



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Case No: PHSH602-16/17

Panellist: Paul Phundu

Date of Award: 7 April 2017

In the matter between:

**Hospersa obo Isaac Baphuti**

Applicant

and

**Department of Health- North West**

Respondent

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## DETAILS OF HEARING AND REPRESENTATION

- [1] This is an arbitration award issued in terms of Section 138 of the Labour Relations Act, 66 of 1995 (as amended) and herein after referred to as the LRA. The matter was set-down for arbitration in terms of Section 191(5) (a) of the LRA.
- [2] The arbitration hearing was conducted on 02 February and 23 March 2017 at the Department of Health Boardroom, Klerksdorp Hospital, Klerksdorp.
- [3] The Applicant was present at the arbitration hearing and represented by Mr Mpho Mongane, an official from the union Hospersa. The Respondent was represented by, Mr Joseph Dlamini, Manager, Labour Relations.

[4] The proceedings were conducted in English and were digitally recorded. I also kept handwritten notes.

[5] Both the Applicant and Respondent handed in a bundle of documents marked Annexure "A and B", the content of the documents is not in dispute. Both parties presented oral closing arguments.

### **ISSUE TO BE DECIDED**

[6] I am required to establish whether the Respondent committed an unfair labour practice in relation to suspension or not, if so, I must determine the appropriate remedy.

### **BACKGROUND TO THE ISSUE**

[7] The Applicant is in the employ of the Department of Health as a Professional Nurse since 01 February 2015 until he declared a dispute of an alleged unfair labour practice concerning suspension. His salary at the time of the dispute was R18000.00 rand per annum.

[8] The Applicant appeared before a disciplinary hearing where he was charged with misconduct. **Charge 1:** *Wilful/intentional endangering of another person's life and/or Negligence.* **Charge 2:** *Insolent Conduct*

[9] The Applicant was found guilty. A sanction of suspension for three months without pay as well as a final written warning was imposed on the Applicant.

[10] The Applicant lodged a grievance and the outcome of a grievance was against the Applicant.

[11] Conciliation failed and the certificate of non-resolution of the dispute was issued. The matter proceeded to arbitration. In terms of relief, the Applicant prays for 1 month suspension without pay.

## SURVEY OF ARGUMENTS AND EVIDENCE

### Applicant's evidence in chief

[12] The Applicant had no witnesses and led oral evidence in support of his case. His evidence was briefly as follows:

[13] **Mr Isaac Baphuti** testified under oath that he is employed by the Respondent as a Professional Nurse based in Klerksdorp Hospital. The Applicant stated that on the 02 of July 2015 he was summoned to the manager's office, instead of heeding the call he told the messenger that he is busy and will only come after he had finished with his filing. The Applicant confirmed that on arrival at his manager's office he argued with his manager and started shouting at each other. The Applicant confirmed that he exchanged some unpleasant words with his manager and was very angry and rude towards her. The Applicant stated that the manager was also rude towards him. The Applicant stated that he requested to be released from duty for the day as he was not in a right state of mind because of the altercation between him and his manager. The Applicant indicated that it was not his duty on the day to look after a patient who was anaesthetised. The Applicant stated that it was the duty of a doctor to do so. The Applicant confirmed that he left the Hospital without signing a leave form and he further confirmed that his leave application was not in writing, however, he was told it will be regarded as leave without pay.

[14] Under cross-examination the Applicant confirmed that he is not challenging the final written warning. The Applicant further confirmed that he is only challenging the severity of the punishment, that is, 3 months' suspension without pay. The Applicant stated that he should have at least been given a 1-month suspension without leave because the chairperson of the disciplinary hearing was biased and did not apply his mind to the facts before him. The Applicant further confirmed that he is not challenging the second charge and he was guilty as charged.

### Respondent's submission

[15] The Respondent had three witnesses in support of its case. The evidence was briefly as follows:

- [16] Mrs **Jabulile Sylvestra Myeni** testified under oath that she is the former employee of the Respondent and she is presently retired. The witness stated that she was the Acting Unit Manager and used to supervise the Applicant at Tshepong Hospital. The witness indicated that the Applicant was a habitual late comer and used to report for duty late almost every day. The witness stated that on the 02 July 2015 she noticed that the Applicant did not sign the attendance register and was also late for work. The witness indicated that she was asked by the Deputy Director, Ms Grace Moselane to call the Applicant. The Applicant responded that he is busy. The Applicant eventually came and started responding to the questions posed by Ms Moselane in a very disrespectful way and calling her a liar. He started shouting at Ms Moselane and was called to order by her. The witness stated that the Applicant requested to be released for the day and his request was refused. The witness further indicated that the Applicant left the Hospital without approval and as result acted irresponsibly and neglected his duties. The witness stated that the Applicant's conduct had put the life of the anaesthetised patient in danger. She had to move around to find a replacement and ensure that the sick patient was adequately attended to.
- [17] Under cross-examination the Respondent's witness confirmed that the Applicant acted in a very negligent way by leaving his workplace without authority and his behaviour and rudeness was totally unacceptable.
- [18] Mrs **Grace Moselane** testified under oath that she is the former Assistant Director-Theatre & CSSD Services based in Tshepong Hospital, presently retired. The witness stated that on the 15 July 2015 she realised that the Applicant was late and wanted to see him regarding his frequent lateness. The witness stated that the Applicant shouted at her without even greeting her. He said "I told you I will be late", the witness indicated that the Applicant started attacking her verbally and she was shaking thinking that she will be beaten. The witness further indicated that she was told by Ms Myeni that the Applicant has left the Hospital without permission and he neglected his duties.
- [19] Under cross-examination the Respondent's witness confirmed that the Applicant was very aggressive and rude towards her and Dr BJ who had an office just next to hers came to her rescue.
- [20] Mrs **Ntombizodwa Lindiwe** testified under oath that she is the Registered Nurse in the employ of the Respondent based in Klerksdorp, Tshepong Hospital. The witness indicated that the Applicant left an anesthetised patient unattended hence she was asked to cover for him.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

- [21] In terms of Section 186(2) (b) of the LRA, suspension fall within the meaning of an “unfair labour practise”. section 186(2) provides that; *“unfair labour practice” means an unfair act or omission that arises between an employer and employee involving – (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee*”. The onus is on the Applicant to prove, on a balance of probabilities, an unfair act or omission on the part of the Respondent that gives rise to an unfair labour practice.
- [22] The dispute was referred as an allegation of an unfair labour practice in relation to suspension. I am therefore required to determine whether the Respondent’s conduct was fair or unfair in suspending the Applicant for three months without pay. It is my belief that to succeed in such a claim, the Applicant must show that the Respondent’s conduct was arbitrary, capricious and therefore unfair.
- [23] The Respondent’s witnesses were consistent throughout and their evidence corroborated one another. I accept the Applicant’s concession that he displayed insolent conduct towards her supervisor and was guilty as charged. The applicant failed to advance reasons or compelling evidence that proves that the chairperson of the hearing failed to apply his mind to the facts before him. I am therefore not convinced that the sanction meted out by the Respondent was wrong and inappropriate.
- [24] The Applicant confirmed that he exchanged some unpleasant words with his manager and was very angry and rude towards her. The applicant conceded that he was rude and disrespectful towards his superior who was also an elderly person. It is my finding that this kind of conduct by the Applicant was totally unacceptable and it must be discouraged. The Applicant indicated that it was not his duty on the day to look after a patient who was anaesthetised. The Applicant stated that it was the duty of a doctor to do so. I reject the Applicant’s argument that it was not his duty to look after a sick patient. The Applicant was presented with a rooster a day before the incident, same rooster indicated all his responsibilities and duties the following day. I am therefore convinced that the Applicant was aware that on the 02 of July 2015 he was required to look after the anaesthetised patient. I accept the Respondent’s argument that the Applicant left his workplace without approval, as a result neglected his duties on the day. In view of the above, I

am therefore persuaded by the Respondent submission that the Applicant was guilty of the charges levelled against him and the sanction of 3 months without pay was an appropriate sanction under the circumstances.

[25] It is therefore my finding that the Respondent acted fairly and did not commit an unfair labour practice concerning suspension.

[26] In **Aries v CCMA & others (2006) 27 ILJ 2324 (LC)** the Court held that *“there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. The court held further that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner”*.

[27] In view of the above judgement, and the reasons mentioned, I am inclined not to interfere with the decision of the Respondent, that is, to suspend the Applicant for three months without pay.

[28] In light of the above, I am convinced that the decision taken by the Respondent was the correct one. It is further my finding that the Applicant failed to discharge his onus to prove that the Respondent acted unfairly in suspending him on a balance of probabilities.

[29] I therefore make the following award:

**AWARD**

[30] The Applicant has not discharged the onus to show that the Respondent has committed an unfair labour practice in relation to suspension.

[31] The Applicant is not entitled to any relief.

[32] The application is dismissed.



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**PHSDSBC PART-TIME PANELLIST: PAUL PHUNDU**