



**PHSDSBC**  
PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: **Bhekinhlanhla Stanley Mthethwa**

Case No: **PSHS85-17/18**

Date of Award: **31 July 2017**

In the matter between:

**NUPSAW obo Adeboye, OT**

(Union/ Applicant)

and

**Department of Health- Kwazulu Natal**

(Respondent)

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**Details of hearing and representation:**

1. The matter was scheduled for arbitration on 8 June 2017 and remained part heard; it was heard again on 6 July 2017 at Stanger Hospital in KwaDukuza. Mr C Ngubane, a trade union official from PSA represented Dr OT Adeboye (hereinafter referred to as the Applicant) and Mr VP Ndelu who is a Senior Human Resources Practitioner represented the Department of Health in KwaZulu/Natal (hereinafter referred to as the Respondent). The proceedings were digitally recorded.

2. Having presented their respective cases, parties agreed to submit heads of argument by 13 July 2017. I had also applied for extension to issue this award on 31 July 2017.

**Preliminary points:**

3. There were no preliminary points raised.

**Issue to be decided:**

4. I must decide whether or not the respondent committed “any unfair disciplinary action in issuing the applicant with a final written warning and suspended him for three months without pay”, as contemplated in section 186, (2), (b) of the Labour Relations Act 66 of 1995, (“the Act”), as amended read in conjunction with Resolution 1 of 2003 concluded at the Public Service Co-ordinating Bargaining Council (“the PSCBC”).

**Background to the issue:**

5. The applicant was employed as a Medical Officer since 1 March 2013. It was common cause that on 3 February 2016 at about 16h20 at the Main Gate of Stanger Hospital the applicant was found in possession of the patients’ file upon his car being searched by a security officer. However, it was in dispute whether or not the applicant had permission to be in possession of the said files. According to the applicant he had permission to be in possession of the patients file for the purposes of research. It was further alleged that on 4 February 2016 the applicant demonstrated insolent behaviour by threatening his supervisor, Dr Myint. According to the respondent the applicant threatened to fix Dr Myint and he wagged a finger at him. Subsequently, the applicant was charged and found guilty of these offences. He was then issued with a final written warning and suspended without pay for the period of 3 months.

6. The applicant was aggrieved about the disciplinary action taken against him; and he was of the view that the respondent's action, amounted to unfair labour practice. It was also averred on behalf of the applicant that he should have been only issued him with a final written warning; it was unjust and too excessive to suspend him without pay for the period of 3 months. The applicant then referred a dispute in terms of section 186 (2) (b) of the Act.
  
7. On the other hand, the respondent contended that the applicant had no permission to be in possession of the patients' file. The applicant was also convicted for insolent behaviour for threatening his supervisor; Dr Myint on 4 February 2016. The applicant further threatened to fix Dr Myint and wagged a finger at him. The applicant was found guilty on both accounts and he was issued with a final written warning and suspended for 3 months without pay. To this end the respondent contended that its own Disciplinary Code provides for such sanction. The respondent also contended that it has duly adopted progressive disciplinary measure in line with its Disciplinary Code in this instance; and there was nothing wrong in issuing the applicant with a final written warning and suspended him without pay. The respondent argued that this application should be dismissed.

### **Survey of evidence and argument**

8. All witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The respondent led evidence of Dr Tinmyo Myint and Dr Naleema Vidhanandh Lutchminarain. The applicant also testified. Their respective evidence may be summarised as follows:

## **Respondent's case:**

### **Testimony of Dr Tinmyo Myint:**

9. He was employed as a Specialist in the Family Medicine. He was the applicant's supervisor between the years 2012 and 2016. Thereafter, the applicant was transferred to Montobelo Hospital.
10. On 3 February 2016, the applicant took more than one-hour lunch break. On the day, the applicant extended his lunch break by 45 minutes. Other doctors complained after covering for the applicant during his absence. On 4 February 2016, he discussed the matter with the applicant. He then instructed the applicant to complete a leave form for the extended lunch break on 3 February 2016. The applicant then shouted at him and pointed at him. This incident happened in the presence of Dr Lutchminarain. During that incident the applicant's voice was very high and he was angry. He felt threatened by the applicant's conduct. The applicant then went out. The applicant came back for the second time and said he better watch out; he will fixed him up
11. It was not the first time that the applicant demonstrated such behaviour. Previously, he refused to sign performance appraisal report. The applicant repeatedly reported for duty late in the years 2014 and 2015. On 15 May 2015, he was issued with a final written for reporting late for duty. The applicant refused to sign that final written warning. On 3 August 2015, he was issued with a written warning for listening to music on his cellphone during consultation. There was also a complaint from patients, nurses and doctors that the applicant listens to high music during consultation. On 15 August 2015, he was issued with a final written warning for leaving a patient without permission.
12. On 3 February 2016, he took a patient's file without Medical Manager's authority. All doctors were inducted when they joined the hospital about the procedure of removing files from the hospital. For ethical reasons, it was not allowed to remove the files from the hospital. The file was regarded as a hospital property. There were also meetings where doctors would be informed that it was not allowed to remove files from the

hospital. Every Friday there was a Continuous Medical Education where all doctors would be informed that patient files could not be removed from the hospital, unless there was permission from the Medical Manager. There was also a requirement from Health Professional Council of South Africa (“HPCSA”) that health professionals should accumulate at least 30 points per annum for attending these sessions. At least 4 to 6 points should be on ethics. Amongst others; the HPCSA Ethics Rules provides that a patient file must be removed from the hospital with permission. If someone wants to take out a file s/he must obtain permission from the Medical Manager.

13. He was not aware that on 3 February 2016 the applicant was attending Accident and Emergency Department Lecture. It was not true that the seminar finished at 13h45. There was a policy that doctors would come back to their work stations at 13h00 even if the seminar or a workshop was still continuing.

**Testimony of Dr Naleema Vidhanandh Lutchminarain:**

14. She was the Head of the Department of Family Medicine. On 4 February 2016 Dr Myint asked the applicant to complete a leave form for the time he had taken. Dr Myint had explained the purpose of completing the leave form to the applicant. The applicant refused to complete a leave form and shouted at Dr Myint. The applicant said “you better watch out. He also pointed a finger to Dr Myint. The applicant left the office and came back. He further said, “you better watch out: I will fix you”. She was with Dr Myint when the incident occurred.
15. The applicant had a habit of reporting late for duty. She tried to speak to the applicant about his habit but he did not change his behaviour. At times, the applicant would call and say he was running late. The applicant would be told that he was not allowed to report late for duty but he would ignore the warning. On 14 November 2016, he addressed an email to the applicant due to his late coming. On 9 November 2016, he took 1 hour and 45 lunch break and she addressed the applicant through an email for this misdemeanour.

16. She was aware that the applicant required access to the patient files; however, she was not aware that the applicant was taking files out of the hospital. It was against the hospital policy to take the files out of the hospital. She did not authorise the applicant to take files out of the hospital.
17. On 29 May 2016, she issued the applicant with a written warning for late coming. She also issued the applicant with a written warning on 3 August 2015 for late coming. On 13 August 2015, she issued the applicant with a final written warning for deserting his post. In this instance, he had left the hospital at 14h30 without permission and he did not return to work for the whole day.
18. She was aware that on 3 February 2016 the applicant attended a workshop; however, he did not report that the workshop went beyond the schedule time.

#### **Applicant's case:**

#### **Testimony of Olusegun Taofeek Adeboye:**

19. He had permission to remove files from the hospital. Despite that he was found with the files within the premises of the hospital. He had the file for the purposes of his research.
20. On 4 February 2016, he was approached by Dr Myint and asked him to complete a leave form. Dr Myint did not explain why he should have completed a leave form. He then walked out of the office without saying a word. It was also not true that when he left the office he banged the door. When he came back for the second time; he politely asked Dr Myint why he wanted him to complete a leave form without any explanation. When he came back for the second time Dr Lutchminarain was not in the office. At the time Dr Myint was with Drs Shandu and Wager in the office.

21. It was not true that he said he would fix Dr Myint. He could not say that because he was a Pastor in a big church in town.
22. On 3 February 2016, he attended a seminar that was scheduled to commence at 12h00. However, the seminar did not commence in time due to technical problems; as such it proceeded until 13h30. He stayed behind because the topic under discussion was very important to him. This seminar was dealing with the chest pains. He did not report that he would be coming back late. Dr Myint should have asked him what happened because he was not a junior doctor.
23. It was not true that he pointed a finger at Dr Myint on 4 February 2016.
24. It was not fair that he was suspended for 3 months without pay. This has caused him serious financial prejudice in that he could not meet his monthly financial obligations.

**Analysis of evidence and argument:**

25. The point of departure in this case must be found in the provisions of Resolution 1 of 2003 concluded at the PSCBC, read in conjunction with the definition of unfair labour practice in the Act.
26. Resolution 1 of 2003 is regarded as the Disciplinary Code in the public service. The said Resolution is a collective agreement that is binding on the state as an employer (in this instance department of health) and its employees. Clause 7.4 of Resolution 1 of 2003 provides that if the chairperson finds that an employee has committed misconduct the chairperson must pronounce a sanction, depending on the nature of the case and the seriousness of the misconduct, employee's previous record and any mitigating or aggravating circumstances. The sanctions consist of: (i) counselling; (ii) a written warning; (iii) a final written warning; (iv) suspension without pay, for no longer than three months; (v) demotion; (vi) a combination of the above; or dismissal.

- (b) With the agreement of the employee, the chairperson may only impose the sanction of suspension without pay or demotion as an alternative to dismissal. If an employee is demoted, after a year she or he may apply for promotion without prejudice.
27. In my view, the Resolution gives the chairperson unfettered discretion to impose an appropriate sanction he deems fit. In this instance, the applicant was convicted for being found in unlawful possession of the patients' file. He was also convicted for insolent behaviour for threatening his supervisor; Dr Mint on 4 February 2016. I view these allegations serious to warrant harsher sanction; if found guilty. It is important and worth noting that the applicant conceded both in examination-in-chief and cross-examination that he was found in possession of these files and he failed to produce any permission to be in possession of these files.
28. In his plea explanation, the applicant stated he was found in possession of the patients' file within the respondent's premises. Therefore, he did not commit any offence because he was found within the premises of the respondent. This version must be rejected because had it not that the security officer searched the boot of his car he would have taken the patients' files out of the premises. The applicant's second defence that these files were of his family members must fail. The fact remains he had no permission to remove the files from the hospital premises. The applicant had only been given permission to access the patients' files for research purposes; he was never given permission to remove the files from the hospital. Accordingly, it goes without saying that he had no permission to be in possession of Yetunde Adeboye and Toluwani Adeboye files. As a result, he was in unlawful possession of those files.
29. Secondly, the applicant was convicted for insolent behaviour for threatening his supervisor; Dr Myint on 4 February 2016. In this regard Drs Myint and Lutchminarain testified that on 4 February 2016 the applicant refused to obey an

instruction from Dr Myint to complete a leave form for the extended lunch break he took on 3 February 2016. The applicant then shouted at him and pointed a finger at him in the presence of other colleagues. The applicant further said he better watch out; he will fixed him up.

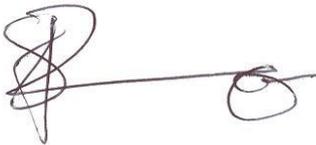
30. As much as the applicant disputed this version; however, his denial was not convincing. Firstly, the applicant disputed that Dr Lutchminarain was present when the incident happened. According to the applicant it was Drs Weger and Shandu that were present. It is important and worth noting that the name of Dr Shandu only came up for the first time during cross-examination. The applicant failed to give explanation as to why his representative did not put this version to any of the respondent witnesses. For these reasons, I reject the applicant's version in this regard. I therefore find on a balance of probabilities that the applicant threatened Dr Myint on 4 February 2016.
31. Section 186 (2) (b) of the Act sets out the meaning of unfair labour practice as follows, "Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving... – the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee"..
32. The onus to establish the existence of the unfair labour practice rests with the applicant. In **Early Bird Farms (Pty) Ltd v Mlambo (1997) 5 BLLR 541 (LAC)** it was held that "the test which should be applied is whether the version of the party who bears the onus of proof can be believed or not. This process involves comparing the version of both parties to determine which version is more probable".
33. I have already rejected the applicant's testimony. Accordingly, in light of the offences committed by the applicant and in consideration of the provisions of Resolution 1 of 2003 it cannot be said that issuing the applicant with a final written warning and suspending him without pay for 3 months was inappropriate sanction. The chairperson was well within his/her powers to issue the applicant with a final written warning and suspend him without pay in line with Resolution 1

of 2003. Therefore, without any shred of doubt the respondent has not committed any unfair labour practice for issuing the applicant with a final written warning and suspending him without pay for 3 months.

34. In my view, I should not easily interfere with the prerogative and the discretion that an employer has in disciplining its employees where necessary, and it can only be interfered with if by doing so, the conduct of the employer could be shown to have been "so grossly unreasonable as to warrant an inference that it failed to apply its mind'. Therefore, it remains the employer's right and duty to ensure that its employees adhere to reasonable standards of efficiency and conduct.
35. Accordingly, I cannot find any impropriety on the part of the respondent to issue the applicant with a final written warning and suspending him without pay for 3 months as provided for in Resolution 3 of 2003. It is trite that someone asked to arbitrate a dispute concerning the allegation of an alleged unfair disciplinary action cannot lightly interfere with the employer's prerogative or decision to invoke its Disciplinary Code, unless such discretion is exercised in a manner where it could be said that the decision cannot be justified for the arbitrator to interfere with. I find no justification to reach such a conclusion in this matter. The applicant bears the onus of proving that he had been unfairly charged and issued with a final written warning and suspended for 3 months without pay, and I find that he has not discharged that onus.

**Award:**

36. The dispute is accordingly determined as follows:
37. Dr OT Adeboye's application is dismissed and he is not entitled to any relief because the Respondent's conduct did not constitute an unfair labour practice.
38. The three (3) months suspension without pay and final written warning issued against Dr OT Adeboye should remain in force and its validity shall endure for the duration specified in Resolution 1 of 2003.
39. No order as to costs is made.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a horizontal line and a small circular flourish at the end.

**Commissioner: Bhekinhlanhla Stanley Mthethwa**