



ARBITRATION AWARD

Case No: **PSHS1007-19/20**

Commissioner: **Samuel Baron**

Date of award: **14 August 2020**

In the matter between:

LYDIA WILLEMSE

APPLICANT

and

DEPARTMENT OF HEALTH- WESTERN CAPE

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was heard and finalized on 31 July 2020 at the premises of the Respondent in George. At the conclusion of the matter, and due to the time factor to make oral arguments, the parties requested seven days in which to submit their closing arguments and they duly obliged.
2. The Applicant, Ms. Lydia Willemse, was present and was represented by Mr. Mava Patrick Brown, an official from the trade union NEHAWU, of which the Applicant is also a member.
3. Mr. Abraham Solomon, an Assistant Director: Labour Relations, represented the Respondent.

4. The proceedings were digitally recorded and Mr. Peacemaker Mbobi provided interpretation services from English to Afrikaans and *vice versa*.

ISSUE TO BE DECIDED

5. I am required to determine whether the Applicant's dismissal was substantively fair and if not, determine the appropriate remedy.

BACKGROUND TO THE DISPUTE

6. The Applicant worked for the Respondent as a Household Aid the Themba lethu Clinic since 1 October 2009 and was earning a salary of R10 000 per month at the date of her dismissal, which occurred on 4 October 2019.
7. The Applicant was charged and dismissed for the following misconduct:

Charge 1

You made yourself guilty of an act of misconduct in terms of Annexure A of the Disciplinary Code and Procedures (PSCBC Resolution 1 of 2003) in that you on 29 August 2019 assaulted Ms. N Mangazi in the tearoom of the Themba lethu CDC by pinching her.

Charge 2

You made yourself guilty of misconduct in terms of Annexure A of the Disciplinary Code and Procedures (PSCBS Resolution 1 of 2003) in that you on 29 August 2019 threatened Ms. N Mangazi in the tearoom of Themba lethu CDC to do bodily grievous bodily harm to her by threatening to kill her.

Charge 3

You made yourself guilty of misconduct in terms of Annexure A of the Disciplinary Code and Procedures (PSCBS Resolution 1 of 2003) in that you on 29 August 2019 improperly touched the private parts of Ms. Mangazi in the tearoom of Themba lethu CDC.

SURVEY OF EVIDENCE

Respondent's case

8. The Respondent called three witnesses in support of its version. The first witness, **Ms. Josephine Jarret**, testified that on 29 August 2019, the day the incident took place, Ms. Ndileka Manganzi came to her and she was not looking good. Ms. Manganzi informed her that the Applicant assaulted her in the tearoom.
9. Ms. Jarret testified further that she asked Ms. Willemse to write her statement, but the Applicant's version did not add up and she referred the matter to the Humans Resources Department for further investigation.
10. According to her, the Applicant was previously issued with a final written warning also for unprofessional conduct and such warning was still valid at the time the incident took place. Ms. Jarret mentioned that there were other interventions in the form of ICAS (an employee assistance program) for the Applicant and the report indicated that she needed ongoing support to sort out any difficulties she might encounter. This was given to the Applicant according to her.
11. When asked, Ms. Jarret stated that the trust relationship between the Respondent had been broken irretrievable due to the Applicant's conduct.
12. Ms. Jarret stated under cross-examination that she was not aware whether the Applicant had been rehabilitated. She mentioned that in the event this can be proven, she would consider trusting her again.
13. **Ms. Annie Maganie** testified that she was in the tearoom on the day in question. The Applicant and Ms. Manganzi was at the time already there. According to her, the Applicant was very angry at Ms. Manganzi and accused her of being the cause of her being issued with a warning. According to her the Applicant said to Ms. Manganzi that she will strangle her in the "Sloosh Room" because there were no cameras.

14. Ms. Maganie stated further that the Applicant further mentioned that she (the Applicant) is a psychological case and that she will start with Ms. Jarret and end up with Ms. Manganzi. According to her, the Applicant then went towards Ms. Manganzi, lifted up her skirt and put her hand underneath her skirt.
15. She stated under cross-examination that she will be willing to work with the Applicant again in the event that she is reinstated.
16. **Ms. Emma Says** testified that she also entered the tearoom on the day in question around lunchtime and the Applicant and Ms. Manganzi were already busy having an argument. The Applicant, according to Ms. Says, told Ms. Manganzi that she (the Applicant) had to sign a warning because of Ms. Manganzi. She testified further that the Applicant told her that she will kill her and that she will start with Ms. Jarrett.
17. She testified that the Applicant also said to Ms. Manganzi that she will take her to the room where the cameras are not working when she does so. She mentioned that the Applicant also said that Dr. Louw will not fire her because she is a psychological case. She stated that the Applicant then went to lift up Ms. Manganzi's dress and put her hand underneath her dress. According to her the Applicant was very angry at Ms. Manganzi.
18. She testified under cross-examination how the chairs were arranged and how the Applicant passed her in order to get to Ms. Manganzi. She was also asked at length whether she could see whether Ms. Manganzi's private parts were in fact touched or not. She reiterated that she saw the Applicant's hand go underneath the skirt although she could not see whether her hand made contact with Ms. Manganzi's private parts or not.

Applicant's case

19. **The Applicant** testified that she never went near with Ms. Manganzi and she did not touch her private parts on the day in question. She further denied that she ever threatened the Applicant. According to her she was seated at another table with a Ms. Scott, far from Ms. Manganzi.

20. The Applicant conceded that she had an argument with Ms. Manganzi regarding the warning, but she never threatened or assaulted her during that time.

ANALYSIS OF EVIDENCE AND ARGUMENT

21. Section 188 of the LRA provides that a dismissal is be unfair if the Employer fails to prove that the reason for the dismissal was not for a fair reason (substantive fairness) and that the dismissal was not effected in terms of a fair procedure (procedural fairness).

22. The Applicant did not challenge the pre-dismissal procedures followed by the Respondent prior to the dismissal. I will thus concern myself only with the substantive issues. The Applicant denies that she is guilty of the misconduct for which she was dismissed. I am thus required to determine, on the evidence before me, afresh whether the Applicant was guilty of the offences and if I so find, consider whether the sanction of dismissal was appropriate under the prevailing circumstances.

23. The Respondent's witnesses testified that the Applicant argued with Ms. Manganzi in the tearoom and it related to the fact that the Applicant accused Ms. Manganzi of being the cause of her receiving a warning. This part seems to be common cause, meaning that the Applicant was in same room with Ms. Manganzi and the others and she had an argument with Ms. Manganzi. This is however where the similarities end.

24. Mr. Brown cross-examined the Respondent's witnesses thoroughly regarding what they saw on the day and tried to punch holes in their testimonies without once putting the Applicant's version, namely that she was nowhere near Ms. Manganzi on the day in question, to any of the witnesses. The witnesses thus no opportunity to deal with that version.

25. The Applicant chose not to call Ms. Scott to testify on her version that she was sitting at another table with her (Ms. Scott). She rather simply flatly denied the version of the Respondent's witnesses.

26. The evidence of Ms. Jarret was not disputed insofar as she mentioned that she called the Applicant in to ask her what happened and to request her to write a statement. It

would amount to some sort of a conspiracy if the Applicant was called in by the Operations Manager to give account to something that never happened and for two other eyewitnesses to come and tell stories to discredit the applicant. Be that as it may, it is difficult to accept the Applicant's version on the balance of probabilities.

27. Ms. Maganie and Ms. Says both testified that they saw the Applicant placing her hand under the skirt of Ms. Manganzi, although they could obviously not say for sure whether her hand made contact with the genitals. The manner in which it was described by the witnesses, indicates that the Applicant's hand in all probability touched Ms. Manganzi's genitals. It was not done lightly, and there was a clear intention to do so.

28. The issue of the threats was also testified to by the witnesses of the Respondent, although it varies with regards to whether the Applicant said she will kill Ms. Manganzi or strangle her. They both however consistently testified that threats were made by the Applicant.

29. The testimonies of the two witnesses who were present in the tearoom were in my view sincere and consistent. One could almost feel that they were at pains to relate the events that transpired. Ms. Maganie said she will work with the Applicant again and Ms. Says testified that she used to call the Applicant "my child". I did not detect any malice or that they in any way conspired with lies against the Applicant. I cannot but reject the Applicant's version that she did not do anything to Ms. Manganzi. She happily took part in an elaborate demonstration on how she apparently lifted the skirt of Ms. Manganzi during the testimony of Ms. Says, but afterwards said she did not do it.

30. Although no evidence was led on any pinching as per Charge 1, I thus find that Applicant guilty of the other charges.

31. This brings me to the issue of sanction. This requires me to take into account the totality of the circumstances surrounding the dismissal. The Applicant had a previous final written warning for unprofessional conduct also in relation to an argument with a fellow employee. It was valid for six months and the warning was still valid at the time the incident at hand occurred.

32. The Respondent has a duty to protect its employees and threats and assault has a serious impact on the harmonious relationships in the workplace. It is thus understandable that it took such strong action. As I said, the basis for the Applicant's defense is that she is simply not guilty and is indicative of the absence of remorse on the part of the Applicant.
33. It cannot be denied that harm was caused by the Applicant's actions, especially to an innocent employee as well as to others observing the incident. The Respondent cannot be seen to condone such behaviour.
34. The Applicant had approximately ten years of service at the Respondent, but the misconduct complained of is of such a serious nature, bearing in mind the previous warning as well as the intervention of ICAS did not yield any results, that her length would in this instance not warrant a sanction short of dismissal. The Applicant in any event denied that she had any condition effecting her emotional well-being.
35. In the end, having assessed the circumstances and given the gravity of the misconduct, I find that the sanction of dismissal was appropriate. The dismissal was thus substantively fair.
36. In the premises therefore, I make the following award:

AWARD

37. The dismissal of the Applicant, Ms. Lydia Willemse, by the Respondent, Department of Health- Western Cape, was substantively fair.

38. The Applicant's claim is dismissed and she is not entitled to any relief.



Signature: _____

Commissioner: ***Samuel Baron*** _____

Sector: ***Public Health*** _____