



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: **Kuvonakala Pretty Chavalala**

Case No: **PSHS996- 16/17**

Date of award: **18 May 2018**

In the matter between:

Fikiswa Ntshwati

(Union/ Applicant)

and

Department of Health- Gauteng

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

- [1] This is an arbitration award between Fikiswa Ntshwati (hereinafter referred to as the applicant) and Department of Health Gauteng (hereinafter referred to as the Respondent). The hearing concerned an unfair labour practice relating to a suspension and a sanction short of a disciplinary action referred in terms of section 186(2) of the Labour Relations Act 66 of 1995, as amended (the LRA). It was held at the S.G Laurens Nursing College, Pretoria on several occasions and it was finalised on the 23 April 2018.

- [2] The parties were supposed to exchange their heads of arguments in writing by close of business on 08 May 2018 and they both did so.
- [3] The applicant was represented by Mr Brits who had briefed Adv. Mteto. The respondent was represented by Ms Mametse.
- [4] The respondent submitted a bundle which was marked Bundle A. The applicant's bundle was marked Bundle B1 and later submitted a bundle which was marked B2
- [5] The hearing was held in English and it was digitally and manually recorded.

ISSUE TO BE DECIDED

- [6] I am required to determine whether or not the respondent has committed an unfair labour practice in relation to suspension and or sanction short of a dismissal towards the applicant, if yes, the appropriate remedy

BACKGROUND TO THE ISSUE

- [7] The Applicant is an employee of the respondent appointed as an assistant director: finance. She was engaged by the respondent effectively on the 09 December 1996.
- [8] The applicant was charged with two counts charges but was found guilty on charge 1 which was formulated as follows: -

CHARGE 1

It is alleged that you are guilty of a misconduct as listed in Annexure A of the Disciplinary Code and Procedure which reads as follows: "fails to carry out a lawful order or routine instruction without just a reasonable cause in that:

1.1 On the 06 august 2015, after Ms Robertson told you that Ms Mampane wants to see you, you failed to honour the instruction and you told her that Ms Mampane must send you an email.

1.2 On the 7th August 2015 you failed to assist Mr Chavalala to GRV invoices despite an instruction to that effect

[9] The following were common cause issues:

- (a) The applicant was found guilty on both counts of charge 1.
- (b) The sanction that was recommended at the disciplinary hearing was dismissal. The outcome was communicated to her on the 3rd August 2016.
- (c) The applicant lodged an a appeal against the sanction on the 05 August 2016.
- (d) On the 6th December 2016 the applicant received an outcome from the CEO and another from the MEC.
- (e) In terms of the appeal outcome from the ...the applicant was suspended without pay for a period of three months and issued with a final written warning.
- (f) On the 06 August 2015, Ms Robertson told the applicant that Ms Mampane wants to see the applicant.

[10] The following were the issues in dispute: -

- (a) That the applicant failed to honour an instruction is disputed. It is disputed that the applicant told Ms Robertson that she must tell Ms Mampane to send an email.
- (b) It is disputed that there was an instruction at all.

[11] The applicants sought upliftment of the suspension and repayment of her salary, and the removal of the final written warning

SURVEY OF THE EVIDENCE AND ARGUMENTS

The respondent's case

The respondent called 3 witnesses as follows:-

First witness

Ms Susana Maria Robertson who testified under oath as follows: -

- [12] She is appointed by the respondent and stationed at Steve Biko Academic Hospital as deputy director finance. She is in general responsible for revenue and expenditure. She has been at Steve Biko Academic Hospital for 37 years and deputy director finance for the past 10 years.
- [13] She knows the applicant as they work together. The applicant is an assistant director at finance. The applicant reports to her.
- [14] On the 29 July 2015, she was on sick leave. When she returned, Ms Mampane told her that she had called the applicant the previous day and told her that she will no longer be responsible for revenue anymore. The applicant would only be responsible for expenditure and a new assistant director had been appointed for revenue. She was not there when Ms Mampane had this talk with the applicant.
- [15] On the 06th August 2015, she got a call from Charlotte Hack at around 8:50. Charlotte Hack asked her why the applicant was calling her (Charlotte Hack) to a meeting if she is no longer supervising revenue section anymore. Charlotte Hack was a revenue supervisor and was no longer reporting to the applicant. When she heard the news, the witness went to Ms Mampane and told her that the applicant is having a meeting with revenue staff. Ms Mampane told the witness to go call her and tell her that she, Ms Mampane wants to see her. Ms Mampane told the witness to tell the revenue people to go back to their offices.

- [16] She then went to the applicant's office and found her busy with the meeting. She told the applicant that Ms Mampane wants to see her in her office. The applicant said that she will finish her meeting first. The witness told the revenue supervisor to go back to their offices. The witness went back to her office. Ms Mampane was at that time in the witness office. She told Ms Mampane that she called the applicant. They waited for about 5 minutes. Ms Mampane sent the witness to go and tell the applicant to come and see her in the office. The witness went back to the applicant's office, she told the applicant that Ms Mampane wants to see the applicant in her office. The applicant aggressively responded "I won't, she can send me an email".
- [17] She instructed the revenue supervisors to immediately leave the meeting. She waited for each of them to go to their office and she went to her office. Ms Mampane herself stood and went to the applicant's office, she did not go with the applicant so she does not know what transpired there.
- [18] On the 07 August 2015 she had a meeting with her supervisors. It had been agreed previously that the applicant would help Mr Chabalala with GRV. It was a standing point on the minutes that she will assist with the GRVs. The witness asked for a response from the applicant with regard to GRVs. The applicant said "why must I help with GRVs, the responsible person must do the GRVs". The witness indicated that Mr Chabalala was overworked. The applicant stated that she will help him if he can prove that he is overworked.
- [19] She testified under cross examination that the applicant has a temper and it had increasingly become difficult to supervise her since around 2010. She however never disciplined or lodged a grievance against the applicant.
- [20] She stated that the meeting the applicant held on the 06 August 2015 was unauthorised because she was no longer supervising revenue section. She confirmed

that it would be proper to hold a meeting in order to do a handover. She could not deny the version of the applicant that she was on that day doing a hand over.

[21] She confirmed that she did not have the minutes or the agenda of the meeting of the 7th August 2015. She confirmed that Mr Chavalala is at level 5 while the applicant is at level 10.

[22] She could not comment on the version of the applicant that the applicant made herself available to Ms Mampane after her 06 August 2015 meeting. She could not comment on whether or not the applicant's job description stated that she should assist with GRVs.

Second witness

Mr Martin Chabalala, the second witness for the respondent testified under oath as follows:

[23] He is employed by the respondent stationed at Steve Biko Academics Hospital as a financial Clerk. His responsibility in general is to do Good Receive Verification (GRV). In his directorate, he is the only one responsible for GRV of invoices.

[24] He has had a lot of backlog with GRVs. He started working on them in May 2014. He knows the applicant. He reports the Ms Angie Botha who reports directly to the applicant.

[25] At the time he was having a backlog, Ms Robertson and Ms Botha told him that the applicant will assist him with GRVs. The applicant did not assist him with GRVs but he won't say she refused. He gave her invoices and she said she will do it but later called him to take them as she was too busy and could not manage to do them. He then took invoices and GRV'd them.

[26] He confirmed that he was not at work on the 07 August 2015. He will not have a comment on the occurrences of the 07th August 2015. His supervisor is the one who knows what needs to be done even in his absence.

Third witness

Nomsa Veronica Mampane submitted under oath as follows:

[27] She is the Director: Finance and in general responsible for financial management and that includes accounts payable, revenue, budgeting and book-keeping. She started in that position on the 1st November 2013. She knows the applicant as the applicant is one of her subordinates.

[28] On the 06th August 2015, she was at work in her office having a web cycle report. The web cycle report is an exceptional report. It was full of invoices not being processed and subsequently suppliers not being paid within 30 days. As she was investigating the report she realised there were a lot of invoices not GRV'd. GRV is one of her responsibilities as finance directorate.

[29] She called the deputy director finance, Ms Robertson to explain to her why the GRV's are not being done. Ms Robertson said that is the applicant who can explain. She asked Ms Robertson to call the applicant because she was not far from where they were. The applicant was called but she refused. She asked Ms Robertson what the applicant was doing that was making her to refuse. Ms Robertson advised her that she is having a meeting and two officials from revenue are at that meeting.

[30] She still insisted that the applicant should come as her meeting is not as important as the witness meeting, the witness was in any case no longer dealing with revenue at that stage. The applicant insisted that she will not come and she never went till the end of the day.

[31] Ms Robertson told her that the applicant said she was having a handover and she, Ms Mampane wondered why because 25th July 2016, she called the applicant to her office and told her that the post of assistant director finance has been filled and the official would start on the 1st September 2015 and as from the 1st August 2015 the applicant would report in expenditure. She had specifically told the applicant that she will as from the 01 August 2016 not have any dealings with the revenue section. She should have done all the hand over as of the 31 July 2015. Even if the meeting was a scheduled meeting, the plan was supposed to change after the 31 July 2015.

[32] When the applicant refused, she felt very demeaned and angry that how can an employee be so full of insubordination and that employee feels its normal. It was not for the first time, there were occurrences before but that day the applicant acted as if she were a president and department is not supposed to be like that. On the same day, she went to her supervisor who is the CEO and reported the incident. The CEO advised her to charge the applicant. She happened to meet the applicant at the atrium and she called her and asked why she kept refusing to go to her office. The applicant became very arrogant, she was even shaking her head and speaking loudly at the atrium and people could hear her. The applicant even asked her if her hormones are getting the better of her. The witness was pregnant at the time. She realised that the applicant was not normal. She then went straight to her office and laid a charge of insubordination. She never laid a charge of insult because she was being professional.

[33] There had been an agreement that arose from a directorate meeting that the applicant would assist Mr Chabalala with GRV invoices. The applicant said that she would assist Mr Chabalala to GRV invoices. She sped up the process on ensuring that the applicant's profile on SAP is active because one cannot operate on SAP System if not activated.

- [34] On the 07th August 2015 Mr Chabalala was on leave so the applicant was the one to answer since she had volunteered that she would assist with GRV. She however could not give any further instructions on that day because she had laid a claim against the applicant on the 06 August 2015.
- [35] The applicant was formally charged and was found guilty. The sanction was a dismissal. The applicant appealed and MEC reduced it to three months with no pay and a final written warning. Her view is that the sanction is light. She views their trust relationship having broken as they cannot work together anymore. She disagrees to the suspension being uplifted because the applicant is guilty of the offence charged with.
- [36] The charges were formulated by the Investigation officer while she, the witness was on maternity. She agrees with charge 1.2 although she is aware that Mr Chabalala was not at work. According to her understanding, the charge speaks of what the applicant failed to do in the absence of Mr Chabalala.
- [37] She gave an instruction in one of the directorate meetings. She told Ms Robertson to tell applicant to do GRVs like she said she would. The charge may not be explaining all that transpired but it is according to her correct.
- [38] She stated that she ensured that applicant got training to do GRVs. It was put to her that the version of the applicant will be that the applicant got her User Id at end of August 2015 when she completed training. The applicant stated that she was informed by Ms Robertson that the applicant's profile was created in July 2015.
- [39] She confirmed that Mr Chabalala was at that time a level 5 employee and the applicant a level 10 employee.
- [40] She stated that she required and told Ms Robertson to ensure that GRV functions is included in the applicant's job description. The contract was changed because the

applicant was moving to expenditure and GRV are also mentioned in the contract. The contract was put to the witness who confirmed that the contract does not state anything about the GRVs. She stated that the contract that she was referring to and will state the GRVs is the performance management contract and job description.

- [41] She could not recall the applicant saying that he would assist with GRV's only of martin was overworked or that martin had utilised 20 of the 100 hours of overtime.
- [42] On the 05th August 2015, she sent her secretary Ms Cate Mojapelo to tell the applicant of the meeting of the 06 August 2015. When she did not arrive, the witness asked Ms Robertson to call her. As she was not present when Ms Robertson went to call the applicant, she could not deny that Ms Robertson never told the applicant to stop the meeting and go to her at that moment. She denied that she personally went to the applicant's office to call her.

THE APPLICANT'S CASE

The applicant Fikiswa Ntshwati, and the only witness for her case testified under oath as follows:

- [43] She is the applicant and was engaged by the respondent effectively from the 09 December 1996. She is still employed by the respondent and is in the finance directorate. She currently reports to Eunice Rambuda who is the new deputy director: finance. Ms Robertson who was the deputy director: finance has left employment on the 30 September 2017.
- [44] Her working relationship with Ms Mampane at this stage is cordial.
- [45] On the 06 August 2015 she had a scheduled meeting. She had been working with revenue section and Ms Mampane had informed her that she will no longer be working

with revenue but only expenditure. When this information was relayed to her, all revenue supervisors were not at work. She had to find time to do a proper handover.

- [46] In the beginning of each calendar year she used to schedule meetings for the whole year. In that year of 2015, she was having meetings with her subordinates every second Thursday. She had submitted the dates to her direct supervisor the deputy director of finance, Ms Robertson. The 06th of August 2015 was one of the dates wherein meeting was scheduled. She then decided to do a handover on that date because it was a pre-scheduled date.
- [47] Just as the meeting was starting Ms Robertson arrived by her door and told her that Ms Mampane wanted to see her. She told Ms Robertson that she is still busy with the meeting she would see Ms Mampane after. Ms Robertson then left, after some few minutes, Ms Mampane arrived at her office and told the applicant that she has called her. The applicant told her that she is still busy with a meeting and requested Ms Mampane to send her an email of her availability so she could go and see her
- [48] According to her, the request to send an email was not out of the ordinary since she was still busy with a meeting. It was also not for the first time that she made that kind of a request. Previously when there was an interview, she was scheduled for shortlisting and the time was coincided with Ms Mampane's time. She asked Ms Mampane to send an email with her available time so she could later come. Ms Mampane did so.
- [49] On the 06th August 2015, Ms Robertson went to her office again and told the supervisors to leave, she waited at the door until all the revenue supervisors had left.
- [50] It is not true that she told Ms Robertson to tell Ms Mampane to send an email; she actually said that to Ms Mampane herself. It is not true that Ms Mampane never went to her office on that day, she went and said to her in vernacular 'ndi ku bizile' meaning 'I have called you'.
- [51] On the 30 September 2015, she was given a yearly performance contract to sign, that contract did not state that she should assist with GRVs.

- [52] She confirms that she stated that she would assist Mr Chavalala with GRV. What she meant is that she would get him help. There are 6 clerks in expenditure and some of them work during peak periods so she would have them assist Mr Chabalala. There was no instruction given on the 07th August 2015 to assist Mr Chabalala. Mr Chabalala was not even present on that day.
- [53] She was not found guilty on charge 2. However, the final written warning that appears on page 39 of bundle B1 incorporates charge 2 and she believes that it is unfair to be warned on charge 2 while she was never found guilty on it.
- [54] She received two outcomes from the CEO and one from the Executive authority as appears on page 37, 38 and 39 of bundle B1. She does not know which is which. All she wants is that the whole finding be scraped and she goes back to her clean record.
- [55] After the events of the 06th August 2015, she was only charged on the 28th January 2016.
- [56] She confirmed that at times she performs functions which are not in the contract if they are reasonable and will assist in ensuring that the operations of finance will run smoothly and ensure a link between strategic management and people at operational level.
- [57] When asked if she could not tell that her being called was serious by virtue of Ms Mampane going to her she stated that at the workplace, one needs to be very clear and not expect that people will know of urgency despite it being communicated.
- [58] Ms Mampane never sent her an email like she had asked her to for her availability. Ms Mampane never objected to sending an email so the applicant assumed they were in agreement. She never received the email that is why she never went. She could not just stand and go to the director's office without an appointment. Even when she wants to see Ms Mampane she called the director's personal assistant to check availability of the director.
- [59] She considers her job description on Bundle B2 page 16 formal and authentic since she performance review is based on it

ANALYSIS OF THE EVIDENCE AND ARGUMENTS

- [60] In terms of section 185 of the Labour Relations Act, every employee has a right not to be subjected to unfair labour practice. Unfair Labour Practice has been defined in Section 186(2) as any unfair act or omission that arises between an employer and an employee involving inter alia an unfair conduct by the employer in relation to suspension or any other disciplinary action short of dismissal.
- [61] One of the primary objects of the LRA is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution including the right to fair labour practices enshrined in section 23(1).
- [62] Although the LRA is silent on the incidence of onus to prove an unfair labour practice, it is generally accepted that he or she who alleges an unfair labour practice (in other words the employee) must prove the allegation. It is trite that the employee bears the onus to prove that the conduct of the respondent was unfair. The onus of proof never shifts and remains fixed throughout the course of the proceedings. The evidentiary burden will from time to time shift between parties and their versions. Although it is usually practice that the party who bears the onus will bear the duty to begin it is at times more practicable not to follow the norm. The sequence of evidence as well does not alter the onus of proof.
- [63] It is common cause that the suspension that is the basis of the dispute before me is a punitive suspension and not precautionary in nature. The applicant was charged, found guilty and the sanction was dismissal. She appealed to the relevant body and the outcome in consideration of inter alia her years of service was a sanction short of a dismissal. This sanction short of a dismissal resulted in the applicant referring an unfair labour practice.

[64] It is clear that as a commissioner acting under s186 (2) (b), I cannot pronounce upon the fairness of dismissal as a sanction, my jurisdiction is confined to considering the fairness of the MEC's alternative sanction.

[65] I pause to state that I have noted the argument with regard to the "alleged three outcomes" that the applicant received following the lodgement of her appeal. My understanding is that there are two outcomes and both stated that a final written warning must also be issued against the applicant. The "third outcome is actually the final written warning to give effect to the outcomes that the applicant received. Why the CEO decided to pen down an outcome I would not know, the two outcomes slightly differ in that the outcome from the CEO does not speak of a psychiatric evaluation. Be that as it may, it is not the applicant's case that she was suspended twice or received two final written warnings. The two outcomes she received both resulted in the suspension and a sanction short of dismissal she now declared a dispute against. It is however common cause that the relevant body or office handling appeals is the MEC. It is common cause that there was an outcome from the MEC as well. The outcome from the MEC as the relevant body is the effective one and I will focus on it.

[66] Procedure that was followed was never an issued identified as an issue in dispute. The applicant however argued that the time that elapsed was too long before any form of action was taken against the applicant. Ms Mampane sated during cross examination that charges could only be laid after she came back from maternity. She left for maternity shortly after the incident. I find that the explanation for the delay is reasonable.

[67] I now turn to the question of substance.

[68] An employee would refer a dispute relating to the unfairness of disciplinary measures taken, based on the merits of their innocence in the alleged wrongdoing. A punitive suspension would be unfair if it was based on an invalid reason. It is against the background herein and in the paragraphs supra that I determined that the respondent bore the duty to begin.

[69] The applicant denied having committed the misconduct she was charged for. The assessment of whether the respondent committed an unfair labour practice in ordering a punitive suspension and a final written warning has to start on assessing whether or not the applicant committed the offence which resulted in the sanction. The respondent bore the evidentiary burden to prove that the misconduct was committed, after which the applicant would have to prove that the conduct of the respondent in issuing her with the sanction short of dismissal was unfair.

[70] The applicant was charged for an alleged insubordination.

[71] The rule to obey lawful instructions and to be respectful toward the employer or the employee's seniors is one of those rules that arise out of common law. It is so well established and known that it is not necessary to write or communicate them. The employee has a common-law duty to carry out all work instructions and obey all reasonable and lawful instructions issued by the employer and the employer reimburses the employee for carrying out these instructions. This forms the basis of the employer employee relationship. There is accordingly no reason why the employer should have to let employees dance to the beat of their own drums.

[72] It has been held by the courts that insubordination may exist in the form of verbal defiance, disrespect or defiance and refusal of the reasonable and lawful instructions. The offence of insubordination in the workplace has, in this regard, been described by our courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority.

[73] I will firstly deal with charge 1.1 of the charges. The applicant was charged of being insubordinate in that on the 06 august 2015, after Ms Robertson told her that Ms

Mampane wants to see her, she failed to honour the instruction and she told Ms Robertson that Ms Mampane must send her an email. It was common cause that Ms Robertson went to the applicant to tell her that Ms Mampane wants to see her, there was never any dispute about that. It became common cause through the evidence of Ms Robertson and the applicant that at the time when the applicant was told Ms Mampane wants to see her, the applicant was in a meeting.

[74] The dispute arises as to what transpired after the applicant was told by Ms Robertson that Ms Mampane wants to see her. According to Mr Robertson, she went for the first time to tell the applicant that Ms Mampane wants to see her and the applicant said she will finish her meeting first. She went for the second time and the applicant said she will come and that Ms Mampane can send her an email. According to Ms Mampane, she sent Ms Robertson twice and never herself went to the applicant's office. According to the applicant, Ms Robertson went to her office twice. The first time was to tell her that Ms Mampane is calling her and she responded by saying she is in a meeting. The second time was when Ms Robertson chucked the revenue supervisors out. The third time, the director arrived at her office to tell her that she has called her.

[75] From the above summary, it is common cause that when Ms Robertson went to the applicant for the first time, she told the applicant that Ms Mampane wants to see her and the applicant responded that she is in a meeting. It is common cause that Ms Robertson went to the applicants office again but the events of the second visit are in dispute. The basis of the charge is the alleged refusal by the applicant and connoting that the director must send her an email.

[76] The respondent's version is that the applicant specifically said she would not go to Ms Mampane and Ms Mampane can send her an email. The evidentiary burden was on the respondent to prove this allegation. It is probable that Ms Robertson only instructed the revenue supervisors to go out of the applicant's office. It is equally probable Ms Robertson could have told the applicant that Ms Mampane wants to see her again and the applicant refused requiring an email. The probabilities are balance according to

me. The party with the evidentiary burden should and could have done more in order to sway the probabilities in its favour. Both parties testified that the applicant was with supervisors in that meeting, none of them were called to testify as to the events that transpired then. No reason was given as to why these competent witnesses were not called. They are eye witnesses to the incident. Their evidence was crucial to the case.

[77] Ms Robertson testified that she was called by Charlotte Hack who enquired if the applicant should be having a meeting with the revenue people. She stated that she went to Ms Mampane and told her of the applicant's meeting with revenue supervisors and Ms Mampane asked her to call her. Ms Mampane testified that the reason she wanted to see the applicant was because of the web-cycle report. The reason given by witnesses as to why the applicant was required to see Ms Mampane even differs.

[78] Ms Robertson could not confirm that she had told the applicant to stop the meeting and immediately see Ms Mampane. It is my finding therefore that the respondent did not discharge the onus in proving the commission of the misconduct in charge 1.1. It was not proven that a clear instruction was given and subsequently that the applicant refused to carry out such instruction.

[79] I now turn to charge 1.2. The evidence of Ms Robertson was that the applicant stated in a supervisors meeting that she would not do GRVs; she would only assist if there was proof of backlog. Mr Chabalala testified that he could not say that the applicant refused to help him because she once took invoices to GRV but returned them as she was also having a lot of work. Mr Chabalala did not mention when that was.

[80] It was common cause that Mr Chabalala was on leave on the 07 August 2015. There were a lot of questions posed with regard to how the applicant could have failed to assist Mr Chabalala on the 7th while he was not at work. Ms Mampane explained that the 07th August 2015 is the day the applicant refused to assist not the day the instruction was given. This would mean that in the absence of Mr Chabalala, the applicant refused to assist in his role. This explanation is acceptable to me.

[81] The applicant denied that she ever refused to assist Mr Chabalala with GRV. She stated that what she meant by assisting was that she would source help from other clerks not necessarily do the work herself. The applicant's representative however went all over the place during cross examination of Ms Mampane with regard to the defence of the applicant on this specific charge. The counsel gave a lot of focus to whether or not the applicant had gone for training on the GRVs, whether she had access to the system that does GRVs, whether she had to support Mr Chabalala to do GRV as level 10 employee and Mr Chavalala being a level 5 employee and whether the applicant's contract states that she should assist. I at some stage got lost as to what was the defence of the applicant. Was it that she would not have done GRVs because she did not have access to the SAP system? Was that she could not have done GRVs because she was not trained to do GRVs? Was it that there was no proof for backlog and depletion of his overtime hours that Mr Chabalala needed assistance? Was it that GRV was not part of her contract?

[82] Even so, the question remains whether or not the respondent discharged the onus on balance of probabilities that the applicant was insubordinate. It was not clear who gave the instruction and how it was given. Ms Robertson stated that the applicant had volunteered to assist with the GRV. Ms Mampane stated that she ensured that GRV role was included in the applicant's contract. Such contract was never brought by the respondent to substantiate this allegation. The applicant denied that it existed. The applicant made an application to bring the contract of employment and job description to disprove the allegation. No such provisions were found. Ms Mampane clarified that the GRV role is stipulated in the performance contract. No application was made by the respondent representative to bring such a document.

[83] With the applicant having admitted that she had volunteered to assist Mr Chabalala, the employer was entitled to expect her assist him and was entitled to seek progress report from her. The applicant explained what she had in mind by saying she would assist. She stated that she meant that she would get some clerk to assist him if it is not

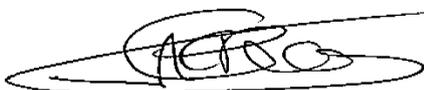
their peak periods. However, Mr Chabalala testified that the applicant took some invoices to do GRV them at some stage but returned them because she was busy. This was not challenged by the applicant; in fact her representative confirmed this version when cross examining Ms Mampane. The applicant's version is that she was trained to GRV only in end of August 2015. Why would she be trained to physically do GRV if she did not intend to physically do them? It is my finding that the probabilities in this regard weigh in favour of the respondent. It is my finding that is more probable that assistance with GRV was indeed to physically do the work.

[84] Whether or not the applicant refused to do GRVs is another. Ms Robertson stated that it was at her supervisors meeting on the 07 August 2015 when the applicant stated that she will not assist Mr Chabalala unless proof is produced that he has backlog. Here too, there were other supervisors present. None of them were called as witnesses. Only Ms Robertson testified to this refusal which was allegedly committed in the meeting with other supervisors available. The applicant denied having refused. There were no minutes or agenda for this meeting. It is my finding that the respondent failed to discharge the onus of proof on balance of probabilities that the applicant refused to do GRVs. The respondent failed to discharge the onus that the applicant is guilty of charge 1.2

[85] Having failed to prove commission of the offences, it follows that the sanction short of dismissal that was issued against the applicant cannot stand as it was issued for an invalid reason. Such sanction short of dismissal amounted to an unfair labour practice against the applicant.

AWARD

- [86] The respondent has committed an unfair labour practice against applicant in issuing the sanction short of dismissal.
- [87] I therefore order that the suspension, final written warning and an order that the applicant be sent for psychiatric evaluation be uplifted and the applicant be paid her withheld salary, less tax and all statutory deductions for the three months of her suspension. The amount must be paid on or before the 25 June 2018.



Panellist Commissioner

K.P Chavalala