



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Arbitrator: **Mr. Anand Dorasamy**

Case No.: **PSHS786-14/15**

Date of Award: **05 MAY 2017**

In the matter between:

**NUPSAW OBO MDANDA ZM**

(Union / Applicant)

and

**DEPARTMENT OF HEALTH- KWAZULU NATAL**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. Mr M M Zweni of NUPSAW represented the applicant and Mr T D Ntshangase represented the respondent. This dispute relates to an allegation of unfair dismissal.

The arbitration proceedings commenced on the 28 March 2017 continued and set down for the 25 and 26 April 2017. After the evidence was tendered the parties agreed to submit written closing arguments on the 3 May 2017.

## ISSUE TO BE DECIDED

2. The issue to be decided was whether the dismissal of the applicant was procedurally and substantively fair. Should I find in favour of the applicant I am to determine the appropriate relief.

## **BACKGROUND TO THE ISSUE**

3 The applicant faced three charges according to the charge sheet (bundle page 3) dated the 9 January 2014 and she was found guilty of charges 1 and 2 and dismissed after her appeal was unsuccessful. The misconduct charges preferred against the applicant for which she was found guilty are recorded as follows:-

It is alleged that you:

Charge 1(a)

On the night of the 28<sup>th</sup> October 2013 compromised the health status of the patients in ward 2 at FOSA TB Hospital by failing to give and also ensure that medication was given to the patients.

Charge 1 (b)

On the night of the 28<sup>th</sup> October 2013 at or near ward 2 FOSA TB Hospital refused to comply with a reasonable and lawful instruction from the night supervisor Professional Nurse N A Ndaba when she requested you on two separate occasions to administer/give the medication to the patients in ward 2.

4. The applicant challenges the procedural and substantive aspects of her dismissal and seeks retrospective re-instatement.
5. The respondent contends that the dismissal was procedurally and substantively fair and prays for the dismissal to be confirmed.

## **SURVEY OF EVIDENCE AND ARGUMENT**

The salient aspects of the party's evidence are recorded below:

### **RESPONDENT'S OPENING STATEMENT**

6. The Department will call four witnesses to show that it acted procedurally and substantively fairly when dealing with the applicant's misconduct. It prays that the dismissal stands.

### **APPLICANT'S OPENING STATEMENT**

7. Firstly the incident took place in 2013 and in terms of Resolution 1 of 2003 the process should have been prompt. The disciplinary hearing took place on the 5 February 2014. The presiding officer dealt with the issue but did not issue a Ruling but proceeded with the matter. The applicant prays for the matter to be dismissed.

## **RESPONDENT'S RESPONSE**

8. The preliminary issues were dealt with by the presiding officer and the hearing did not take long to start.
9. I noted that the offence took place on the 28 October 2013 and the investigations were completed in December 2013 and the applicant was charged on the 7 January 2014. The matter spanned the summer holidays and took into account that the presiding officer had dealt with the preliminary issues and that a long time had not elapse from the incident, completion of the investigation and the notice of set down of the disciplinary hearing and do not believe that the application for the dismissal of the matter should succeed and ruled that the matter proceed.

## **RESPONDENT'S EVIDENCE**

### **THUTHUKANI MADLALA**

The salient aspects of his testimony are recorded below.

10. He was the chairperson of the disciplinary hearing and did not work at FOSA Hospital and did not know the applicant before the hearing. She was the officer charged and was represented by Mr Molefe of NUPSAW.
11. The preliminary issues were presented and he ruled that the matter proceed. The report is a summary of the proceedings. He read the rights of the applicant and she was given an opportunity to state her side of the story.
12. He considered the evidence of the parties to ensure that there was procedural fairness and that the parties rights were taken into account. After considering the evidence he weighed the evidence and made his findings on a balance of probabilities and found her guilty of charges 1(a) and 1(b) and not on 1 (c).
13. On the substantive issues the Department was fair as both presented aggravating and mitigating circumstances that were taken into account together the case of Sidumo in the sanction.
14. The rule was broken and had been known by the applicant and the rule was applied consistently to other employees. The patient's life was at stake and the seriousness of the charge and he considered dismissal as the appropriate sanction.

Under cross examination he stated as follows:

15. He did not know any other employees in the section the applicant's worked. He does not know of other nurses that were charged for similar offences and did not know that the applicant was referred to EAP.
16. He did not record his Ruling on the preliminary issues in the report.

### **MAKHOSAZANE PRISCILLA NCUBE**

The salient aspects of her testimony are recorded below.

17. At the time of the incident she was employed at the FOSA Hospital and the applicant was her senior. On the day when she was leaving the hospital the applicant came on duty and she showed her the keys. At 19H00 sister Ndaba called her and asked about the keys and she told her that she left the keys at the ward and she was told that there were no keys and she asked to be put through to the ward. She spoke to Ms Maphumulo. The next day she came to work and found the gates locked and the patients were striking and did not allow her to get to the ward.
18. She was called to the matron's office and asked about the keys and she said that she left it in the ward. Thereafter sister Naidoo came and said that sister Mdanda (applicant) left the keys in the matron's office. The keys were for the medication locker and cupboards.
19. Medication is given to patients because they are sick and the TB patients to get well. She showed them the keys and where it was left. It was a new procedure. The patients were not given medication because there were no keys. She was upset because she left the keys in the ward.

Under cross examination she stated as follows:

20. She had given the applicant the day duty report.
21. She lived near the hospital and could have gone to the hospital if she took the keys home. The night shift nurses had to take medication out and give it to the patients.
22. The applicant refused to speak to her on the phone

### **MAUREEN NOBUHLE BUTHELEZI**

The salient aspects of her testimony are recorded below.

23. At the time she was working as the Ops Manager at FOSA Hospital and left the hospital at 16H00 on the day. At the time the trolley was broken. The next day the keys were found in the matron's office.
24. Sometimes they borrow medication from other wards. She lives five minutes from the hospital.

Under cross examination she stated as follows:

25. Sister Ndaba was aware of the changes and problem of the broken trolley. She knocks off at 18H00. Sister Ndaba was told to get somebody else to give the medication and she complied by sending staff nurse Subramania. The medication must be kept under lock.

## **APPLICANT'S CASE**

### **MDANDA ZANDI MANDY**

The salient aspects of her testimony are recorded below.

26. On that night she came late and did not see staff nurse Ncube at ward 2. She started working at FOSA Hospital in May 2007. The day duty staff receive medication and leave medication for the night staff and the keys are kept in the ward. It was the first time that the keys went missing. They had two types of TB patients, extreme drug resistant and multi drug resistant and the medication differs. At night the anti drug resistant patients get antibiotics.

27. The keys are handed over by the day shift to the night shift and the keys are kept in a drawer. She saw the other nurses from other wards to give the patients medication. The pharmacist Suraya said that the medication must be locked up and did not want people to borrow medication.

Under cross examination she stated as follows:

28. She did not meet sister Ncube but joked with her while she was waiting for her transport. Nurse Ncube did not give her a report and she did not know the reason for not getting a report. Sister Ndaba was in charge of the night staff. She did not ask sister Maphumulo about the report or keys and sister Maphumulo did not inform her about it.

29. She went to the trolley and phoned sister Ndaba but did not have airtime. Patients must get medication at 19H00 and it is her duty to give patients medication. She did not speak to nurse Ncube nor was she called to the phone.

30. The patient will be compromised if not given medication. The change in the medication procedure was done when she was on leave. She denies stopping patients from getting medication. She knows sister Naidoo but does not know where the keys were found. She left the drug keys in the matron's office. The drug keys are handled by her.

Everyone is lying but her and they are against her and she does not know about the relationship between her and the other employees.

### **CLOSING ARGUMENTS**

**The parties agreed to submit written closing arguments on the 3 May 2017. The parties submissions were considered when arriving at my decision.**

### **SURVEY OF EVIDENCE AND ARGUMENT**

31. The applicant was dismissed and the matter was set down for arbitration.

32. The applicant was dismissed and is seeking a finding that her dismissal was unfair. The respondent challenges the contention and seeks a decision that the dismissal be found to be fair and that the matter be dismissed.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

33. This matter was cited as an unfair dismissal dispute in terms of Section 191 of the LRA and the issue to be decided was whether the dismissal of the applicant was procedurally and substantively fair.
34. The applicant was found guilty of two charges and dismissed. She appealed but her appeal was dismissed.
35. I have taken cognizance of the decision in *Sweeney/ Transcash* [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitute a rehearing *de novo* on the merits. The award must accordingly be based on evidence led at the arbitration, not on the record of the disciplinary hearing.

Further an arbitration is a new hearing which means that the evidence concerning the reason for the dismissal is heard afresh before the arbitrator. The arbitrator must determine whether the dismissal is fair in the light of the evidence admitted at the arbitration.

The arbitrator is not merely reviewing the evidence considered by the employer when it decided to dismiss, to determine whether the employer acted fairly. This does not prevent the arbitrator from referring to any enquiry record in so far as it is admitted as evidence in the arbitration.

36. The Code of Good Practice: Dismissal promotes progressive discipline, it distinguishes between single acts of misconduct that may justify the sanction of dismissal and those that may do so cumulatively. The Code identifies gross dishonesty, wilful damage to property, endangering the safety of others, assault and gross insubordination as examples of what may constitute serious misconduct that may justify dismissal as a result of a single contravention.
37. In this matter it is clear from the documents submitted by the respondent and the evidence tendered that the following may be reasonably gleaned.

The applicant was given a notice to attend a disciplinary hearing, attended the hearing, and was found guilty and received the letter of dismissal and then appealed the decision but the sanction was upheld. She challenges the procedural and substantive aspects of her dismissal.

38. In terms of the guidance provided in the *Avril Elizabeth Home for the Mentally Handicapped v CCMA* as per A van Niekerk AJ the following is of importance:

Where there is no established procedure in the work place the standard required is the one referred to in the Code. This requires no more than the following:

- (a) The conduct of an investigation;

- (b) Notification to the employee of any allegations that may flow from that investigation; and
  - (c) An opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee; and
  - (d) Communication of the decision taken including the reason for the dismissal; and
  - (e) A reminder of rights to refer a dispute to the CCMA or to a bargaining council or to dispute resolution procedures established in terms of a collective agreement.
39. In deciding whether a procedure was fair commissioners should not adopt an overly technical approach and should bear in mind that the purpose of the recommended procedure is to provide an opportunity for dialogue and reflection regarding whether a fair reason for dismissal or some other sanction exists. The applicant was served with a notice to attend a hearing, attended the hearing, was found guilty of two charges she faced and was advised that the sanction was dismissal and she challenged her dismissal.
40. As a consequence of the above I do not believe that the employer had miss-conducted itself in respect of the procedural aspect of the dismissal. In any event the applicant's representative ought to be aware of the respondent's disciplinary policy and practice. The applicant was afforded the standard required in the Code of Good Practice. Therefore I determine that the procedural aspect of the dismissal to be fair.
41. I record that I have taken note of oral and documentary evidence and record the following for completeness and in determining this matter:
- Section 138 General provisions for arbitration proceedings
- (1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
  - (7) Within 14 days of the conclusion of the arbitration proceedings-
    - (a) the commissioner must issue an arbitration award with brief reasons, signed by the commissioner.
  - (10) The commissioner may make an order for the payment of costs according the requirements of law and fairness.....
42. The applicant was charged with three counts of misconduct and found guilty of two counts.
43. The question arises whether the above mentioned infractions/ misconduct are such that it warrants dismissal.
44. It is the prerogative of the employer to set standards that the employee is expected to render service.
45. The applicant was in charge of the ward and it was her responsibility that the patients received their medication by 19H00. Further she handed the keys to the matron's office the next day. The

question arises and she does not render an acceptable explanation for not asking sister Ncube about the report and the keys. Neither did she phone sister Ncube about the medication and keys or report. The patients were not given their medication in time or by the applicant.

46. The medication could have been sourced and was brought from another ward and given to the patients by other nurses and not the applicant. The applicant confirmed that she saw sister Subramania and another nurse come to the ward and give the patients medication but did not intervene and request the medication so that she may administer in. She was on duty was paid but did not perform her duty.
47. The applicant was a senior nurse on duty and much more was expected of her given that she was in charge of TB patients who were suffering from extreme strains of TB and that the timeous handing of medication was necessary for the recovery. She also confirmed that not giving patients medication would compromise their recovery.
48. There is no question of the guilt finding of the presiding officer because the applicant was on duty did not administer the medication to the patients as it was factually based therefore I am inclined to prefer the version of the respondent over the version of the applicant.
49. As a consequence of the above it is established that the respondent had discharged the onus that the dismissal of the applicant was substantively fair.
50. *The Code of Good Practice guides on fair reasons for Dismissal for Misconduct*  
*(4) Generally, it is not appropriate to dismiss an employee for first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Example of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.*
51. The applicant was found guilty on one of the listed grounds in the code of Good Practice endangering the safety of others (patients). As a senior employee she was expected to go the extra mile to make sure that patients who come to public hospitals must be treated properly and given medication timeously especially as TB is a disease that the Government is trying its best to control and that the disease is contagious and easily spread to others.
52. In respect of the reason for the dismissal, although this is best left to the discretion of the respondent and in this case, it proved the allegation against the applicant in respect of the transgression.
53. I determine that the sanction imposed by the respondent to be appropriate and deem it unnecessary to interfere with the sanction of dismissal.
54. As a consequence of the above I determine that the dismissal of the applicant was procedurally and substantively fair.

**AWARD**

56. I find that the applicant's dismissal was procedurally and substantively fair.
57. The application is dismissed.
58. This file should be closed.

A handwritten signature in cursive script, appearing to read 'a.S. Dorasamy', written in black ink.

Arbitrator: Anand Dorasamy