



ARBITRATION AWARD

Case No: PSHS676-16/17

Commissioner: T ERASMUS

Date of Award: 1 December 2016

In the matter between:

PSA obo DE WET, J

(Union/Applicant)

and

DEPARTMENT OF HEALTH- WESTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard at the offices of The Boardroom, Worcester Hospital, Worcester on 16 November 2016. The matter was postponed as a part head matter to 23 November 2016. The Applicant was represented by Mr B Jacobs from PSA, whilst the Respondent was represented by Mr A Mniki, Labour Relations Officer at Respondent.

ISSUE TO BE DECIDED

2. I must decide whether Applicant was subjected to an unfair labour practice with regards to disciplinary action short of dismissal in terms of section 186(2)(b).

APPLICANT'S OPENING STATEMENT

3. Applicant received a written warning with respect to misconduct. Applicant is unhappy with the written warning. Applicant was charged with:
 1. demonstrated insolence towards management
 2. conduct is inappropriate
 3. consulted or spoken to fellow colleagues about top management and asked if anybody else shares the same view
 4. CEO'S name slandered in the meeting
 5. coercing people to gang up against the CEO
4. Applicant stated that it was still part of a consultation and he was not aggrieved at that time, it would have formed a collective grievance. Applicant pleaded not guilty to the charges, therefore both the sanction and finding of guilty is in dispute. Procedural fairness is also in dispute.

RESPONDENT'S OPENING STATEMENT

5. Respondent believes the mere fact that Applicant called his colleagues to a meeting to find out if they have anything against the CEO's management style. He invited them to give input. These people are witnesses and they felt uncomfortable about Applicant's actions. Applicant should have lodged a grievance instead. The Applicant's colleagues felt incited or influenced to join him. Applicant's behaviour was inappropriate. Applicant was subjected to an *audi* and management felt that it was appropriate to discipline the Applicant.

APPLICANT'S CASE

6. **JACQUES DE WET testified in support of his own case (hereinafter referred to as "Applicant")**
7. Applicant testified that he received a written warning evidenced on page 17 of bundle A. Reference was also made to page 15 of bundle A, which is Applicant's *audi alteram partem*. Applicant stated that he knew that he was about to have a telephonic conversation with Genesis and that he simply wanted to ask his colleagues if they wanted to join him in a discussion. Applicant was not aggrieved at that stage and was awaiting a telephone call from Annamarie Basson from Genesis. Applicant

testified that he personally experienced and witnessed things at the Worcester Hospital with top management that was unsatisfactory. He wanted to bring it Genses's attention. He asked for protection by his union and he understood that the CEO, Ms Vosloo, would be allowed to respond.

8. According to Applicant an informal discussion took place in his office and with the following colleagues present:
 - Marisa Bezuidenhout, Physio Therapy
 - Elinda September, Radiology
 - Marilise Mathia, Dietitian
 - Corne Conradie – Occupational Therapy
 - The rest were on training or on leave.

9. According to Applicant none of his colleagues informed him that they were uncomfortable with the discussions. The discussion dealt with concerns he had with management. He ensured his colleagues that he would not hold it against them if they did not want to join him. Applicant testified that Elinda wished him well and said she understood that he had a few hard years behind him with management and that she understood why he was doing what he did. According to Applicant a few people gave him their names to be forwarded to head office, as long as they are protected.

10. Applicant confirmed that he responded to the *audi alteram partem*. He was called in by Vosloo's PA and she told him that Vosloo wanted to see him in the office. Laetitia from Labour Relations told him to sign for the *audi* and that he did not have to respond immediately. He was granted three days to respond. He pointed out to her that it should be five days and he was granted an extension of five days to respond. According to Applicant he was not granted an opportunity to read the document before signing same. Applicant was not given an explanation before he received the *audi*.

11. Applicant testified that Vosloo called his colleagues to her office whilst he was on leave in the presence of the Labour Relations officer. Apparently Vosloo was very angry. She wanted to know what their problems were and whether they were incited to say negative things about her.

12. Applicant testified that Vosloo could have called him in first to find out what was going on. Vosloo decided that he was guilty of something without establishing his side of the story. Applicant testified that if Vosloo had called him in, he would have addressed the matters with her which he addressed

before, but she ignored them, that is why he went to head office. Applicant received an *audi* on 18 July 2016 and a written warning was issued on 29 July 2016, whilst Vosloo signed the written warning on 28 July 2016.

13. He received a request from Vosloo that she wanted to see him in her office urgently. He ran into Laetitia from Labour Relations in the passage and she said she did not know what the outcome of the *audi* was. He took Sister Abigail Phillips with as a witness when he received the written warning. She gave him the outcome without any discussion and Vosloo reminded him of his right to appeal. According to Applicant, the written warning is similar to the *audi*. Applicant continued with his duties as normal. The communication with Vosloo has been strained since, although he acted in good faith. Applicant confirmed that he did not break any rules, nor did he coerced or manipulate colleagues. He made it very clear to his colleagues that everybody chooses to deal with the matter as they chose to do. Applicant feels that the sanction and the procedure were unfair. He would like the written warning to be removed from his record, valid for six months.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

14. According to Applicant he was not aware that any of his colleagues were uncomfortable with the meeting. It was put to Applicant that it is not true, as Elinda will testify that she indicated to Applicant that she does not have a problem with the CEO and that she does not want to be part of the process. Applicant responded that Elinda said that she did not want to give her name as she did not feel it necessary, as a new radiology head had been appointed. She did not foresee any problems in the future, as she would no longer have to report to Vosloo anymore. Applicant also stated that he did not want to disclose his colleagues' names in order to protect them. According to Applicant he did not break any rules. Reference was made to page 4 of bundle B, C3.4, the Code of Conduct. It was put to Applicant that he did not follow the appropriate channels. Applicant responded that the CEO, Vosloo, ignored his complaint for two years, but he was not aggrieved at the time and he did not incite his colleagues to join him in a grievance either. It was put the Applicant that the appropriate channel would be to lodge a grievance and not to call his colleagues to discuss the CEO. Applicant responded that he asked them whether they were going through the same thing, although he was not aggrieved at the time. He was looking for a meaningful discussion with head office. It was put to Applicant that if he had a problem with management it would be appropriate to follow a grievance. Applicant responded that it would be the only way for employees to lodge a collective grievance. It was put to Applicant that he influenced other staff members to complain about the CEO, which he denied. It

was put to Applicant that he indicated to his colleagues that most of the staff is unhappy with the CEO's management style. Applicant stated that he could not remember that. It was put to Applicant that Respondent's witnesses will testify that they were uncomfortable with the meeting he called, which he denied.

THE FOLLOWING ENSUED FROM RE-EXAMINATION:

15. Applicant stated that as he was not aggrieved at the time, C3.4 of Code of Conduct is not applicable. Applicant approached Genesis as he was concerned about the way in which Vosloo dealt with management issues. He wanted someone higher up and outside the institution to consider the matter. Basson stated that they would not entertain the matter unless he lodged a grievance, which he then did. He referred the matter to Vosloo's supervisor.

RESPONDENT'S CASE

16. **ELINDI MALCHEA DREYDEN testified on behalf of Respondent (hereinafter referred to as Dryden")**
17. Dryden testified that Applicant phoned her and asked her to come to his office. She thought it had something to do with his recent Hong Kong vacation. On arrival he informed them that he was busy meeting with head office about Vosloo's management's style. He gave them an opportunity to tell him how they felt about Vosloo's management style and offered to speak on their behalf. Reference was made to page 11 of bundle B. Dryden confirmed that she wrote the letter in question. There was a meeting held in Vosloo's office. She called each of them to her office separately and asked them whether they had any problems with her management style. Dryden stated the following on page 11:

"Ek was gebel, ek was daar en ek het nie geweet waarom dit gaan nie. Ek het gedog ek gaan Hong Kong pics kyk. Ek voel as ek 'n probleem het, sal ek dit met Mevrouw uitsort en dit is wat ek gesê het. Het geen probleem met Mev Elbie se styl nie.

I did not want to be involved in any plots against Mrs Vosloo."

18. Dryden confirmed that she was aware that Applicant and Vosloo had a history. She did not want to get involved in their issues. Just as they were leaving, Applicant told them not to discuss the meeting

with anyone else, it made her uncomfortable. Applicant said that if they spoke about the meeting it would stop him from having a fair hearing. Applicant told them that there are other staff members who are unhappy with Vosloo's management style. Dryden informed Applicant that if she had a problem with Vosloo she would sort it out with Vosloo herself.

19. Applicant informed them that this was an opportunity for all of them to speak up; he would speak on their behalf. Dryden spoke on behalf of Marissa and said that she was not there at the time, so she does not have an issue. Dryden confirmed that she felt uncomfortable about the process and felt really strongly about the fact that she did not want to get involved. She confirmed that they worked together in a team as allies, but yet she did not feel uncomfortable when Applicant initially called them in, but when she heard what the purpose of the meeting was, she felt uncomfortable.
20. Dryden confirmed that if she was in Applicant's position she would not even consider lodging a grievance, she would discuss the matter with Vosloo directly. She made it clear to Applicant that she did not want to get involved and then left his office.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

21. It was put to Dryden that she testified that when the Applicant called them to his office they were an allied team. She confirmed that there was a level of trust and camaraderie. She thought that the meeting was about Applicant's Hong Kong trip. She only felt uncomfortable once he told them what the purpose of the meeting was. She told him at the end, after listening to him, that she did not want to get involved and that was her way of telling him that she was uncomfortable. She was caught unawares therefore she did not tell him that she was uncomfortable during the course of the meeting. Dryden and Marissa were of the first to leave the meeting. She specifically told him not to speak on behalf of her or her department. She left Applicant's office together with Marissa and they left two of their colleagues behind.
22. Applicant wanted to forward names to head office. He told them that he knew that some of them might be unhappy with Vosloo's management style and he could speak on their behalf. Reference was made to page 11 of bundle B. Laetitia came into the meeting. Vosloo already had a good idea what was going on.

23. **MARISSA EVETTE BEZUIDENHOUT testified on behalf of Respondent (hereinafter referred to as “Bezuidenhout”)**
24. Bezuidenhout testified she was in a meeting with the Applicant as per page 9 of bundle B. She wrote a letter confirming the meeting. She drafted a letter to state what happened and to confirm that they did not want to be associated with what Applicant was busy with. She felt uncomfortable from the very beginning when he started talking. She was afraid that it might create an impression that she agreed with the Applicant by the mere fact that she was in his office during the meeting. He said that he was going to speak on behalf of all of them that made her uncomfortable. Bezuidenhout stated that she did not have any problems with Vosloo’s management style, since she started working for Respondent during 2014. According to Applicant there were a lot of people in the hospital who had problems with Vosloo’s management style. She believes the mere fact that Applicant called them to a meeting in his office and told them that they have a platform to speak was in fact an encouragement to act or to talk against Vosloo. She believes that it was wrong for Applicant to call them in to the office. When he started talking, she kept quiet. Dryden told Applicant that he must leave her alone because she did not know what was going on, she was not employed at the hospital at the time that Applicant was referring to. It was not a formal meeting. He also asked them not to share the meeting with anyone else as it would jeopardize what he was busy with. She is unaware of what was said after they left, because she left together with Dryden.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

25. She drafted the letter evidenced on page 9 where she clearly stated that she did not want to get involved and that she did not have any problems with Vosloo’s management style.
26. The letter evidenced on page 9 of bundle B was handed to the Labour Relations officer. Applicant also informed them that he wanted to speak on their behalf. She was asked whether she had an opportunity to object during the meeting. Bezuidenhout responded that she did not speak at all during the meeting and she was scared to say anything in fear of being judged. She felt that it was unfair of Applicant to include them. The issues they had with Vosloo in the past were resolved. She stated that she did not have any issues with Vosloo. The letter was written by both herself and Dryden, therefore the issues in the past were those that Dryden would have referred to and not her own. The meeting took place on 6 June 2016, whilst Bezuidenhout wrote the letter evidenced on page 9 of bundle B on 9 June 2016.

27. Bezuidenhout was challenged on her working relationship with Applicant. She replied that she does not really have a working relationship with him as they work in different departments. The only reason why she knew about the meeting was because Applicant came to her office and asked her if she could go to his office at 08:30. She responded that she would have to do ward rounds and may only be able to go to his office after 08:30.

ELIZABETH VOSLOO testified on behalf of Respondent (hereinafter referred to as “Vosloo”)

28. Vosloo testified that she is the Chief Executive Officer at the Worcester Hospital. The Applicant is employed as an audiologist, 80% of his work includes audiology and 20% administration. Vosloo testified that after she started working in 2013 the Respondent did not re-appoint a medical manager and since then Applicant reported to her.
29. Vosloo referred to the written warning evidenced on page 1 of bundle B. Vosloo testified that she received a complaint from Applicant’s colleagues; they wanted to be distanced from a specific meeting to which he called them. Vosloo subjected Applicant to an *audi* and after consideration of the *audi* evidenced on pages 4 and 5 of bundle B, Applicant was served with a written warning. She explained to him that he had an opportunity to respond so that she can make a decision. He responded via e-mail as per page 3 of bundle B. After she received the response she made sure that everything could be proved. The written warning was not exactly the same as all the points on the *audi*. Applicant was called in together with Ms Phillips to go through the *audi*. Vosloo explained to him that he may appeal, which he did. This is not the first incident, there were grievances against the Applicant in the past, and there were mediations sessions, consultations and recommendations in the past. The seriousness of the transgression, the cause of disharmony and influencing of other peoples’ perceptions and service delivery, were facts that the considered in her sanction. Vosloo testified that if Applicant has a problem with her as supervisor, he should make an appointment with her to discuss same; where after the route of a grievance can be followed. Each employee should work on their own interpersonal relationships in the workplace. It is unfair to influence other people.
30. Vosloo confirms that if someone has an issue with her the issue should be brought to the table. He already referred the issue to head office and was involving other people, which is against protocol. Applicant wanted to speak on behalf of the entire Allied Health Group. He is not their supervisor or a shop steward; therefore he did not have the authority to do so. Vosloo testified that she served

Applicant with a written warning and not counselling and in terms of the Code of Conduct and the serious nature of the transgressions a written warning was the correct sanction.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

31. Applicant started reporting to Vosloo since 2014. They mostly communicated *via* e-mail. According to Vosloo their working relationship was good from her side when he started reporting to her. The communication was also good. Applicant found it difficult to report to her from day one. They had a discussion and she invited him to tell her exactly what his problem was in reporting to her, which he had not done to date. The written warning was the correct process that had been followed. Applicant had been consulted before, mediated and advised to go to ICAS for interpersonal relationships. There were two previous grievances against the Applicant, the one was withdrawn based on the fact that the parties go to Mediation and that Applicant must also go to ICAS. The Applicant was served with an *audi* as per page 15 of bundle A. It was put to Vosloo that during Applicant's testimony he testified that he made several attempts to engage Vosloo in matters that are of concern. This was denied by Vosloo and she challenged Applicant to show proof of such attempts as she is not aware thereof.
32. It was put to Vosloo that Applicant testified that he was asked to go to her office, in the presence of Laetitia from the Human Resources Department. He asked for an extension of the time period. Vosloo confirmed that he was initially granted three days to prepare his response for the *audi*. After Applicant requested five days to respond to the *audi* he was granted an extension to five days. Applicant stated that his workload was too high and that he wanted to consult with his union, where after the time period was corrected. It was put to Vosloo that Applicant testified that he was not informed of the contents of the *audi*; it was just handed to him. Vosloo disagreed with this and stated that she also applied her mind to his response. She signed the written warning on 28 July 2016 and Applicant was served with same on 29 July 2016. She did not engage with the Applicant after receipt of his response. She would have done so if there was anything lacking, but Applicant responded *via* e-mail and he Bcc'd a number of people. She did not contact Applicant prior to making her finding as there was no need to do so.
33. There were five issues from the Code of Conduct mentioned there. Procedurally she is not required to hear evidence when dealing with an *audi*. He did not address the issues related to the Code of Conduct. The response is evidenced on page 23 of bundle B. He did not deal with all the charges in

the *audi*. Vosloo was challenged why she did not engage with Applicant with regards to the fact that he did not deal with all the evidence. He had five days to apply his mind and to answer what is in the *audi*. Applicant hardly responded to any of the allegations in the *audi*, instead he stated that he was busy with higher structures. Vosloo was challenged on whether it was procedurally correct to hand an *audi* to Applicant without the presence of his union representative. She stated there is no problem with that. He is entitled to union representation in handling the *audi*. If the *audi* was issued to the union and he did not know that he should have five days to respond, it would have been unfair, which was not the case. Vosloo confirmed that the labour relations officer was impartial. It was put to Vosloo that Applicant was not afforded a proper opportunity to respond. Vosloo disagreed with this.

34. Reference was made to page 17 of bundle A, being the written warning and to page 25, being an e-mail referring to where Applicant responded that he would be in her office in twenty minutes time after attending to a patient on which date he was served with a written warning evidenced on page 17. Vosloo confirmed that she went through the written warning with Applicant, but she did not allow him to argue the outcome. It was an informal process, there was no need to argue or prove his case. The Applicant lodged an appeal with Dr Karrie, but she did not see the document. It was put to her that during Dryden's testimony; she mentioned that the Allied Health meeting, a question was put to her that if she had a problem with the meeting she could inform them. Vosloo testified that she informed the employees that if they have an issue that cannot be discussed in open meetings they can come and see her in private, if there is anything that is uncomfortable. In general the working relationship between the staff in the hospital is excellent and there must be respect. Vosloo testified that she tried to meet with Applicant to discuss matters with him, but he walked out and said he is not prepared to discuss matters with her without his union representative. It was put to Vosloo that the reason why the matter has been referred to Arbitration is due to the clash between herself and Applicant. Vosloo responded that she was very disappointed to hear it in a meeting like this and she disagreed with the reason as they are professional and should be there to do their work and they should all work together. If Applicant has a personal problem with her he must define it, which he had not done to date, as they are here to attend to service delivery to patients.

APPLICANT'S CLOSING ARGUMENT

35. According to Applicant, the process was procedurally flawed. Applicant stated under oath what happened. He would have been forced to reply in the time period if he did not contest it. Applicant's meeting with his colleagues was an informal meeting and nobody was coerced to team up with him at

all. Nobody indicated in the meeting that they were uncomfortable. They only voiced their discomfort after the meeting, after they were called in one by one by Vosloo. Applicant approached Genesis at head office. Genesis told Applicant he had to lodge a grievance before they could deal with the problem. He did not have a grievance at the time. He was exhausting all avenues available to him. The institution did not suffer any disharmony or lack of service delivery because of Applicant's conduct. Nowhere is it stated that Applicant's performance lacked or that of his colleagues or that there was a problem with trust. The statements of Dryden and Bezuidenhout were read into the record. It was never put to them under cross-examination. Even in Vosloo's testimony- it shows that the employer did not even engage with Applicant again, although he did not give a full response to the *audi*. Respondent did not apply their mind in opposing a sanction of a written warning. The written warning must be withdrawn and an apology extended to the Applicant.

RESPONDENT'S CLOSING ARGUMENT

37. The Disciplinary Code and Procedure was not challenged by Applicant. *Audi* letter was issued and nowhere does it state in the Code that you have to be represented when served with an *Audi*. Applicant could consult with the union on receipt of the *Audi*. Applicant was given an opportunity within the informal process to state his side of the story. It is up to the Applicant to state in his response whatever he wanted to and he may consult with his union. There was no obligation on the union if he decided not to answer all the allegations in the *Audi*. Applicant did not deny the contents of the *Audi*, he just said in his opinion he did not influence or incite people. His response was enough for the CEO to know what Applicant responded on. It is an informal procedure and does not specify how many days a person must be given to respond. Vosloo agreed to extend the responding time to five days. Applicant had appropriate channels to air his grievance. There is a procedure for employees to follow and Respondent cannot allow an employee to deal with issues as he chooses. Applicant said he was not aggrieved, but he said at the meeting with his colleagues that he was unhappy. He called his colleagues and imposed his opinion on them. If they did not have a problem with Vosloo's management style, it is improper to impose his opinion on them. If Applicant had a problem with management, he could follow the correct avenues. His conduct had the potential of causing disharmony. Bezuidenhout is a new staff member and he was trying to influence her opinion of the CEO by his conduct. Both witnesses confirmed that they were uncomfortable with what Applicant did. The witnesses indicated that Applicant told them that they must not tell anyone what was discussed with them. The inference can be drawn that his conduct was improper. He has a right to lodge any grievances. A written warning is a corrective measure and the CEO had to set a standard for all employees, so that the employees

knew how to deal with all the matters. There are rules. The written warning was an appropriate sanction. He infringed the Code of Conduct and the decision to discipline him and issue him with a written warning was fair.

APPLICANT'S REPLICATION

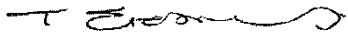
38. An aggrieved person is someone who has tangible evidence, but there are a lot of this people who are unhappy but it does not necessarily amount to a grievance. The grievance procedure is only followed after all other avenues have been exhausted.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

39. It is common cause that Applicant initiated a meeting in his office with his colleagues without informing them of the purpose of the meeting, These colleagues form part of the allied health workers and usually support each other, it is furthermore common cause that Applicant informed his colleagues that he referred the issues he has with the CEO, Ms Volsoo, to head office. He invited his colleagues to voice any concerns they might have with Vosloo' s management style and that he offered to speak on their behalf, had they wished him to do so.
40. None of Applicant's colleagues supported his referral of a dispute to head office on their behalf and they made it clear to him that they did not share his sentiments about Vosloo's management style. Both Dryden and Bezuidenhout testified that they would take any issues they may develop with Vosloo up with her personally. Dryden went as far to state, that she wouldn't even consider lodging a grievance. Dryden was aware that Applicant and Vosloo had differences in the past..Both Dryden and Bezuidenhout testified that they wanted no part in the action that Applicant had undertaken and that they felt uncomfortable with Applicant's effort to involve them in personal issues he had with Vosloo.
41. Applicant transgressed Rule C3 and C4 of the Respondent's disciplinary code. Applicant failed to follow the appropriate channels in airing his grievance, although Applicant was familiar with the contents of the Code of Conduct and was therefore guilty of an act of misconduct.

AWARD

42. I find that Applicant was appropriately disciplined and that the written warning was a fair sanction under the circumstances. I find that Applicant was not subjected to an unfair labour practice and Applicant is therefore not entitled to any relief.



COMMISSIONER: T ERASMUS