



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

COMMISSIONER: JANINE CARELSE

CASE NO: PSHS 1279-16/17

DATE OF AWARD: 4 OCTOBER 2017

In the matter between:

HOSPERSA obo YVONNE NEL

APPLICANT

and

DEPARTMENT OF HEALTH- WESTERN CAPE

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. The Arbitration hearing commenced on 24 August 2017 and concluded on 28 September 2017 at The Western Cape Nursing College in Cape Town in terms of Section 191(5)(a)(i) of the Labour Relations Act 66 of 1995, as amended, ("the Act"). The proceedings were digitally and manually recorded and the matter proceeded in English.
2. The applicant, Ms Yvonne Nel, was present and represented by Mr Shaun McGladdery (Mr McGladdery), an HOSPERSA official, whilst the respondent, Department of Health- Western Cape, was represented by its Labour Relations Officer, Mr Ayanda Mniki (Mr Mniki).

3. Both parties handed in a bundle of documents and the respondent's bundle was marked bundle "A", whilst the applicant's bundle was marked bundle "B". The contents of all documents were accepted to be what they purported to be.
4. Ms Janine Jacobs, an HOSPERSA official was present as an observer on the first day of the arbitration.

ISSUES TO BE DECIDED

5. I must decide whether the applicant's dismissal was substantively and procedurally fair. If I find that the applicant's dismissal was substantively and/or procedurally unfair, I must decide what the appropriate remedy will be for such unfair dismissal.

BACKGROUND TO THE DISPUTE

6. The applicant was employed by the respondent as an Operational Manager and she was responsible for various units within the hospital. She commenced her employment with the respondent on 1 August 1999 and was dismissed for fraud on 15 December 2016. She was further employed on a level 10 salary at the time of her dismissal. It is not in dispute that the applicant falsified medical scripts when she, on seven occasions, made it seem that Dr Phillips had given her scripts for sleeping medication when he did not and she falsified his signature. She did this to obtain sleeping medication for herself that she was addicted to. When Dr Viljoen discovered what she had done, he brought this to her manager's attention who then referred her to ICAS and she was sent to rehab. Upon the applicant's return to work after completing rehab, the applicant was suspended and subsequently dismissed for fraud. The applicant now challenges the substantive fairness of her dismissal on the basis that the dismissal sanction had been too harsh. She also challenges the procedural fairness of her dismissal on the basis that the respondent had followed the incorrect procedure. Mr McGladdery argued that the respondent should have followed through on the incapacity process which it initially embarked upon.

7. The applicant wants to be re-instated with retrospective effect and be given a sanction short of dismissal.

SUMMARY OF EVIDENCE AND ARGUMENT

THE RESPONDENT'S EVIDENCE AND ARGUMENT

8. Mr Abraham Solomon (Mr Solomon) testified under oath for the respondent and stated that he is employed by the respondent as an Assistant Director and that he works at the head office. He has been working in Labour Relations since 2004. He was referred to the seven charges with which the applicant was charged, that is, falsifying prescriptions. He stated that the fraud charges brought against the applicant would be dealt with under the disciplinary code of the public service and that disciplinary action should be taken against the applicant. He was referred to the respondent's fraud prevention plan and read out paragraph 61 on page 26 of bundle "A". Paragraph 61 deals with the recommended sanction when an employee is found guilty of fraud in the work place and states that "should it be found that an employee participated in acts involving fraud, theft or corruption, they will be subjected to a disciplinary hearing. In all such instances, the Department's representative initiating the disciplinary proceedings will be required to recommend dismissal of the employee concerned". He averred that in terms of the respondent's disciplinary code and procedure, fraud is serious and even when an employee is found guilty of it as a first offence, he/she must be subjected to disciplinary action. No employee can be excused from disciplinary proceedings in such instances. He was referred to page 37 of bundle "A" where he was referred to the record of an employee who was dismissed for falsifying a medical certificate. He further stated that when an employee's work is affected by drugs or alcohol, then the employee will be subjected to the incapacity process and that falsification of documents does not fall within drug dependency or alcohol abuse. He stated that there is a distinction between fraud charges and incapacity in terms of the disciplinary code and he is not sure whether the applicant's performance was affected by the drug dependency. He contended that the incapacity process is reserved for an employee who suffers from ill health or injury and that employee's work performance

is affected by that. The incapacity process also addresses alcohol and drug abuse, however, the charges against the applicant are purely misconduct because it involves the falsification of a prescription drug.

9. Under cross-examination he testified that the incapacity process is followed only when the employee's performance is an issue, however, when a transgression has been committed then the employee must be subjected to the disciplinary code. The incapacity process will commence when an employee admits to a drug dependency problem and when the employee commits an offence, it is viewed separately from the incapacity process. He stated that an employee's dependency issue must be brought to the employer's attention and only when the employer fails to provide services in respect of the incapacity then the blame can be put on the employer. In this matter the employer looked at the transgression and the incapacity code. He agreed that if the respondent knew about the offence before the time it should have acted earlier.
10. He was referred to page 35 and 36 of bundle "B" which is resolution 12 of 1999 and relates to sanctioning guidelines for the public service. He read paragraph 7.7 of this resolution into the record which according to him by implication provides that the respondent must be aware that the applicant is addicted to drugs or alcohol and that if the applicant brought this information to the respondent's attention then the respondent will have to apply resolution 12 of 1999. He contended that the other transgressions included being under the influence whilst at work or being absent because of being under the influence, but that the applicant was charged with fraudulent activity. He stated that when the procedure was initiated, the respondent was addressing the cause and stated that fraud is a dismissible offence.
11. He averred that the incapacity process makes provision for when there are transgressions after an investigation is done and then the disciplinary process will kick in. He agreed that the applicant should have been given an opportunity to see whether the rehabilitation that she was sent for had been successful. He further stated that it is required that reasons for the sanction must be in the report and the presiding officer is obliged to do this. The aggravating and the mitigating argument will be in the report and the two arguments will be weighed against each other. According to the fraud

prevention policy, the recommended sanction is a dismissal because the word “must” is not used. This means that the presiding officer does have some degree of discretion. The presiding officer is required to consider the witness’s evidence when he or she decides the appropriate sanction. He stated that dismissal is never a mandatory sanction and that the presiding officer must apply his or her mind to the particular case.

12. Under re-examination he stated that resolution 12 of 1999 does address alcohol and drugs, however, the charges against the applicant is for fraud and the resolution only speaks to alcohol and drug addiction. When an employee returns from rehabilitation, that employee’s performance is evaluated to see whether the employee’s performance has improved. He averred that the charges against the applicant relates to conduct and not performance because her conduct was found to have been fraudulent and this is a serious charge. The employee had to be subjected to a disciplinary hearing because her conduct warranted such action, but since the applicant came forward and admitted to having a drug dependency issue, they also needed to send her to rehabilitation. He contended that the applicant committed a serious act of misconduct and when compared to absenteeism then absenteeism is not that serious. The respondent was correct to have subjected the applicant to a disciplinary hearing.

13. Ms Tenjiwe Khumalo (Mrs Khumalo) testified for the respondent under oath and stated that she is the Assistant Manager Nursing where the applicant had worked. She further stated that the applicant was the operational manager for the trauma unit. She averred that Dr Viljoen sent her an email and attached a prescription that the applicant had falsified and told her to deal with the applicant’s misconduct. When she called the applicant into her office to confront her about the allegations, the applicant informed her that she had a sleeping problem and that she was prescribing sleeping tablets for herself. Based on this information she then decided to send the applicant for rehabilitation. She decided on this course of action because the applicant admitted to her that she has a drug dependency problem and she is aware that if somebody has such a problem then the respondent would send them to rehab to do something to assist or help the employee. She stated that she became aware of the applicant’s problem in August 2016 for the first time and she contacted ICAS about the issue. Both

the pharmacy and Dr Philips was aware that the applicant was falsifying prescription medication.

14. She contended that every employee that works in her department is always reminded that fraud is something that cannot be accepted and tolerated and must be dealt with. According to the CEO, fraud is a serious crime and he advised her that they will deal with that part. She was referred to page 29 of bundle "A" and stated that according to paragraph 68 fraud cannot be tolerated and it is the responsibility of the manager that a culture of no fraud be promoted. The trust relationship that she had with the applicant was therefore broken because the applicant is a leader of several staff and she was required to promote a culture of no fraud. She stated that she has worked with the applicant for more than 20 years and she reached out to the applicant before the incident occurred. She stated that she had reached out to the applicant before the incident because the applicant was frequently absent and always looked tired. She stated that she kept asking the applicant what she could do. She stated that the applicant informed her that she had personal problems and she allowed the applicant to go for counselling for herself and her husband at one stage. This occurred between 2014 and 2015. There would be times when the applicant gets better and times when she did not get better. She averred that she had a good relationship with the applicant and always asked the applicant how she could assist the applicant and their relationship was open. She stated that she knows sister Walters and that she had dealt with sister Walters. Sister Walters approached her and informed her that she wanted to resign with immediate effect because she was addicted to tik. She then sent sister Walters to rehab and sister Walters returned clean and never went back on tik again. The difference is that sister Walters did not commit any acts of fraud like the applicant. She contended that fraud and drug dependency were two different things and that the applicant was sent to rehab because she had a problem, but the applicant also committed fraud and therefore this had to be dealt with separately. ICAS did inform them of the process that was done and that they were required to follow up and ensure that the applicant does not do it again. She did not see any elements of dishonesty on the reports.

15. Under cross-examination she was referred to page 26 of bundle “B”, which is a report that was sent from ICAS to her. She read out that the reason for the applicant’s referral which to a large extent mentions that the applicant’s work performance and quality had dropped. She agreed that there had been no reason that the applicant was referred because she committed dishonesty. Dr Viljoen sent her an email regarding the applicant’s conduct because she was the applicant’s supervisor. She averred that the CEO said that the fraud that the applicant committed was serious and that she was not required to deal with it. She stated that she was simply there to address the applicant’s drug dependency issue and she had no knowledge of the fraud case. She further stated that she was not aware that Dr Philips had prescribed the same drugs to the applicant. She thinks that the applicant had on several occasions had personal problems and work pressure. The casualty department which was one of the departments that the applicant was supervising was a very busy department and the trauma department which the applicant oversaw was a big department.

16. She further stated that the staffing situation at the hospital was always a problem with short staff. The applicant had managed the trauma unit, overnight ward and high care department. She was also in charge of the psychiatric ward when she was a specialist in trauma and agreed that it is stressful to manage a department that one is not specialised in. She contended that she has since received additional staff, that is, three sisters, four staff nurses and four enrolled nursing assistants. She conceded that there has been staff problems for a long time and that it has improved. She cannot say what the prescription medication was used for, but the applicant said that she had used it for her dependency. Based on this she decided to send the applicant to rehab and this happened before they decided to charge the applicant for fraud. She was not aware that the applicant was going to be fired. She averred that the applicant insisted that she wanted to resign and she convinced the applicant to attend rehab to sort out her dependency. She knows applicant for a long time. She stated that she needed to do what is expected of her and that was to send the applicant to rehab and she knew that this would assist the applicant on a personal level. The applicant had told her that she was thinking of giving up her position as an operational manager and at that moment the applicant stated that she wanted to resign. She stated that when somebody does something wrong then this breaks the trust relationship. She agreed that trust cannot

be repaired if not given a second chance. If the situation was such that the applicant could continue working then she would have followed the ICAS recommendations on page 25 of bundle "B".

17. She indicated that she is not sure whether sister Walters had been subjected to a disciplinary hearing for using tik and agreed that it was illegal to use tik. She cannot comment on which process was more important whether it was the misconduct process or the incapacity process. An employee is an individual and they must do what is best in the circumstances. The respondent can say that fraud is fraud. She cannot say whether the applicant's drug dependency and the fraud should have been dealt with as one. She agreed that everybody copes differently and use different things to cope. She cannot say whether the incapacity process would have solved the problem. Prior to the misconduct incident, she sent the applicant for counselling and put shift leaders in the applicant's place to relieve her so that she could only attend to the trauma unit. She believes that she did her best and that the respondent did its best to address the issue. She does not think that the applicant was going to go back as an operational manager. The applicant cannot go back to trauma because of bad blood and too much stress. She cannot say whether the applicant will be able to cope in another environment. She stated that the applicant was not suspended immediately and when the falsification issue came up then she was told not deal with that part. She stated that she did not tell the applicant that she did not trust her anymore and that she did not want the applicant to work there.

18. Under re-examination she stated that the applicant was struggling at work and that she seemed sleepy and sending her to rehab was the right thing to do. ICAS had ticked what was relevant to the applicant's case and she also ticked what she thought was relevant. She stated that she was not involved in the applicant's disciplinary hearing and was simply asked what her role was and why she sent applicant to rehab. She was informed by Dr Viljoen not to get involved and that they will deal with it.

THE APPLICANT'S EVIDENCE AND ARGUMENT

19. The applicant testified under oath that she was employed by the respondent as an Operational Manager of the casualty unit, high care unit, psychiatric unit, casualty short stay and D ward. Her duties were to oversee the said units and she was responsible for staffing, patients, equipment and maintenance of equipment and after hours. She commenced her employment on 1 August 1999 and started as a junior sister in the casualty unit. At the age of 25 she was the senior sister of the casualty unit and she supervised other employees. Not long after she was appointed as the senior sister of the casualty unit people resigned due to the work pressure. At the age of 26 years she was the senior sister of the casualty and overnight ward and in 2007 she was appointed as the operational manager of the casualty unit. In 2009 she did a course in trauma and became in charge of the D ward, high care ward and casualty short stay. She stated that on various occasions she informed Ms Khumalo that her work was too much for her and that she wanted to resign and Ms Khumalo promised to get her help. Psychiatry was not part of her job, but she was told that she was getting paid for her position. Between 07:00 and 13:00 she was operational on the ground and would assist with stats, sorting out various departments and she would do staff allocations. When staff did not show up then she would have to fill the gap and this was in addition to her office work. She was one of three operational managers in the office and there were only two computers and therefore they were required to give each other a chance to work on the computers. As a result, there was not enough time to complete the deadlines. When she oversaw the wards then she must be in all of the wards to see for complaints and to assist doctors in a crisis because the sisters in the wards could not do everything.

20. She averred that she had access to an emergency medicine cupboard. She stated that trauma and emergency were her speciality and that she was not qualified to do all of the work she had to oversee. She stated further that zolnox is an anti-hypnotic that helps her to fall asleep and that tramaset helps with pain and is an analgesic. This medication was first prescribed to her by Dr Philips and he only prescribed this medication to her once on a three-month repeat. At the time, Dr Philips did not ask why she needed the medication. As far as her knowledge is concerned, Dr Philips was supposed to get her medical history before prescribing it. She admitted that she had access to medication every day and the keys of the medication cupboard was never

taken away from her. She does accept responsibility for her actions. She became dependant on these drugs when she started to come home from work and her mind could not switch off and she would stay awake the whole night.

21. She went to see a general practitioner and he prescribed zolnox and she became used to it and dependant on it. She stated that her husband became tired of her drug dependency because she was always tired and sleeping and neglected the children. She felt frustrated because she had many work issues and her husband would not understand. She would take the medication to help herself and this allowed her to cope with her work and family. She also sought some help with the “help me network” and attended there for a period of two years. She refused to be admitted to a psychiatric hospital in 2015. She stated that she had no reason to inform her supervisor why she would stay away and that her supervisor was aware of her personal issues but not her addiction. She stated that if she informed her supervisor of her addiction then they would not trust her anymore. She contended that the respondent did not suspect anything at the time because it was not apparent that she was dependant on drugs. Her drug dependency caused her to be absent for work, she did not meet her deadlines, she experienced behavioural changes and lost a lot of weight. She looked like a drug addict and she was withdrawn and depressed. She did confide in her supervisors and told them that her work load was too much. It should have become obvious to the respondent that something was wrong when she lost so much weight. Sister Marthinus called her in on one occasion and told her to take two weeks leave. Sister Marthinus is an assistant manager and she oversees the general areas and she is the direct supervisor when Ms Khumalo is not there.

22. She stated that she did inform sister Khumalo that she cannot cope with work and she then suggested that she will take over the high care unit but that did not materialise. She also promised shift leaders to be employed on a month to month basis but that did not materialise. She also wanted to be demoted and wanted to resign at one stage, but Ms Khumalo convinced her to stay. On 1 August 2016 she was called into Ms Khumalo’s office and she informed her that Dr Viljoen advised her that she was falsifying prescriptions. She admitted that it was her and that she has a drug dependency problem. Ms Khumalo then started speaking about ICAS and sent her for

therapy on 1 August 2016. That day was the first day that she admitted to the respondent that she has a drug dependency problem. She stated that sister Khumalo did not deal with the misconduct side of things and that was dealt with by the head of HR. Ms Khumalo further did not stop her going to rehab and she attended rehab. She understood that she was sent away to get better and that she would resume her duties when she was discharged. She was assisted by Comfort Sithole who works for ICAS and ICAS is an institution that helps government employees with their personal issues.

23. She was referred to page 21 of bundle “B” and read out paragraph 5 which relates to an employee assistance program explanation that was addressed to Ms Khumalo and she thus recognised it as an employee assistance program. She was referred to page 23 and 25 of bundle “B” which speaks to her program going forward and the findings and treatment strategies. She stated that substance abuse is a disease. She stated that she indeed benefitted from the incapacity process and she has not relapsed since. She has been clean since the day that she left the rehabilitation centre. She was discharged from rehab on 8 October 2016 and booked off until 24 October 2016. She therefore started to work on 24 October 2016. Dr Reid recommended that she see the ICAS officer, NA and the psychiatrists and she continued with these sessions. On the day that she returned to work she went to see ICAS and was served with suspension documents. She was under the impression that when she returned to work she would be subjected to drug tests and was supposed to work under the supervision of Ms Khumalo. On the basis of the recommendation she believed that she would go back to work because if she is dismissed then there is no way that the respondent could effect the recommendation. She believes that she is guilty and that’s he deserves to be punished. She went to rehab to prove herself, but the rug was taken out from under her feet.

24. She was referred to page 26 of bundle “B and read out the reasons for her referral to ICAS. The reasons for the applicant’s referral to rehab related to her absenteeism from work and her poor work performance in general. She agreed that the reasons for the referral to ICAS was correct. According to page 20 of bundle “B”, her psychiatrist, Dr Reid, recommended that she continue seeing her psychologist and herself on a regular basis amongst other things and she adhered to her recommendations, however, she

could not continue seeing them because she was dismissed and did not have enough money. According to page 27 of bundle "B", Ms Khumaloo approved her special leave to attend rehab and she was given a medical certificate by Dr Reid for this period. She stated that she was not suspended on 1 August 2016 and on the following Monday, she came to work in civilian clothes after she was caught out falsifying prescriptions. Ms Khumalo sent her home to change into her uniform and she continued working until she was sent to rehab. The respondent gave her no indication that the trust relationship was broken because even the keys of the drug cupboard was not taken away from her. When she was discharged from rehab she thought that everything at work had been over. She contended that she did not relapse when she was suspended, as it took too long for her to get healthy and regardless of losing her job, she was not prepared to take prescription drugs again. It did not cross her mind that she would lose her job. She had believed that she was a patient and that she would be treated as one of the psychiatric patients.

25. She averred that the disciplinary hearing was held on 9 December 2016 and the outcome was given on 15 December 2016. The presiding officer knew that she was at rehab, as the report was in the file. She stated that the presiding officer requested correspondence from her doctor and sister Marthinus emailed the documents to her. At that time, she was still attending the program. She stated further that the presiding officer did not explain the implications of pleading guilty to her and she was not represented. She averred that the CEO, Mrs Leo, spoke about the trust relationship being broken between them and she did not have a chance to cross examine her on that aspect. She stated that the presiding officer did not give any reasons as to why dismissal had been the appropriate sanction. She also did not give an indication of what weight needed to be attached to each of the mitigating and aggravating factors that were mentioned. The presiding officer was aware of the report of Dr Reid. She did appeal against the dismissal finding, but her appeal was unsuccessful and she was informed thereof.

26. She contended that she was informed of her rights to representation and was not advised of the implications of not having representation present. She was referred to

page 40 of bundle "B" and read paragraph 2.11 into the record which states that if there is a suspicion of alcohol or drug abuse then a counselling session must be held and an offer made for the referral for treatment and the staff member referred to ICAS. She confirmed that she went to ICAS and then to rehab. She continued to read paragraph 2.14 into the record which states that where an employee resists the above then discipline must be applied. She stated that she did not refuse the treatment and counselling, thus the respondent should not have dismissed her as a first option. She was then referred to the policy in respect of incapacity or ill health and injury and read out on page 45 of bundle "B" that it is a tool not used to punish the employee but to assist the employee. She stated that she has no previous disciplinary records and she rated above average. She averred that she was tempted to use the scripts because it was easily accessible, as it formed part of the nursing documents. She is prepared to go back to her previous position or to be demoted as a speciality sister. She contended that she is ready to go back even though she has faced challenges and lost respect from her friends and humiliated. She wants to go back to show them that she is still the same person who they knew once before. She will continue to attend NA and see Dr Maree. She now has her family supporting her and her old friends from the hospital.

27. Under cross examination she stated that she is aware that she can be represented by a union representative or a fellow employee. Sister Marthinus went with her for support and not as a representative. She pleaded guilty to the charges and was requested to do a mitigation of her sentence. She chose not to have a representative because she did not want a person who would have to convince others that she did not do anything wrong. She stated that she suffered prejudice because she did not know anything about disciplinary hearings, but it was her decision not to be represented. She did not say that she wanted a union official and she admitted that she cannot now blame the presiding officer for not being represented. She confirmed that the presiding officer did check her understanding and establish her awareness of the seriousness. She agreed that the charges against her were serious and she still did not indicate that she wanted to be represented.

28. She agreed that she did not lodge any grievances about the work load. She stated that she went to counselling on her own and that Ms Khumalo did not recommend that she

sees a counsellor. She felt that nobody would listen to her if she lodged a grievance and there was nobody to help her as everybody was too busy with their work. She does not blame Ms Khumalo for anything that happened to her and she did tell her that her workload was too much. Ms Khumalo promised to get her a shift leader. Sometimes there would be somebody to help her and then nobody for the next few months. If she shifts people around in the department then it creates a problem in the department. She further stated that she benefitted from going to rehab and that the respondent did play a role in rehabilitating her, however, prior to her recovery she received very little help. She stated that it would be wrong to say that the respondent did not assist her at all to recover. After she left then Ms Khumalo appointed shift leaders in each ward and if that had happened whilst she was still there then her responsibility would have decreased. She agreed that there will always be pressure and she is not there to be treated as if she is vulnerable. She had learned many lessons and coping skills. She stated that she is aware of the fraud prevention plan and she can understand why disciplinary steps were taken against her. She acknowledges that it is management's responsibility to establish, maintain and promote a zero-tolerance culture towards fraud and she agrees that if the respondent did not deal with the misconduct then they would be acting against the policy. She agrees that fraud is serious and a dismissible offence.

29. Under re-examination she stated that if she was given an opportunity to relive her disciplinary hearing then she would take a union official with to represent her. She stated that she was aware that she could have asked for a union official, but that the presiding officer did not say that it would be advisable to have one to represent her. She cannot recall that the presiding officer said to her that she could be dismissed. She stated that the reasons for her dismissal were never given to her and it is the first time that she sees it. She averred that she did raise issues with her supervisor regarding the magnitude of her workload but that shift leaders were never appointed on an ongoing basis and the rehab certainly did not help her with her job. She stated that everybody should not be dismissed for every offence that they commit. She was never trained on the fraud prevention and fraud detection. The respondent only disciplines people and does not prevent and she had to be disciplined. She averred that a serious offence is not always a dismissable offence.

30. Mrs Eva Lydia Marthinus (Sister Marthinus) testified under oath for the applicant and stated that she is employed by the respondent at the Helderberg Hospital in Somerset West and she is one of the assistant managers nursing. She knows the applicant because the applicant was employed by the respondent as an operational manager and oversaw the overnight unit, D ward, psychiatric ward and high care unit. There are four assistant managers and she and Ms Khumalo are the assistant managers on day duty. She and Ms Khumalo would relieve each other when either of them are on leave or for any other reason. She was not aware that the applicant had an addiction issue until she admitted to it after she was found out falsifying scripts. On 1 August 2016 Ms Khumalo informed her that the applicant admitted to being dependant on prescription medication and the fraud charge against her. Dr Viljoen sent Ms Khumalo an email to inform her that the applicant had falsified scripts and requested her to deal with it. They then discussed the matter with the applicant and decided to send her to rehab. The staff would get together in the night office to enquire about staffing and deal with the hand overs and one of the operational managers said that the applicant appeared to seem amidst when she comes in to work in the mornings. Ms Khumalo did say that the applicant had personal problems. She stated that she spoke to the applicant and asked her to take two weeks of leave to sort out her problems. This happened in December 2015 and January 2016 and Mrs Khumalo had been on leave during this time. When the applicant was called in to Mrs Khumalo's office, she admitted that she had a drug dependency problem and on this basis she was sent to rehab because Dr Viljoen asked Mrs Khumalo to deal with it. The first step for them was to send the applicant to rehab and after about four or five days, the CEO informed Dr Viljoen to do nothing about the matter because the matter will be dealt with by the regional office. Ms Khumalo had already sent a request to ICAS for applicant to be sent to rehab.

31. She averred that she does not believe that the applicant was being treated fairly by the respondent in the way the matter was handled. She and her other colleagues thought that when the applicant returns to work after rehab that she will be put in the high care unit only and the applicant's dismissal thus came as a shock to them. She stated that before the applicant went to rehab, the trust relationship was not broken, as she was still supervising her departments. The applicant continued performing

supervising duties and oversaw all staff on duty. She never thought that the applicant will not be able to do her work. She contended that they are battling to obtain speciality sisters and applicant had been trauma trained and could still contribute a lot. She wanted to use the applicant in the speciality areas.

32. She averred that she is not aware of any disciplinary action or complaints against the applicant, except that there were concerns about her being fully awake while on duty. She stated further that the managers have learned a lot about the applicant's mistake because when it became known that the applicant was struggling with a dependency due to work stress, they spoke about it amongst themselves and everyone learned and said that they will intervene. Before the applicant was sent to rehab, the casualty unit did not have enough staff compliment and after the applicant was dismissed, they allocated more staff to the casualty unit. The applicant was required to work in the psychiatric department even though she was not trained in that area of work. She stated that the applicant did not have a fair work load and she did request other staff to swop with her and nobody was prepared to swop with her. She indicated that the applicant's work load could have contributed to her dependency issue.

33. She stated further that she did not recommend that the applicant be removed from her position after the incident and that everybody felt that they could have done more, as they did suspect that something was wrong with the applicant. She stated that the applicant's situation should not be viewed in isolation. In the night office they have rescue remedy in the draw and if any one of the staff cried and also they drank red bull and berrocca to get through the day. She can and will work with the applicant again. Dr Reid's report was emailed to the chairperson and the applicant did not fall under the direct supervision of the CEO.

34. Under cross examination she stated that the applicant reported to her or Ms Khumalo, but that Ms Khumalo was the applicant's direct supervisor. The applicant reports 90% of the time to Ms Khumalo. She averred that the relationship dynamic between herself and the applicant and the applicant and Ms Khumalo is different. She cannot say how Ms Khumalo felt about the situation and cannot speak for her. She stated further that the staff spoke amongst themselves that the applicant would still be asleep when she

comes to work and that she does not respond to questions. The applicant was also absent from work on many occasions and they thought that it might be a dependency problem but they did not address it. They should also have addressed her absenteeism problem and maybe she would have admitted to having a drug dependency problem. On one occasion she informed the applicant that the applicant seemed high. She averred that she was not blaming anyone for not intervening, but she feels that management should have done more. When the CEO asked them whether they feel that they failed the applicant and they said yes.

35. She stated that the applicant did ask to be reallocated to another department and for her workload to be reduced. The applicant did say that her work load was too much. After the applicant was dismissed they put more staff in the casualty unit and they now make use of agency staff. The CEO has also given permission to put more staff in the casualty unit and the D ward. They however felt that they should have done this when the applicant was still there. She stated that the applicant claimed that she could not sleep at night and that is why she became dependant on the drugs. She is aware of the fraud prevention plan and that the applicant's conduct amounted to fraud.

36. With reference to the disciplinary hearing against the applicant she stated that she did expect a disciplinary process because of her misconduct. She knows that the parties are first sent to rehab and when they return they are subjected to disciplinary action. The applicant committed fraud and it was necessary to discipline her afterwards. She is not aware of anybody who falsified scripts or medical certificates. She contended that if anybody is dependent on drugs then they would first be sent to rehab and the respondent still have staff who work and who were given written warnings and final written warnings. She admitted that a manager who falsifies scripts does not maintain and promote a zero-tolerance culture against fraud. She stated that the applicant committed fraud because of her drug dependency. There was another employee who was an alcoholic and used to be drunk on duty and he also used to abscond from work and they regarded this as stealing time. She never brought any evidence to show that the respondent applied discipline inconsistently.

37. Under re-examination she stated that she knows all the staff and she was responsible for the change list and she knows her staff. They would do a motivation in writing if an employee wanted to be moved to a different department. She has a fair knowledge of the nursing staff. It is not Ms Khumalo's decision to dismiss the applicant. The signs that there was something peculiar with the applicant were there because as a nurse you are taught the signs, symptoms and behaviour of people who are addicted to drugs. She has also had exposure to patients who are alcoholics and have drug dependency issues and denial is the first reaction of such a patient. More staff compliment was added to the units after the applicant was dismissed. She stated that the applicant never moved from her position as operational manager because nobody wanted to swop with her and when she was dismissed then the workload and capacity issues were addressed. No work sessions were held on fraud prevention and there was no training on how to combat fraud. She does not know the definition of fraud. She can only recall training being given on whistleblowing. She further averred that private scripts are easily accessible and lie around in the wards. According to page 26 of bundle "B" paragraph 61, dismissal is the recommended sanction and not a mandatory sanction because the word "must" is not used. She stated that the applicant's conduct in committing fraud was a symptom of the applicant's problem because a drug addict would do anything to get drugs. Even the staff member who was on tik was sent to rehab and she came back and no disciplinary action was taken against her. She finds it strange that the respondent does not have a zero tolerance on drug dependency because it is illegal to use tik. She further indicated that she did basic training as a registered nurse as it formed part of her nursing qualification and she can identify the signs and symptoms of a drug addict, such as behavioural changes, appearances, slurred speech, pupil dilation and psychotic behaviour. She did not do drug counselling and the patients are sent to psychologist and psychiatrist for that.

Closing Arguments

38. I acknowledge the parties' comprehensive oral closing arguments. Both parties dealt with both the procedural and substantive fairness. Essentially, each party wants me to rule in their favour. I do not wish to repeat their arguments and submissions. I have decided to deal with them in my analysis of the evidence and arguments.

ANALYSIS OF EVIDENCE AND ARGUMENT

39. Section 192(1) of the Act provides that an employee bears the onus of proving the existence of a dismissal, whilst subsection (2) requires the employer to prove the fairness thereof. In this matter the applicant's dismissal is not in dispute.
40. In determining whether the applicant's dismissal was procedurally fair, I am guided by the factors listed in Schedule 8 of the Act under Item 4 of the Code of Good Practise: Dismissal.
41. The applicant stated that she was not represented at her disciplinary hearing and that sister Marthinus merely accompanied her for moral support. The applicant confirmed that the chairperson confirmed whether she wanted to be represented and she decided that she did not want to be represented. She further confirmed that the chairperson explained the seriousness of the charges against her and based on this she still did not want any representation. The applicant explained that she was prejudiced because she was not familiar with the process. I do not find that it would be fair to hold the respondent liable for the applicant's choice not to be represented when she was advised about her right to be represented and the seriousness of the charges against her. The procedure cannot be found to be unfair simply because the applicant felt that she was prejudiced because she was not familiar with the process. If she felt this way then she should have requested a representative.
42. Mr McGladdery argued that the respondent did not follow the correct procedure when it subjected the applicant to a disciplinary hearing for misconduct, when the misconduct emanated from her drug dependency problem. I do not agree with this argument, as the applicant committed a serious act of misconduct that warranted a disciplinary hearing and the respondent was correct in subjecting her to a disciplinary hearing for that. I find that the respondent has discharged its onus of showing that the applicant's dismissal had been procedurally fair.

43. In determining whether the applicant's dismissal was substantively fair, the factors listed in Schedule 8 of the Act under Item 7 of the Code of Good Practice: Dismissal is considered. The applicant does not dispute that she is guilty of fraudulently falsifying medical prescriptions to obtain Zolnoxix and Tramacet for her personal use. It is however the applicant's case that her dismissal had not been the appropriate sanction in the circumstances and this is all that I am required to decide under substantive fairness.
44. I find that dismissal had not been the appropriate sanction for the reasons mentioned hereunder.
45. It is common cause that when the applicant admitted to having a drug dependency problem, Ms Khumalo, her immediate supervisor referred her to ICAS and sent her on a rehabilitation program. This the respondent was obliged to do in terms of its policy relating to incapacity for ill health or injury. I cannot fault the respondent on taking this course of action, since the applicant's dependency problem had an adverse effect on her work performance. Ms Khumalo confirmed that the applicant was struggling at work and seemed sleepy while she was at work. The reasons for the applicant's referral to ICAS was that the applicant's work performance had declined and she was excessively absent from work. To this end, the respondent acknowledged the applicant's drug dependency problem and embarked on the proper process to assist the applicant. When the applicant returned to work after completing the rehabilitation program, however, she was suspended from work and dismissed subsequent to a disciplinary hearing. The purpose of sending the applicant to rehab, as the incapacity policy rightly states, is to assist the employee and not to punish the employee. The incapacity process is further not a "hit and run" process, instead, it is a lengthy process that involves sending the employee to rehabilitation and monitoring the employee's performance thereafter to establish whether the employee's performance and condition has improved because of the assistance that has been afforded to the employee. When the respondent decided to dismiss the applicant, it had the effect of nullifying the incapacity process which it had initiated, rendering it futile and purposeless. It appears that the respondent had simply sent the applicant to rehab to comply with its incapacity policy and that it had never been a genuine attempt to assist

the applicant, since the applicant's discharge from rehabilitation was followed by her dismissal. I find that this cannot be construed as aiding the applicant in that it could have been a set back to the applicant and led to a relapse.

46. It should be borne in mind that the applicant's misconduct had been a direct result of her drug dependency, as she prescribed medication for herself to feed her addiction. Had the applicant, for example, falsified scripts for somebody else's benefit or for her own financial gain then clearly there is no nexus between the applicant's misconduct and her drug dependency. In this case there is undoubtedly a link between the applicant's misconduct and her incapacity and therefore the respondent erred in considering the misconduct and the incapacity as two separate and distinct issues. As noted above, the respondent was correct to subject the applicant to a disciplinary process for falsifying scripts, however, I find that the respondent had been incorrect to consider the misconduct in isolation and without having regard to the applicant's drug dependency. I agree with Mr McGladdery's argument that the respondent addressed a symptom of the applicant's drug dependency issue and not the cause itself, which is the applicant's actual drug addiction. They initiated the incapacity process but failed to follow through with it.

47. Whilst I am mindful that the courts have consistently held that mitigating factors such as long service and a clean disciplinary record cannot save an employee who is guilty of serious misconduct, I agree with both Mr McGladdery and Mr Mniki who stated that this case is unique. It is unique because the applicant's long services and clean disciplinary record are not the only mitigating factors that are relied upon. This case is unique because the applicant's misconduct is linked to her drug dependency and "but for" the applicant's drug dependency, she would not have committed the misconduct. On this basis, I do not believe that the trust relationship between the applicant and the respondent cannot be restored. If the applicant's drug dependency can be rehabilitated, then the misconduct that she committed would inevitably be eliminated. Moreover, Ms Khumalo's evidence that she can no longer trust the applicant cannot be justified, given that the applicant continued working in her position for weeks after it transpired that she had falsified scripts. The keys of the medication cupboard to which the applicant had access was not taken away from her and she continued

with her duties as normal and nothing changed from the time that Ms Khumalo found out about the misconduct until the time that the applicant was dismissed. The misconduct that Ms Khumalo was made aware of on 1 August 2016 was the same misconduct that the applicant was dismissed for on 15 December 2016. There is therefore no basis for Ms Khumalo's claim that she cannot trust the applicant. If there had been no link between the applicant's misconduct and her drug dependency, they yes, it would be safe to find that she committed serious misconduct that has irreparably broken the trust relationship. In this case, the respondent should have followed through with the incapacity process that it initiated and given the applicant a sanction short of dismissal because of the connection between the applicant's misconduct and her drug addiction.

48. With reference to the "zero tolerance policy" that the respondent has in respect of offences that involve fraud, the Labour Appeal Court in ***Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others (JA49/14) [2015] ZALAC 23*** at paragraph 17 held as follows:

"A commissioner of the CCMA or other arbitrator is the initial and primary judge of whether a decision is fair. As the code of good practise enjoins, commissioners will accept a zero tolerance if the circumstances of the case warrant the employer adopting such an approach."

49. The court held further at paragraph 18 as follows:

"But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, a "no go area" for commissioners.Commissioners should be vigilant and examine the circumstances of each case to ensure that the

constitutional right to fair labour practises, more particularly to a dismissal that is fair, is afforded to employees.”

50. Inasmuch as the respondent’s policy concerning fraud speaks about a “zero tolerance culture” that management needs to uphold, dismissal is not a mandatory sanction for fraud. In terms of the respondent’s fraud prevention plan, dismissal should be recommended by the respondent’s representative when an employee is found guilty of fraud, amongst other charges of dishonesty. It does not provide that the chairperson of the disciplinary hearing has no discretion but to dismiss such an employee. In terms of the above-mentioned case law too, it is clear that each case must be decided on its own merits and I agree with Mr McGladdery in this respect.

51. It is not in dispute that the applicant had been working under a tremendous amount of pressure. Ms Khumalo conceded to the fact that the casualty department that the applicant had supervised was a very busy department and that the high care unit that she also supervised is a big department. She further agreed that the applicant specialised in trauma and she oversaw the psychiatric ward and that it is stressful to manage a department that you are not trained in. Sister Marthinus further testified that the applicant had so much work that none of the other staff were willing to swop with her, even though she had requested on numerous occasions to swop with other staff. She also stated that the applicant wanted to move and always complained about her work load. Sister Marthinus and Ms Khumalo indicated that additional staff was employed in the various wards that the applicant had managed, after the applicant had left. Sister Khumalo testified that they were short staffed for a very long time and that it has improved. It is therefore clear that if staffing was not a problem, it would not have been necessary for the respondent to employ additional staff. I find that the respondent had been responsive or reactive to the issues of staff capacity only once the applicant had already been dismissed. Albeit that the applicant may have had personal problems, the evidence is clear that her work pressure and the short staff issue had contributed largely to her drug dependency. I find that considering this evidence the respondent bears a more onerous burden to assist and accommodate the applicant. The applicant’s drug dependency cannot be said to be solely self-inflicted and the

evidence is clear that her work load and work pressure most likely contributed to her drug addiction.

52. The applicant was extremely remorseful and honest from the beginning and disclosed her drug dependency from the moment that she was called into Ms Khumalo's office and confronted about the falsified scripts. She did not deviate from that version and was extremely apologetic for what she had done. This is yet another indication that the applicant is capable of being rehabilitated. The applicant has about twenty years of service with the respondent and a clean disciplinary record. Moreover, I do believe that the applicant can be rehabilitated and that she will not commit this type of misconduct again.

53. Considering the totality of the circumstances, I find that dismissal had not been the appropriate sanction in the circumstances and that the respondent should have given the applicant a final written warning for falsifying the scripts. In view hereof, I find that the applicant's dismissal had been substantively unfair.

Remedy

54. Section 193 and 194 of the Act deals with remedies for unfair dismissals. In this regard, reinstatement is regarded as the primary remedy. The applicant has indicated that she seeks retrospective reinstatement as relief. As stated above, I do not find that dismissal had been appropriate and I have no reason not to reinstate the applicant. However, I will not reinstate the applicant with back pay, considering that she is guilty of misconduct, albeit that the misconduct does not warrant a dismissal as mentioned above. I will further substitute the applicant's dismissal with a final written warning for falsifying prescriptions, which will be valid for a period of twelve months.

AWARD

55. The dismissal of the applicant, Ms Yvonne Nel by the respondent, Department of Health- Western Cape, was procedurally fair and substantively unfair.

56. The respondent, Department of Health- Western Cape, is ordered to reinstate the applicant, Ms Yvonne Nel in its employ on terms and conditions no less favourable to her than those that governed the employment relationship immediately prior to her dismissal.

57. The applicant's reinstatement will not operate retrospectively.

58. The respondent is ordered to replace the applicant's dismissal with a final written warning which will be valid for twelve months from 1 November 2017.

59. The applicant is to tender her services to the respondent on 1 November 2017.

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Janine Carelse
COMMISSIONER