presented in evidence showing the sanctions imposed by the presiding officers in the disciplinary hearings and it showed that both of them were given the sanctions of 1 month suspension without pay, final written warning and counseling.

66. I must from the outset mention that the Respondent has not led any evidence to prove Charge 3 relating to prejudicing discipline, administration and efficiency of the Department and I therefore find that the Respondent did not prove that the Applicant committed this offence.

67. With regard to the evidence of Mr Mabasa, I find it very improbable. My reasons are as follows: Firstly, he testified that he was threatened by the Applicant yet after the threats he continued to work as normal and completed the report and the CEO came to the office after the Applicant left since she was making a lot of noise. It was common cause that Mr Mabasa's office is next to that of the CEO. It is therefore mind boggling how the CEO can hear the noise just next door and yet not come out to find out what's happening and only go when the Applicant has left the office. The CEO has not been called as a witness to corroborate Mr Mabasa's evidence as it seems she was the first person to speak to Mr Mabasa immediately after the alleged incident.

68. Secondly, I find it very awkward that a person that has been threatened to such an extent that he would be killed and his manhood be paralyzed just continue working as usual as if nothing has happened. In fact under cross-examination, Mr Mabasa testified that he continued working even after the threat by the Applicant because he was not afraid of the Applicant, looking at her size, age compared to his physical appearance. He was not afraid that the Applicant could do anything to her as she was older than him. He only regarded the paralyzing of manhood as a threat not the killings as he did not know how she was going to do it.

69. Thirdly, after opening a criminal case, Mr Mabasa withdrew the charges and his reasons that he was a man of God and felt pity for the Applicant in that he did not want her to go to prison and that the Department was taking action were being

taken very lousy. Threat is a very serious offence especially that it was testified that it involved allegations of paralyzing a person's manhood.

70. I therefore do not believe that there were genuine reasons to withdraw the criminal case and therefore the threat actually did not happen, more especially considering further that it was testified by Mr Rhangane that Mr Mabasa believed that the utterances of the Applicant in relation to the Seshego Hospital killings were taken seriously and believed that they can be a reality. Mr Mabasa however testified that after the incident he went to the Applicant's office to sign performance review. Did he then feel safe to be with the Applicant in the same office after being threatened to be killed and to be paralyzing his manhood? Where the threats no longer there? What about his name and reputation as a man, a father and leader of the church on alleged utterances to paralyze of his manhood?
71. Fourthly, the evidence of Mr Rhangane that Mr Mabasa told them the Applicant mentioned the Seshego killings never came out during Mr Mabasa's evidence. I find it very strange since the investigators relied on that information as well to assist the Department in deciding whether there were valid grounds to charge the Applicant or not as they viewed that the threats can materialize like it happened in Seshego.
72. Fifthly, I also find it really strange as Mr Rhangane testified that the secretary of the CEO, Ms Maladzi also voluntarily gave a statement during the investigations but instead gave a different written statement.
73. Mr Rhangane further testified that they believed Ms Maladzi's interview statement and the fact that she wrote the letter to ask for more security at the CEO's office was done. However Ms Maladzi whom it was said overheard these allegations of threat by the Applicant to Mr Mabasa has not been called as a witness to corroborate Mr Mabasa and Mr Rhangane's evidence. To this extent it is regarded as hearsay evidence and shall be excluded. Mr Rhangane testified that they made recommendations to management to take action against Ms Maladzi as she even refused to testify at the disciplinary hearing.
74. I must also mention that at this arbitration the Respondent asked for an adjournment with an intention to call her as a witness and I was told that she still refused to come and testify. It could then be concluded that she lied in the first place when she gave a statement that she overheard the Applicant threatening Mr

Mabaso and due to her change in her statements, she is very aware that the truth in her statements will be very much tested and she will not be able to give truthful answers and may be exposed; or she may also be part of the ploy explained by the Applicant to remove her.

75. Mr Rhangane's investigation report did not show the statement of Mr Makhwanya. He justified that as an omission, yet the investigation report forms the basis on which the Respondent decided to take disciplinary action against the Applicant based on recommendations by the investigating officers. This also puts doubt on the credibility of the investigation itself as well as the contents thereof.
76. The insinuation by the Respondent that there are two other people who overheard the threat allegations but yet not call such people to testify as witnesses in corroboration of Mr Mabasa cannot be accepted, more especially Ms Maladzi's conduct as explained above. This finding also brings me to a considered view that the threat allegations could have been fabricated indeed as a ploy against the Applicant as she has testified that she believe that the Respondent wanted to get rid of her due to the corruption report she gave to HOD regarding what was happening at the hospital.
77. Let me also emphasize that the Applicant's evidence about the ploy and Mr Mabasa telling her that he was brought to the hospital as part of the intervention team to get rid of her due to her corruption reports to HOD has not been challenged at all by the Respondent.
78. The inconsistency application of discipline was raised by the Applicant's witness Mr Chabalala has also not been disputed by the Respondent. In fact the Respondent's Representative opted not to ask Mr Chabalala any questions, and therefore I make an inference that Mr Chabalala's evidence is conceded by the Respondent and I will admit it as such. The Applicant relied on historical consistency and argued that it expected the Respondent to apply the same standards of discipline for similar offences. I observed that the Applicant compared herself to other employees charged of assault which the Applicant was not charged with, but there is a similar charge of prejudicing the discipline, administration and efficiency of the department. I find Mr Chabalala's evidence credible and supported by documentary evidence of the sanctions given to the other employees by the

Respondent on at least one similar charge but also on acts of violence in the form of assaults which she viewed are a more serious offence to a verbal threat.

79. Based on the inconsistency claims the onus rested on the Respondent to challenge the Applicant's evidence in this aspect as well as to justify the parity in disciplinary action taken by Respondent in respect of the Ms Tlakula and Ms Kekana as compared to the Applicant. Therefore without such evidence and justification by the Respondent, it bring me to a finding that the Respondent has inconsistently applied the rules in disciplinary action against the Applicant.

80. I must also mention that the Respondent has also not led any evidence on the appropriateness of the sanction.

81. Based on the above reasons, I have doubt in the credibility of the Respondent's evidence in that the Respondent has failed to prove that the Applicant committed the offences as charged, and that dismissal was an appropriate sanction for such offences. I therefore find that the Applicant's dismissal was substantively unfair.

82. I will now turn to the Applicant's challenge of procedural fairness. The first aspect was that she requested for the investigation report and the witnesses' statements but Ms Makhananisa refused to give to her and as a result she also saw the documents on the date of the happening. The Respondent has not challenged the Applicant's evidence and did not also lead evidence in this regard. The Applicant is entitled to have access to any relevant documentation that will assist her in preparation for her defence in the disciplinary action. Based in the undisputed evidence of the Applicant, I find that it was unfair for the Respondent to refuse the Applicant such documents which were eventually used against her at the disciplinary hearing. She was prejudiced as she could not properly prepare her defence.

83. The Applicant also testified that Mr Makhwanya sent her the sanction on Whatsapp. She did not expect to be given her sanction on Whatsapp. No documents were given to her to sign but her union representative did sign on her behalf. Although the Respondent again did not challenge this piece evidence, I cannot find anything unprocedural about communication of disciplinary hearing outcome by whatsapp; and sending the documents to the union office/official.

84. Another procedural challenge is relation to the Respondent's failure to entertain the Applicant's appeal based on its defectiveness for non-compliance with Circular

11 of 2020 due to non-submission of supporting documents stipulated in Paragraphs 7.2 of the Circular. The Applicant argued that the Respondent mentioned the wrong date the Appeal was lodged; and that the Circular cannot replace the PSCBC Resolution 1 of 2003 which provides for appeal following a disciplinary hearing to be lodged within 5 working days of receiving the notice of final outcome of the hearing. The Applicant proved with documentary proof that she complied with the Resolution.

85. I agree with the Applicant's argument in this regard. Resolution 3 provides the Disciplinary Code and Procedures for the Public Service including Appeals in Clause 8. The Applicant's disciplinary action is subject to this Resolution. The Respondent cannot issue a Circular which provides requirements not agreed to by parties in the collective agreement. The Collective agreement is binding on all the parties and can only be varied or amended by written agreement. I noted that Clause 7.2 provides a requirement for additional documents to be submitted when lodging an appeal which are not provided in Resolution 3.
86. The Circular is certainly an amendment to the Resolution as correctly argued by the Applicant. I have not been provided with another Resolution amending Resolution 3 in so far as these requirements for Appeal Lodgment are concerned. I therefore find that the Respondent cannot unilaterally amend the Resolution and therefore the requirements in Paragraph 7.2 of the Circular cannot bind the employees who are subjected to the Resolution.
87. The Respondent decided not to lead evidence on procedural aspects raised by the Applicant and indicated that it will deal with them in the written closing arguments. I warned the representative that closing arguments cannot be regarded as evidence but he persisted with on his preferred approach. I have noted that indeed he had dealt with the procedural fairness in the closing arguments. I cannot consider closing arguments on piece of evidence not led by any party as its new issues and their credibility has not been tested by the other party in cross examination.
88. I consequently find that the Respondent was unfair is refusing to entertain the Applicant's Appeal on merits under the circumstances as it was in compliance with Resolution 3 and therefore renders the dismissal procedurally unfair.
89. I therefore find that Applicant's dismissal is substantively and procedurally unfair.

90. The Applicant prayed for reinstatement. The Respondent has not provided me with evidence that the employment relationship has irretrievably broken down and that continued employment relationship will be intolerable. I therefore have no reason not to reinstate her to her original position without loss of benefits. S193 (1) (a) of the Act states that: "If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may, order the employer to reinstate the employee from any date not earlier than the date of dismissal." Therefore, the date of reinstatement will depend on the Court or the arbitrator.

91. In terms of S193 (2) of the Act, the Labour Court or arbitrator must require the employer to reinstate or re-employ the employee unless:

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

AWARD

92. I find that the dismissal of the employee is substantively and procedurally unfair.

93. I order the Respondent to retrospectively reinstate the Applicant into her position without loss of benefits with effect from the date of dismissal, 30 November 2020.

94. As a result, the retrospective effect of the reinstatement I also order the Respondent to pay the Applicant back pay of 7 months remuneration calculated at her monthly salary of R42 429,50 in the amount of R 297 006,50.

95. The Applicant must report for duty on 01 August 2021.

96. I make no order for costs.



Arbitrator: Grace Mafa-Chali
Sector: Public Health