ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS108-17/18**
Commissioner: **A C E Reynolds**
Date of Award: **1 August 2017**

In the matter between:

PSA obo Danica Daniels (Union/ Applicant)

and

Department of Health – Western Cape (Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The matter was referred for arbitration to the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) for a dispute relating to an alleged unfair labour practice regarding unfair disciplinary action referred in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 as amended (the LRA) and was completed over two sittings, the first scheduled at 10h00 on 30 June 2017 and the second scheduled at 09h00 on 17 July 2017 at the premises of the Provincial Hospital in Oudtshoorn.

1. Present at the arbitration for the employee party (the applicant party) were Mr Johann Munro (PSA Full Time Office Bearer as the applicant's representative) and Ms Danica Daniels (the referring employee or applicant). Present for the employer party (the respondent) were Mr Jerry Faas (Assistant Director Labour Relations as the respondent's representative) and Ms Marali Coetzee (Assistant Director Human Resources Oudtshoorn Hospital as observer).

2. It was agreed that the arbitration would be conducted in Afrikaans and English. Interpretation assistance was not required. Electronic and digital recordings were made of the proceedings, with my electronic record serving as the English translation. The parties did not require an explanation of the arbitration proceedings.

4. The applicant's representative raised as a preliminary issue that the applicant's documents for this matter were destroyed, with his home, in the recent Knysna fires and requested patience if all documents were not available immediately. This was noted and understood.

ISSUE TO BE DECIDED

5. The purpose of this arbitration is to determine whether the respondent had committed an unfair labour practice in terms of section 186(2)(b) of the LRA by instituting disciplinary action against the applicant and issuing her with a written warning for alleged misuse of sick leave. The relief sought was for the written warning to be withdrawn. The onus of proof is on the applicant in this matter.

BACKGROUND TO THE DISPUTE

The following facts were common cause:

6. The applicant is employed as a Nursing Assistant Post Level 5 at Oudtshoorn Provincial Hospital with PERSAL number 54124930 as a shift worker with scheduled days on and off duty. She commenced employment with the respondent on 1 November 2005 at George Provincial Hospital and was transferred to Oudtshoorn Provincial Hospital on 1

November 2012. In the position of Nursing Assistant she reports to Ms Ronelle Cornelissen Operational (Unit) Manager of Theatre and Ward 3. The applicant was charged for alleged misuse/abuse of sick leave ("misbruik van siekverlof") on 2 March 2017 and an informal disciplinary hearing was held on 16 March 2017 which was chaired by Ms Helen Human, Deputy Nursing Manager. The applicant was represented in this hearing by Mr Johann Munro of PSA. The outcome was that she was found guilty of the abuse of sick leave benefits for a period that stretched over a number of years and a final written warning valid for six months was issued to her on 16 March 2017, which stated as follows:

Abuse of sick leave benefits (see records drawn from Persal system, attached, employee regularly takes leave (sick and other types) – not necessarily exceeded limits. (Pattern of quantity) – for most of the occasions – minor ailments. (see copies of diagnosis/symptoms attached).

The applicant appealed against this sanction on 24 March 2017 and the appeal authority, Dr Charles Dreyer, Manager: Medical Services, on 4 April 2017 reduced the sanction to a written warning valid for six months, with the following reasons provided:

- *A pattern of abuse is present and this has to stop.*
- *Absenteeism increases the workload as well as the medico-legal risk in the workplace.*

This written warning is to expire on15 September 2017. The applicant had a prior written warning issued on 21 December 2016 for alleged abuse or misuse of sick leave. It is common cause that if a staff member is booked off sick it will impact on operations. The applicant did take the days' sick leave as recorded by the respondent, produced valid medical certificates for all the days' sick leave taken and did inform her supervisor of her sick leave absences. All the sick leave was approved by her supervisor and paid.

The following facts were in dispute:

7. Whether the applicant had suffered an injury on duty in January 2015, during which she injured her back and left shoulder while adjusting a bed for a patient.

8. Whether the absence that led to the written warning of 21 December 2016 related to the injury on duty which she incurred in January 2015 or not and if so, whether the applicant had to utilise her own sick leave for the time booked off for this period of sick leave.

9. Whether the applicant had transgressed a rule of which she was aware of relating to sick leave by booking off sick.

10. Whether the applicant had planned her sick leave to extend her off days.

11. Whether the applicant was guilty or not of abusing sick leave, which warranted a written warning.

SURVEY OF ARGUMENTS

12. Ms Danica Daniels, the applicant, testified under oath for the applicant party. Ms Menizza Coerecius, the applicant's previous supervisor and Ms Helen Human, Nursing Manager, testified under oath for the respondent. Ms Daniel's cross-examination was part heard at the first sitting of the arbitration due to her feeling unwell and the resultant time constraints.

13. Documents were handed in by both parties and admitted as evidence, except where indicated otherwise. The respondent replaced their bundle at the second sitting after the applicant had requested additional documents during her cross-examination.

14. At the conclusion of the final sitting of the arbitration on 17 July 2017 written closing arguments were requested by the parties due to time constrants and the closure of the venue. This was consented to and it was agreed that submissions would be made via e-mail as follows to myself, one another and the PHSDSBC: Mr Munro of the applicant party to submit theirs by latest 19 July 2017, Mr Faas for the respondent theirs by 21 July 2017

and Mr Munro to reply for the applicant party by latest 25 July 2017. All written submissions were received by 24 July 2017, which are not repeated here but have been taken into consideration in arriving at the award.

15. Only the evidence relevant to the facts in dispute are summarised below and that which was established as common cause is not repeated, unless relevant.

ARGUMENT FOR THE APPLICANT

16. The applicant party's case was that the letter of 2 March 2017 that notified the applicant of the hearing which was to take place on 16 March 2017 was not a formal notice of an informal disciplinary process and was also vague in that it did not state when she did what, but only that she had misused sick leave, with no dates provided. They had argued that it was impossible for the applicant to defend herself against the allegations when she did not have an incident or a date and if the alleged misuse was for over a couple of years that they had a problem with the time frame. The applicant had pleaded not guilty on the charge and they had argued that it was her right to take sick leave, she had not yet exceeded her 36 days' sick leave for the current sick leave cycle which expired in 2019, that there was no rule that she may not take sick leave, that she had complied with all the respondent's rules when she took sick leave, that the sick leave was never declined and that she had not applied for temporary incapacity leave as a result of exceeding her sick leave entitlement. They were confused about the "pattern of quantity" which Ms Human had referred to in the final written warning which was issued on 16 March 2017 to the applicant, since this did not feature in any of the respondent's official documents which the applicant could have been aware of. The "minor ailments" that Ms Human referred to in the final written warning could not be determined, with the medical doctor deciding whether the ailments were serious enough for the applicant to be booked off sick from work. A similar incident happened in December 2016 when the applicant was called for a disciplinary hearing and the applicant requested a postponement since it was a difficult time of the year to get hold of people and the applicant only received a response from the resopndent the evening of 20 December 2016 to appear at a hearing the next day 21 December 2016. On that occasion, she was issued with a final written warning for an injury on duty and for her supervisor sending her home, after which she was booked

off sick. They were therefore of the view that the previous disciplinary action, as well as the current disciplinary action taken against the applicant was unfair. The relief sought was that the applicant be found not guilty of any transgression and that the written warning be withdrawn.

17. Ms Danica Daniels, the applicant, testified as follows under oath in her evidence in chief: Her current cycle of sick leave of 36 days over three years of one day per month commenced on1 January 2016. She was not aware that she had misused sick leave as alleged by the respondent. She did not know how many days' sick leave she had taken in this cycle and thought it was about 26 days, but had not exceeded the 36 days yet. The sick leave that she took in this cycle was never rejected, she had always reported when she was sick and handed in sick notes in all instances when she was off sick. She had not heard of a pattern of quantity in sick leave before and for the first time became aware of it from Ms Human. She did not have a pattern of sick leave since she could not establish when she or her children will get sick. She was not aware of any circumstances in which she may not take sick leave. The previous year in 2016 she received a similar letter to this one of March 2017 but nothing happened on the previous occasion with no sanction handed down, whereas she received a final written warning for the one of March 2017. When she received another similar letter this year she felt that she was being victimised since she was the only one who must appear for a hearing when she uses sick leave or family responsibility leave and must go to the police station to make a declaration when her children are ill, whereas the rest of the staff get sworn affidavits to complete at work, although it was conceded that family responsibility leave was not part of this dispute. She had not only booked off sick when she was supposed to go back to work after her off days. She had reported for duty on many days whilst she was sick and then booked off early from work for being sick by the Unit Manager, not herself, as reflected on the attendance registers. When she was booked off early for being sick she had to sign for a full day's sick leave. She explained what happened with the December 2016 incident when she was medically unfit for work due to mechanical backache, when her supervisor Ms Coerecius had alleged she had gone off sick to attend her mother's 60th birthday. She also recieved a letter to attend a hearing and was granted a postponement to attend Court on the day for a traffic fine. She was provided with the new date the day before the hearing/conversation ("gesprekvoering") on 21 December 2016 although she had

requested a postponement until January 2017 for her union representative to be present since people would not be available over the festive season. The notice was for a conversation ("gesprekvoering") and not a disciplinary hearing. Ms Human refused to give her a postponement and that conversation degenerated ("ontaard") into the sanction of a written warning. She was booked off sick then for mechanical backache as a result of an injury on duty which occurred in Ward 3 Room 8 and Bed 1 when she was handling a patient and left her with chronic back ache and pain in her left shoulder. She had reported that injury on duty to Mr P Fourie, the Unit Manager at the time and had completed the necessary forms for the injury on duty. The doctor recommended that she must not pick up heavy items nor do heavy work, although this letter was not in the bundle of documents. Ms Human had said there were no light duties in the hospital and referred her to a nurse in Ladismith who had also suffered a back injury to establish who the specialist was who had treated her, which resulted in her being referred to Dr Tom Barrett the Orthopaedic Surgeon in George. She had to sign for her own sick leave for the time off for the injury on duty. Neither Ms Coerecius nor Ms Human provided proof that she had committed an offence when she was called in by them and of any rule that was transgressed. The letter of 2 March 2017 resulted from when she telephoned in to inform Ms Cornelissen that she could not come to work because her child was sick. She was also not feeling well due to lack of sleep as a result of three months' continuous night shift and handed in a medical certificate for this. Ms Human felt at the conversation of 16 March 2017 that the diagnosis of being booked off sick for insomnia was not a medical reason and not good enough.

18. Ms Daniels testified as follows under cross-examination: This first time Oudtshoorn Provincial Hospital started addressing her about sick leave was after she was transferred from George Hospital and her child was hospitalised when Ms Wagenaar her supervisor at the time called her in and told her she just cannot call in to be off work but must have a back up plan for her children. She did not know that there was a rule that a child cannot be sick and that a mother cannot be with a child and cannot take family responsibility leave when the child is sick. Every time she phoned in that she was sick, Ms Wagenaar always had something to say about it. Ms Cornelissen was only her supervisor from November or December 2016 and could not testify to what happened before that and that she had taken sick leave to extend her days off. Reference was made to the attendance

registers for 2016 and 2017 and the applicant's leave records, in particular for the period May to December 2016. She agreed that the only month that she did not book off on sick leave was October 2016, when she took family responsibility leave. She denied that she had a pattern of taking sick leave. She pointed out that some of the sick leave related to a bad skin irritation that they contracted at work, from which she suffered the most, and they were sent home. She requested that the medical certificates also be provided for her sick leave absences. The reports contained in the respondent's bundle commencing 19 August 2016 until December 2016 recorded by her supervisor Ms Coerecius related to discussions that they had about the misuse of sick leave. She was assisted with the referral to ICAS dated 30 December 2016 by her the Unit Manager Ms Cornelissen, who was her supervisor at the time, after the discussion of December 2016. She agreed that she was formally referred to ICAS for the excessive use of sick leave. She did not know how to lodge a grievance but wrote a letter to management in response to the written warning issued to her on 21 December 2016 for the misuse of sick leave, to which she did not receive a response. The 16 March 2017 incident related to when she telephoned Ms Cornelissen the morning, where they were at Smitswinkel for a meeting of all the matrons, to inform her that her child was sick. She was told telephonically that she must not contact Ms Cornelissen if she is not coming in to work but must speak to Ms Human. The phone was handed to Ms Human and she had to explain to her why she could not be on duty that evening. With reference to the conversation that took place on 16 March 2017, she could not see the misuse of sick leave if a doctor declared her medically unfit. Leave of absence applications for sick leave, the corresponding medical certificates and attendance registers of the applicant from May 2016 were referred to, of which the details and explanations provided by the applicant are not repeated here for the sake of brevity. This did not reflect a pattern of sick leave and that she had attached her sick days to her off days, since she could not plan or prevent when she or her children got sick. She also could not come to work if she was for example coughing and she had to work with TB patients. She was not only sick on the days that she had to go to work and went to the doctor and arranged specialist appointments on her off days, which she did not need to inform her supervisor about. She did not know about a rule that she must hand in a sick certificate when she is sick on her off days or take her children to the doctor on her off days. The doctor only booked her off for two days for the days she had to work and the off days were to rest. A doctor could not extend her off days with sick leave and they did

not query the doctors' certificates. The pattern of quantity referred to in the original final written warning of 16 March 2017 did not appear in the respondent's disciplinary code. The work injury which Dr Barrett's letter referred to was not in this cycle since the injury on duty was in 2015, although the problem was still continuing in the current sick leave cycle. She had asked Ms Coerecius many times about the different treatment of sick leave for a work injury, but she never provided her with an answer. She was not only booked off twice for backache since 18 August 2016, but had also been booked off for the same complaint before that. The letters provided from the physiotherapist and the light duty recommendations were not at the arbitration. The letters from different doctors relating to lumbar muscle spasms and the facet block were also not provided. She was still under a lot of pain and receiving physiotherapy as recommended by the orthopaedic surgeon. She agreed that the sick certificates were issued on the first day of sick leave and stated that the doctor does not need to declare her medically unfit for her off days, but only for the days to be worked. She questioned how many staff at Oudtshoorn Hospital went to the doctor before they had to go to work, with the majority only going to the doctor on the day they had to work, unless they are to be hospitalised and know beforehand that they will be off sick. She was not the only one in the hospital who got sick and knew there were people with a lot of sick leave who are not called in. Only she had to telephone Ms Human if she is off sick, while the others report to their supervisors. ICAS never contacted her about the referral for sick leave abuse.

19. Ms Daniels testified as follows under re-examination: She confirmed that ICAS had never contacted her, neither did her supervisor at the time Ms Cornelissen follow this up with her. After the conversation with Ms Human on 21 December 2016 when she had asked for postponement for another date and which degenerated into a written warning, she had written a letter to which she did not get a response, but was only issued with another date for the misuse of sick leave. None of the letters notifying her of the discussions indicated that disciplinary action was taken against her, but despite this she still received disciplinary sanctions. The notice or charge sheet of 2 March 2017 was vague, with nothing to prepare her for the discussion. None of her sick certificates were rejected and would have been rejected if there was something wrong with them. On 6 July 2017, she came on duty and her colleagues and Dr Heydenrich said she could not work because of the rash on her body. Ms Coerecius wanted her to show the rash to her

before she sent her off duty and to the doctor. She confirmed that she did not misuse sick leave. She was not aware of a policy which stated that she may not use sick leave in a cycle and which referred to a pattern of quantity. She was not aware of illnesses described as minor ailments. She was not aware of any other requirements for taking sick leave other than notifying her supervisor and having a medical certificate if she will be off for more than two days and that it will be approved if there are still sick leave credits. If there are no more sick leave credits then you could use your annual leave or apply for PILIR which is the temporary medical disability/incapacity leave. The sick leave referred to was her 36 days' entitlement for the cycle and not PILIR and she still had sick leave days available in her current cycle.

ARGUMENT FOR THE RESPONDENT

20. The respondent's case was that the process followed with the applicant in March 2017 was an informal disciplinary process as stipulated in Resolution 1 of 2003 (the Disciplinary Code and Procedures for the Public Service) that for all minor transgressions the supervisor can deal with it in an informal process where no formal documents are exchanged nor notices issued, with the employee called to the office, the transgression addressed and a sanction imposed, if needs be. It was important to note that all people dealing with discipline at the level are not experts, which is why the Unit Manager Ms Cornelissen who was supposed to deal with the matter and did not have the expertise for it, elevated it her supervisor Ms Human, the Nursing Manager. All the procedures were followed because the applicant was represented by Mr Munro her union representative and the sanction was imposed. They would explain that because the people involved were not experts in dealing with these matters that the charge was wrong and no dates were stipulated. It was also the responsibility of a supervisor to investigate sick leave abuse when an employee exceeds 20 days in a sick leave cycle which is not for one illness like an operation but for different ailments. This was investigated in the case of the applicant and also found that this was not the first time that this had been addressed with the applicant. As a correction it was pointed out that the sanction for the transgression in December 2016 was a written warning and not a final written warning. They would prove the impact of all the leaves taken on the workplace and would produce a schedule over a period of time to show that the sick leave taken is an extension of the

applicant's off days as a shift worker. They would also show that the applicant's sick leave pattern had improved after the sanction was issued and the the sanction had changed the behaviour of the applicant, which was the purpose of progressive discipline.

21. Ms Menizza Coerecius, the applicant's previous supervisor, testified as follows under oath in her evidence in chief: She was referred to the reports that she had submitted relating to discussions with the applicant regarding her sick leave. She was the applicant's supervisor from July 2015 to November 2016 and had been a supervisor for seven years. She and Ms Cornelissen worked together during December 2016. During the period that she supervised the applicant she had no problem with her work, only her misuse of sick leave. Although the applicant was entitled to sick leave, it occurred on a regular basis, with sick leave taken every month, and pointed to a pattern which she had the duty to speak to the applicant about since she could not let it continue. She explained the pattern refected in the applicant's sick leave summaries for 2016 and 2017. They had only plotted the applicant's sick leave until February 2017. It appeared to her that the applicant telephoned in and reported that she was sick for the two days she must work before her two off days and the weekends. The applicant was booked off for different ailments. She saw that the applicant was booked off for a lumbar muscular spasm from 19 to 21 August 2016, but could not remember if the applicant had incurred an injury on duty during the time that she supervised her, nor that she had received physiotherapy or injury rehabilitation treatment. Sick leave for an injury on duty is treated differently from normal sick leave. She responded to the version that the applicant denied that she did not know about the misuse of sick leave, that she personally spoke to the applicant about this, with witnesses and Mr Munro present and that if she has any problems, especially with her children, that she must have a Plan B so that she can be on duty. The applicant had to work 40 hours per week and sometimes only worked 12 hours per week, which caused a great impact on staff and the patients when they must get people in to help provide a service, which costs money added to already terribly high expenses. It was only one occasion when the applicant had a rash on her arms that the applicant came to her and showed her forearm before going to the doctor. She did not tell the applicant to lift up her clothes as the rash was on her forearm. The applicant is not booked off sick on her off days, only the days she must go to work. Circular H188 of 2010 regarding the management of leave and sick leave was referred to, which confirmed that the

management of sick leave is the responsbility of the supervisor. She could only recall the one time that the applicant reported for duty and was sent home by her, being for the rash on her forearm. The applicant normally worked 12 hours per day or shift. If a person worked till 10h30 a third of the day would be recorded as being on duty, with the rest as off sick. She could not comment on the applicant's referral to ICAS since this was dealt with by Ms Cornelissen. Staff who are problem cases are normally referred to ICAS, which is a formal referral and proof that the supervisor tried to assist the employee. She could not recall seeing the letter of 8 November 2016 from Dr Barrett regarding the applicant's disc protrusion diagnosis. She did not receive a sick letter for the applicant's left leg and foot amongst the ailments that the applicant was booked off for. She explained the process when an employee is called in for a discussion ("gesprekvoering") about for example their attendance at work and that it involved a notification of the time and venue of the discussion. No other documentation is normally provided and the discussion is an informal process with a form that is completed for their personnel office as documentary proof. The discussion is normally for less serious transgressions and a sanction of a verbal warning, written warning or final written warning can be imposed. More serious offences can lead to a disciplinary hearing.

22. Ms Coerecius testified as follows under cross-examination: The discussions ("gesprekvoerings") can lead to a sanction to a certain extent although it is not an official disciplinary hearing, which she cannot present. Although the letters did not state it was an informal disciplinar hearing or meeting and only referred to misuse without any dates nor incidents specified, the employee would be told what happened on previous occasions and was aware of the problem, with it stated on the letter the discussion is for the misuse of sick leave. The witness at the discussion of 2 Sepember 2016, Ms L Antha, the supervisor of the Maternity Department, agreed with the applicant's representative at the time that the applicant did not do anything wrong since she had a sick letter. She and the applicant only had a discussion and no sanction was issued to the applicant. Ms Antha was involved because she stood in as supervisor for Wards 3 and 4 when she, Ms Coerecius, was not present and was aware of personnel on sick leave. She had showed in that discussion that there was a rule according to the applicant's sick profile. The rule reflected in a pattern that one is off before you come to work and then off sick the two days that you must work, which is a pattern. She could not respond as to where there

was a rule that the applicant may not do that and which she needed to comply with. The applicant did not have to report if she is sick on her off days nor provide proof of a sick certificate if she sees a doctor on her off days. She agreed that one would not go to the doctor if you are sick on your day off but will go to the doctor if you are still sick and have to work the next day. She could not recall what happened on certain days reflected in the applicant's attendance register. She knew that the prescriptions said that the time period for disciplinary hearings are that they must be prompt. She could not report on the incidents of 2015 and remember for 2016 whether they were prompt. She did not know what happened with the applicant's referral to ICAS since she was not involved in this. As supervisor, she had referred staff to ICAS and did follow up with these cases.

23. Ms Coerecius testified as follows under re-examination: In the discussion with Ms Antha present she did not give a sanction to the applicant although she felt strongly that a sanction should be given. She had the discussions ("gesprekvoeringe") with the applicant because of continuous sick leave. The purpose of the discussions were to talk to her and that she must try and take less sick leave. The applicant's current sick leave cycle started in January 2016 and would end at end 2018 for three years. Although many staff took sick leave they decided to address the applicant because a misuse of sick leave and a pattern of sick leave was noted since she started at Oudtshoorn Hospital, which pattern continued. She did not refer to any of the 2015 sick leave. If sick leave ran over the days to be worked into the off days the off days will not be counted as sick leave. The sick leave profile of the applicant had a very big impact on the staff and the Department, with the risks much greater with less people on duty. Their nursing staff are under a lot of pressure and rest is important for them.

24. Ms Helen Human, Nursing Manager at Oudtshoorn Provincial Hospital, testified as follows under oath in her evidence in chief: She commenced service at Oudtshoorn Provincial Hospital on 1 May 2016. The Operational Managers of all the wards reported to her. She knew the applicant from doing her rounds in the hospital and from when the applicant requested to work in the out patients department because of her chronic back condition. She had issued a written warning to the applicant on 21 December 2016 for an absenteeism record over a period of time when the applicant had already used 23 days of her available sick leave of 36 days in the three year cycle for illnesses of a minor nature.

Minor ailments were medical conditions of not a serious nature and also reflected the chronic back condition which the applicant claimed she had. She explained the process followed for that written warning. The notice of 2 March 2017 which informed the applicant to be in her office on 16 March 2017 for the alleged transgression of misuse of sick leave had nothing to do with the previous written warning of 21 December 2016 and was a new one which lead to the final written warning being issued to the applicant for the misuse of sick leave. No dates for the alleged misuse of sick leave were supplied on the notice, with no specific reason provided for that omission. With reference to the Disciplinary Code and Procedures of the Public Service, the category of misconduct which the applicant fell within was not a serious misconduct, althought it had quite an effect as also seen in Dr Dreyer's letter that it had a serious effect on service delivery. With reference to the acts or lists of misconduct in the Annexure to the Disciplinary Code and Procedures, the list of misconducts was not exhaustive, with all rules not written in it. The abuse of sick leave was a transgression and is written in HR circulars and absenteeism circulars. The applicant should have known about the rule that the abuse of sick leave is a transgression since there was written evidence of discussions and communications with the applicant by previous operational as well as nursing managers, as well as herself, about her taking excessive sick leave. Her understanding of Circular H188 of 2010 on the management of leave and sick leave was that managers and supervisors must manage sick leave and that it should form part of their performance agreements, as well as that each employee's sick leave must be monitored for not only the number of days taken but also trends and patterns of how they are taken, such as before and after weekends and public holidays. This was especially relevant to shift workers since they also get days off in between and it is relevant that they only get sick the days they are supposed to be on duty and have no sick episodes on the days that they are off duty. Habitual sick leave in terms of Circular H115 of 2005 is defined as the persistent, but intermittent use of sick leave, usually for a variety of ailments. It was not sick leave for surgical procedures but short and intermittent days. The applicant's sick certificates for a year presented to her in December 2016 demonstrated a variety of ailments which did not implicate a specific condition. She explained the duties of a manager or supervisor in managing sick leave of employees. If minor ailments persisted the formal process must be followed. Even if this is done in an informal manner the person must be made aware that she is busy with behaviour which is not acceptable, with the purpose to change the

conduct or pattern. After the final written warning was issued to the applicant in March 2017 there was a clear improvement in the incidence of absenteeism or use of sick leave since April 2017.

25. Ms Human testified as follows under cross-examination: The statement that the list of misconducts was not exhaustive did not mean that the applicant could be charged for whatever was wanted, but within limits if there is substantiation for it. She responded to the question on whether there was a document which guided as to what is a minor illness or not, that the applicant was a clinical person and a minor ailment was indicative of how a medical officer would book one off sick. If the doctor booked one off for a minor ailment for one day then sick leave can be taken. It would be very irresponsible for her as manager to allow an employee to take all 36 days' sick leave in the first 36 days of a the sick leave cycle, but this would be different for a major incident like a heart attack. If a doctor decided that an employee must take all the sick leave she would look at the medical certificate. If an employee was booked off for more than five days the diagnosis on the certificate would be very important. Temporary incapacity leave was not a right. Applications for temporary incapacity leave went to a panel who decided whether to grant temporary incapacity leave or not. There was not a need for the applicant to apply for temporary incapacity leave. The applicant was still charged while she was within her 36 days' sick leave entitlement because it was not the number of days sick leave taken, but the pattern in which she took it. She could not recall that in the appeal after the sanction was issued on 16 March 2017 it was referred to that she had showed Mr Munro, the applicant's representative in that discussion, an unofficial document referring to a pattern of quantity regarding the manner in which sick leave may be taken. At the time she referred not to circulars but the guidelines for managers as compiled out of official documents. She responded to the question on where the rule was documented in the form of a resolution which stated the applicant is not allowed to use her sick leave in a certain manner, that she had presented Mr Munro with an offical document that day, which was not irresponsibly grabbed out of the air. As a unit manager she could have internal rules for her unit without an act (legislation) to base it on. The applicant would be aware of this, which is why she looked for written evidence that the applicant was aware of this (rule). Written evidence that something was spoken about should serve as substantition. There was no rule against the applicant having different illnesses. She responded to the question that since there

was no rule in this regard that each manager would use his or her discretion in accepting a diagnosis on the medical certificate, that if a manager has an issue with the diagnosis that you communicate with the respective employee and present the employee with evidence and substance for communicating with her. She responded to the question on whether it was not double jeopardy that after the applicant was sanctioned for the misuse of sick leave on 21 December 2016 and then sanctioned again on 16 March 2017 for the same sick leave cycle immediately when she took sick leave the next time after three months, that the applicant was off sick again on 4 and 5 January 2017 and was off sick again on 25 and 26 February 2017 after she had taken her annual leave. The pattern therefore continued in the next two months after the sanction of December 2016. She referred to the communications that she had with the applicant regarding the continuation of the pattern of sick leave. She did not refer to specific times and dates of sick leave misused on the notices issued to the applicant. She did not say that people cannot take the sick leave that they are entitled to, but that she as a manager has a responsibility for service delivery and the safety of her patients, and if she picked up something based on criteria that she used, that she must do something about it. The applicant was made aware of the rule and in the two hours' discussion with the applicant in December 2016 she tried to demonstrate to the applicant that she was not victimising her and that she could not allow any other of her 150 employees to take sick leave without using criteria as to who is using or abusing sick leave. The criterium or tool that she used was the attendance summary ("blokkiesraaisel") that makes them aware that an employee is taking more sick leave than the average. Although the average did not set the rule she believed it was a relevant indicator. She expressed concern regarding employees' representatives creating a work culture where their members have the expectation that they can take their 36 days' sick leave irrespective for what illness and when, especially on their on duty days and not on their off duty days. She needed to see the evidence of the letter which was delivered to the applicant at around 16h00 the previous day by messenger that she must be present the next day 21 December 2016 for that discussion since she could not remember all the details for 150 employees. Although she did not admit that the notice was given to the applicant the afternoon of the previous day, she did give the option to the applicant to appeal against that sanction, which the applicant did do on 22 December 2016. That appeal should not have been directed to her, but to the Medical Superintendent, of which she had informed the applicant in the meeting.

26. Ms Human testified as follows under re-examination: In the written warning which was issued to the applicant on 21 December 2016 it was stated that if she was not satisfied with the outcome/sanction of the written warning that she had the right to appeal within 5 working days to the Medical Manager Dr C A Dreyer. The notice of 20 December 2016 for the discussion of 21 December 2016 was not the first notice, since the applicant had requested a postponement of the first date of 13 December 2016 due to a court case. She understood that double jeopardy was when a person is punished twice for the same transgression. The written warning of 21 December 2016 was issued for the sick leave taken in 2016. The sanction of 16 March 2017 was also issued for abusing sick leave in the cycle starting 2016. When the applicant transgressed again in January 2017 and February 2017, she received a more serious sanction of a final written warning. The sanction of 16 March 2017 had the desired effect since there was no absenteeism after that. The applicant was charged for abuse of sick leave in more than one facet being a shift worker. It was therefore not an issue of entitlement to sick leave but misuse of sick leave. The attendance summary was a good tool since it indicated warning lights regarding sick leave of employees. As managers, they needed to prevent that employees used all their sick leave entitlement in the three year cycle and they then have to apply for PILIR, for if PILIR is refused they then have to take unpaid leave. If she allowed this pattern of sick leave misuse to continue then she would be irresponsible by exposing the applicant to possible unpaid leave if PILIR is refused, since she was aware that Human Resources from the PERSAL records looked at the intervals that employees took sick leave over six years to determine whether extra leave for medical conditions will be granted.

ANALYSIS OF EVIDENCE AND ARGUMENT

27. I am required to decide, on the balance of probabilities, whether the respondent had committed an unfair labour practice in terms of section 186(2)(b) of the LRA by instituting disciplinary action against the applicant, Ms Danica Daniels, and for issuing a written warning to her for the alleged misuse of sick leave, as well as the appropriate relief if an unfair labour practice is found.

28. Only the evidence that I consider relevant to determining the matter will be referred to. After considering the evidence presented, the following is found, on the balance of probabilities and under the circumstances of this case, with brief reasons provided as required by section 138(7) of the LRA:

29. Reference is made to item 7 of Schedule 8 – Code of Good Practice : Dismissal of the LRA (the Code) which provides the following guidelines in cases of dismissal for misconduct, the same as would apply to disciplinary action short of dismissal for alleged misconduct, as established in this matter:

Any person who is determining whether a dismissal for misconduct is unfair should consider –

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not –

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

30. In this matter the main issue in dispute is whether a rule or standard regulating conduct in or of relevance to the workplace had been contravened by the applicant. The existence of such a rule or standard is therefore a precondiction to establish whether a transgression had taken place.

31. The applicant party had contended that no formal rule which the applicant could have been aware of had existed which prescribed when, how often and for what type of ailments an employee may use his or her sick leave entitlement within the three year sick leave cycle. Since it was common cause that the applicant had complied with all the requirements to take the sick leave days granted to her and had not exceeded her sick leave entitlement at the time that she was issued the revised sanction of the written warning of 16 March 2017, they were of the view that no misuse of sick leave had taken place and that no santion should have applied.

32. The respondent had in turn contended that the applicant had intentionally taken her sick leave in such a manner that it allowed her to extend her other leave and days off, that she had been repeatedly counselled by her managers and supervisors over several years about the unacceptable pattern of her sick leave and should therefore have been aware that this was unacceptable conduct or misconduct, which placed a strain on other staff members and service delivery at the institution and could attract more serious disciplinary action.

33. The documents handed in by the parties and admitted as evidence, in particular those of the respondent which governed sick leave and associated misconduct, were referred to in order to establish the existence of a rule which prescribed when, how often and for what type of ailments employees may use their sick leave entitlement. Reference is not made to the respondent's family responsibility leave policy, which the respondent was also of a view had been misused by the applicant, but was confirmed to not be part of this dispute. The following extracts from these documents are relevant, with highlighting and emphases retained as provided in the original documents, and my comments inserted relating to this dispute:

DETERMINATION ON LEAVE OF ABSENCE IN THE PUBLIC SERVICE

*14. **NORMAL SICK LEAVE***

14.1 An employee is entitled to 36 working days sick leave with full pay over a three-year cycle. Any unused sick leave credits shall lapse at the expiry of the three-year cycle.

14.2 It is incumbent on the employee to utilise and manage his/her normal sick leave responsibly and with circumspect.

14.3 An employee must submit his/her application for sick leave in respect of clinical procedures in advance, unless the treating practitioner certifies that such procedures have to be conducted as an emergency.

14.4 If overcome by a sudden illness or injury, the employee must personally notify his/her supervisor/manager immediately. A verbal message to the supervisor/manager by a relative, fellow employee or friend is only acceptable if the nature and/or extent of the illness/injury prevents the employee to inform the supervisor/manager personally.

*19. **LEAVE FOR OCCUPATIONAL INJURIES AND DISEASES***

19.1 An employee who, as a result of his/her work, suffers an occupational injury or contracts an occupational disease, shall be granted occupational and disease leave for the duration of the period they cannot work.

Comment: It was not disputed that the applicant had complied with all the requirements to qualify for paid sick leave, including the provision of medical certificates to support the disputed absences on sick leave. A different category of leave would apply for an injury on duty, which the applicant had testified to and provided a medical report for from an orthopaedic surgeon.

Circular H188/2010 **MANAGEMENT OF LEAVE AND SICK LEAVE** dated 23 December 2010

In the recent Horizontal Audit conducted by the Auditor General, the following findings on leave management were highlighted:-

1. Processes and procedures for monitoring sick leave were not always applied.

Circular H79/2004 adddressed the Performance Audit for the Management of Sick Leave Benefits. It was indicated that sick leave must be managed by each supervisor/manager and it should form part of their performance agreements. Each employee's sick leave ***pattern/trend must be monitored*** *(e.g. leave taken a day before or after a weekend/long weekend or a public holiday) rather than managing the average level of sick leave days taken per employee.* ***Institutional Management must ensure that all managers/supervisors are kept informed of their roles and responsibilities in terms of managing and controlling sick leave of their staff.*** *Managers/ supervisors must identify problem areas timeously and information must be obtained and addressed on a monthly basis. Sick leave forms must be submitted within 5 working days after the first day of absence and forwarded to the HR office for implementation on PERSAL. Disciplinary measures shoud be implemented in cases where sick leave application forms have not been submitted timeously to HR offices.*

Comment: This is an internal circular for the instruction of managers and supervisors which staff would not necessarily be privy to. It is on this basis that the applicant's supervisors and managers had addressed their concerns about her sick leave usage and pattern with the applicant.

Circular H106/2011 **MANAGEMENT OF THE INTERMITTENT USE OF NORMAL SICK LEAVE: 8-WEEK RULE** dated 24 August 2011

The recent audit by the office of the Auditor General highlighted that the 8-week rule was not being applied as indicated in the aforementioned circular (H68/2005 dated 20 June 2005). PERSAL was also not programmed in line with the DPSA directive to warn users when sick leave has been captured in contravention of the policy. As a result of the audits as well as a request by the Department to National Treasury to amend PERSAL to comply with the prescripts, PERSAL has now been rectified. It should be noted that in terms of the policy on the 8-week rule as contained in the aforementioned circular, ***a medical certificate is required on the third absence within an 8 week period, regardless of whether a medical certificate has been produced on the first or second occasion, or both occasions.*** *Although PERSAL has been adjusted to warn users of such contraventions, it must be reiterated that it is* ***the responsibility of all managers and supervisors*** *to maintain records of their sub-ordinates absences to enable them to manage the 8-week rule as well as sick leave abuse in general.*

Comment: This is again an internal circular for the instruction of managers and supervisors. In this matter it was common cause that the applicant had provided medical certificates for the recorded absences for sick leave, regardless of the number of days taken.

Circular H115/2005 **HABITUAL USE OF SICK LEAVE AND THE MANAGEMENT OF INCAPACITY** dated 2 December 2005

*1. **INTRODUCTION***

1.1 The Directorate is aware of the fact that many institutions are experiencing problems with employees who make use of habitual, but intermittent sick leave to the extent that the service delivery needs of the institution are adversely affected. In many cases it is not possible to terminate services of such employees in terms of section 17(2)(a) of the Public Service Act, 1994, as amended ("the Act"), due to the varied and temporary nature of the employees' incapacity. Such employees do not fit the profile of prolonged absence due to long-term illness, and medical boarding is therefore not an option.

*2. **DEFINITION OF HABITUAL SICK LEAVE***

2.1 Habitual sick leave constitutes the persistent, but intermittent use of sick leave, usually for a variety of ailments. The pattern of absence is distinctly different from

prolonged absences for long-term illness. The employee usually exhausts his/her normal sick leave entitlement early within a sick leave cycle, and he/she then makes frequent use of temporary incapacity leave.

3. ***LEGAL FRAMEWORK AND ASPECTS***

Circular H69/2002 (Procedure Manual on Incapacity due to Ill Health) makes provision for the termination of an employee's services in terms of section 17(2)(d) of the Act.

3.1 ***PUBLIC SERVICE ACT, 1994, AS AMENDED***

Section 17(2)(d) states that any officer may be discharged from the public service on account of unfitness for his/her duties or incapacity to carry them out efficiently.

Comment: The remainder of this circular is relevant, but is not repeated here for the sake of brevity, in particular paragraph 4 which sets out the procedure to be followed with the management of incapacity and at paragraphs 4.1.5 and 4.1.6 relating to the factors to be addressed in any motivation for the termination of services due to incapacity in terms of section 17(2)(d) of the Public Service Act. Paragraphs 4.1.5 and 4.1.6 read as follows:

4.1.5 Whether the employee was informed in writing of the fact that his/her continuous absence from the work place has a negative influence on the work situation and that the employer based on operational needs has no other alternative but to request the termination of services in terms of setion 17(2)(d).

The employee must be informed in writing of the intended action by the employer. Where verbal consultation takes place with the employee, a written record must be kept and the consultation must be confirmed through written notification to the employee.

4.1.6 Whether comprehensive written reasons for intended compulsory termination of services was furnished to the employee.

The reasons for the intended action by the employer must be furnished to the affected employee in writing, and must accompany the notification detailed in par. 4.1.5 above. Written records of any verbal consultations must be kept.

Further comment: Although a dismissal scenario does not apply in this matter, it is noted that the Public Service Act provides for the termination of service under the circumstances described in this Circular, in particular when a continuous absence in the work place has a negative influence on the work situation, and that in terms of the PSCBC (Public Service Co-ordinating Bargaining Council) Resolution 10 of 1999 it is required that written records of preceding consultations with the affected employee are also kept. This establishes the respondent's right to eventually terminate the services of an employee if habitual sick

leave is identified and the requisite procedures have been followed. In this matter all the conditions for habitual sick leave have however not applied yet since the applicant has not yet exhausted her normal sick leave entitlement nor applied for temporary incapacity leave.

RESOLUTION 1 OF 2003 DISCIPLINARY CODE AND PROCEDURES FOR THE PUBLIC SERVICE

*4. **CODES, RULES AND STANDARDS***

4.1 The Code of Good Practice contained in Schedule 8 of the Labour Relations Act, 1995, insofar as it relates to discipline, constitutes part of this Code and Procedure.

4.2 Employee conduct that may warrant a disciplinary action is listed in Annexure A. This list is not exhaustive. Management may discipline an employee in respect of other conduct, if the employee knew, or ought to have known, that the conduct constituted grounds for disciplinary aciton.

4.3 In applying Annexure A, management must assess the seriousness of the alleged misconduct by considering:

a. the actual or potential impact of the alleged misconduct on the work of the public service, the employee's component and colleagues, and the public;

b. the nature of the employee's work and responsibilities; and

c. the circumstances in which the alleged misconduct took place.

Comment: Under paragraph 5 Procedures disciplinary actions of corrective counselling, verbal warnings, written warnings and final written warnings are detailed, and stated at paragraph 5.5 that no formal enquiry shall be held for less serious forms of conduct. The respondent's witness Ms Human had testified that the misuse of sick leave was a less serious form of misconduct, which meant that a formal enquiry was not required in terms of the Disciplinary Code and Procedures to address this type of misconduct.

ANNEXURE A ACTS OF MISCONDUCT

This document which is an annexure to the Disciplinary Code and Procedures of the Public Service, states as follows: *An employee will be guilty of misconduct if she or he, among other things (this list is not exhaustive): .....*

From the list the two most relevant entries may be the following:

Prejudices the administration, discipline or efficiency of a department, office or institution of the State.

Absents or repeatedly absents him/herself from work without reason or permission.

Comment: Since the applicant had been absent with permission as a result of her periods of sick leave having been approved, the latter category of misconduct would not apply. The former could apply in that the efficiency of her department may have been prejudiced due to her absences, but this is not what she was charged for. This list of acts of misconduct could be deemed to be the rules (although not exhaustive) that employees would need to transgress to attract disciplinary action and a sanction in terms of the respondent's Disciplinary Code and Procedures.

34. From the foregoing, it is apparent that no explicit nor formal rule is documented and communicated to employees for them to be aware of, or reasonably expected to be aware of, regarding the misuse of sick leave, in particular when they may take sick leave, how often, for how many days and for which type of ailments if they are still within their 36 days' sick leave cycle and all the other requirements for the taking or normal sick leave have been complied with. The instructions in the cited circulars relating to the management of sick leave are regarded as being directed to managers and supervisors and not to employees. Although it was stressed that the list of acts of misconduct was not exhaustive, as an official document it does not guide employees as to what constitutes misuse of sick leave, in particular if the sick leave was compliant and had been approved. It is not disputed that the respondent's managers and supervisors had addressed the applicant over a period of time regarding their concerns about the manner and pattern in which she took her sick leave and that the applicant was aware that her sick leave usage was in their view unacceptable. It was common cause that the applicant had complied with all the respondent's requirements to take sick leave, such as notifying her superior of her absences for sick leave and presenting medical certificates for her periods of sick leave, which were still within her statutory sick leave entitlement of 36 days for every three years' employment, which is why she regarded these allegations of misuse of sick leave as unfair. Clause 14.2 relating to normal sick leave of the Determination on Leave of Absence in the Public Service, which is presumably a public document for the information of all employees in the public service, as already cited, requires that an employee utilises and manages his/her sick leave responsibly and with circumspection. It could be argued

that this constitutes a rule relating to the misuse of sick leave, but it still does not provide the explicit grounds to guide employees as to how this sick leave should be utilised responsibly and what type of conduct would constitute the misuse of sick leave. Since no contravention of the respondent's sick leave provisions or conditions can be established, the disciplinary sanction of the written warning issued to the applicant on 16 March 2017 after it was reduced on appeal from a final written warning, is considered to be unfair on substantive grounds.

35. It has to be pointed out that if the respondent had any reason to suspect that the applicant was not genuinely indisposed on the days in question and especially since the respondent is associated with the medical profession, that they would have the right to enquire about the validity of the medical certificates which were issued for the applicant by the medical practitioners concerned, or could have requested a second opinion as to her condition and state of health.

36. The respondent would also have the right to investigate and take disciplinary action against the applicant if she was found to have engaged in activities during a period of sick leave which are contrary to the applicable medical certificate issued, or if she had manipulated the sick leave policy by having fraudulently obtained or misused a medical certificate to attend to other matters, such as attending functions after hours whilst booked off sick or tending to sick family members or family affairs. The same would apply to any other unauthorised absence from work.

37. It is however of concern that no response had been received at the time of the arbitration from ICAS regarding the applicant's referral dated 30 December 2016, with the possibility that the applicant (and respondent) could have benefitted from that form counselling. It is therefore recommended that this referral be progressed and the appropriate counselling commences as set out in the ICAS Managerial Referral document.

38. The notice issued to the applicant to attend the disciplinary "geprekvoering" or discussion of 16 March 2017 appears to be in the nature of a notice to attend a counselling session for alleged misconduct, in support of the principle of progressive discipline and in

accordance with the disciplinary procedure of corrective counselling as provided for in the Disciplinary Code and Procedures of the Public Service in order to encourage and allow an employee to correct unacceptable conduct before more serious disciplinary action is embarked on. The Disciplinary Code and Procedures also provides that a disciplinary sanction up to the level of final written warning may be issued at the informal or counselling level of disciplinary action for a less serious form of misconduct such as the misuse of sick leave. In this regard the respondent's actions in issuing a sanction to an employee as a result of this informal process is not deemed to be unprocedural and contrary to its own Code and Procedures, provided that a rule or standard had been contravened by that employee.

39. The applicant's evidence that she had incurred and reported an injury on duty around January 2015, which injury had contributed to certain of her absences on sick leave, could not be effectively refuted by the respondent. It is also of concern as to what had transpired at the time and what the status is of any claim in terms of the provisions of the Compensation for Occupational Injuries and Diseases Act of 1993 (COIDA) in respect of the applicant, which deserves to the investigated and pursued so that any leave relating to an occupational injury could in fairness be dealt with separately from her normal sick leave.

40. The applicant had also contended that the notice of the disciplinary discussion issued to the applicant on 2 March 2017 was vague since incidents and dates of alleged misuse of sick leave were not specified in that notice, that the disciplinary action taken against the applicant constituted double jeopardy and was furthermore not taken promptly since it related to periods as far back as 2014, alleging procedural unfairness in this respect. The written warning in dispute related to the outcome of the disciplinary discussion held on 16 March 2017 for misconduct of misuse of sick leave benefits that stretched over a number of years. The focus of the evidence during the arbitration was however on the period commencing May 2016, which is not found to be unreasonable given that the history and pattern of sick leave can only be investigated over a period of time, with the then current year of 2016 being appropriate. A flaw however in the procedural context was that the notice of 2 March 2017 did not supply details of the specific dates and periods of the alleged misuse of sick leave, which defect was conceded

to by the respondent. The applicant party's contention is therefore supported that this prejudiced the applicant in that she was unable to properly prepare for and respond to the allegations in that disciplinary discussion or corrective counselling session which resulted in a final written warning being issued. In this regard the disciplinary action taken against the applicant is found to be unfair on procedural grounds.

41. In this matter the onus was on the applicant to show that an unfair labour practice was committed by the respondent. In my view the applicant was able to discharge this onus of proving, on the balance of probabilities, that the applicant was not guilty of transgressing a rule or standard relevant to the workplace and that the disciplinary sanction of the final written warning issued to her on 16 March 2017, which was later reduced on appeal to a written warning, was not justified.

AWARD

42. The first respondent, the Department of Health- Western Cape, had acted unfairly by issuing the written warning for alleged misuse of sick leave to the applicant Ms Danica Daniels, on 16 March 2017 after it was reduced from a final written warning by the appeal authority.

43. The written warning of 16 March 2017 valid for six months is to be set aside and removed off the applicant's record from the date of receipt of this arbitration award.

44. No order as to costs is made.

Panellist: A C E Reynolds