



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS1175-19/20**

Commissioner: **Mr. Anand Dorasamy**

Date of award: **21 July 2020**

In the matter between:

NUPSAW OBO WALTER MANDLA MPUNGOSE

(Union/Applicant)

and

DEPARTMENT OF HEALTH-KWAZULU NATAL

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. Mr. Reginald Tshiso Molefe of the NUPSAW represented the applicant whereas Mr. Mvelo Nzuzza represented the respondent. The arbitration proceedings commenced at 09h00 on the 6 July 2020 and continued on the 7 July 2020 at the Eshowe Mortuary Boardroom in Eshowe. The dispute concerns the alleged unfair dismissal of the applicant. The parties agreed to submit written closing arguments on the 14 July 2020.

SUMMARY OF THE EVIDENCE

BACKGROUND

2. The applicant lodged a dispute challenging his dismissal and the respondent believes that his dismissal was fair.

ISSUES TO BE DECIDED

3. I am to determine whether the dismissal of the applicant was procedurally and substantively fair and make a finding on the appropriate relief if any.

SUMMARY OF THE EVIDENCE

RESPONDENT'S CASE

MICHAEL DOUGLAS LAING

4. The salient aspects of his evidence are recorded below.
5. He is the sub- district manager and knows the applicant who was a shift supervisor. On the day 16 March 2018 he was on duty and is aware of the incident. He received a call from Ms. Magwaza who was crying and alleged that the applicant assaulted her. He advised her to go to the police station to report the matter because he was not at work at the time.
6. He also received a call from the applicant who was upset because Ms Magwaza was interfering with him. He asked the applicant not to assault her. When he came to the office both were not at work. Mr. Khoza told him that Ms. Magwaza was at the Dr Brits rooms and he went to the rooms and saw Ms. Magwaza who showed him the area of the injury. It was on the right upper chest and there was reddening and bruising.
7. The doctor said that x-rays needed to be done and he took her for the x-rays and brought her back to the doctor's rooms. He returned to his office to complete forms.
8. Ms. Magwaza was transferred to hospital and he visited her.
9. He is aware of the criminal proceedings and was subpoenaed and testified in court on the charge of assault. He also testified at the disciplinary hearing.
10. Under cross examination he stated as follows:
11. In the disciplinary hearing he said that the applicant called him first and stated that Ms. Magwaza was unfairly accusing him of denting her car. He agreed not to touch her. The applicant went to the police station and reported the incident because he feared

for his life because Ms Magwaza's family owned taxis. Previously there was an incident between the parties but it was not formally referred to his office.

12. On the 16 March 2018 two witnesses Mrs Ntuli and Mr. Gumede saw the incident. On page 4 Mr Gumede's statement no mention of assault is made.

13. In twenty five years of employment the applicant did not assault anyone and he would not assault a junior staff. He had no experience of the applicant being a problem.

MRS ZAMOKUHLE LUCIA MAGWAZA

14. The salient aspects of her evidence are recorded below.

15. She is employed as a paramedic since 2005 and knows the applicant from the workplace. On the day at 06H00 the applicant and Mr. Gumede were in the supervisor's (applicant) office.

16. On the previous day the applicant caused damages to her car and she greeted him but he did not respond. She wanted him to apologise for what he did. She asked him to buy the paint and paint her car.

17. After that the applicant moved forward and moved past Mr. Gumede and said he would hit her. He went to where the spanners were and took a wheel spanner and hit her on the right chest. When he wanted to hit her again Mr. Gumede stopped him. She saw Mrs Ntuli was pushing to separate them. Mr. Gumede was holding the applicant and Mrs Ntuli was holding her back.

18. The applicant said that he would hit her. After that she was assaulted her. Mr. Gumede and the applicant left the office and she and Mrs Ntuli remained in the office. Mrs Ntuli asked them to leave the office and they thought that he was going to get his gun.

19. She phoned Mr. Laing while in the bathroom (toilet) because she was on duty and wanted to know if she should go to the police station. She went to the police station and then to the doctor because she was hurt. The doctor ordered x-rays. The doctor phoned Mr. Laing to take her for x-rays.

20. She showed Mr. Laing her injuries. She was injured on the right side above the breast and it was swollen and red. She asked Mr. Laing to take the photos as proof of her injury. Then she went to Melomed hospital because the doctor sent her by ambulance. She was in ICU for five days and Mr Laing saw her in hospital.
21. She laid criminal charges and went to court. She, Mr Laing, Mr Gumede, Mrs Ntuli and Dr Brits testified in court. The applicant was found guilty.
22. Under cross examination she stated as follows.
23. The applicant would dispute assaulting her. She drove to the police station and then drove to the doctor who saw her after two hours.
24. She does not know the applicant's wife.
25. She once assaulted him and he reported it but nothing was done. She dropped the SAPS case after the inspector came.
26. He was to apologise but he did not do so. She did not say this story at the Disciplinary Hearing. This happened a long time ago. The applicant was her supervisor and there was no report to say that they were not in good terms. The applicant will deny that he supervised her.
27. She did not report that the state vehicle bumped her car.

MDUDUZI WELCOME GUMEDE

28. The salient aspects of his evidence are recorded below.
29. He knows the applicant who was his supervisor and he was on duty on the 16 March 2018. On that day in the morning he was going to knock off. He was in the office with the applicant and Mrs Ntuli.
30. He was sitting at his table when Ms. Magwaza came in and was shouting saying that the applicant must repair her car. They were arguing with each other. He heard his

supervisor say that he would hit Ms. Magwaza. They stood up and he held the applicant and told him not to do what he wanted to do.

31. After that he saw Ms. Magwaza take her phone and call Mr Laing. He did not know what she said. The applicant and Ms. Magwaza went out to their motor vehicles.

32. He did not see any assault and did not see the applicant use a wheel spanner to hit Ms. Magwaza.

33. When he stood up to intervene, he did not hear "I'm going to kill you" or "she must not tell you kak".

34. Under cross examination he stated as follows:

35. They use the jack handle to switch on the air-conditioning.

NOKUKHANYA CHARITY NTULI

36. The salient aspects of her evidence are recorded below.

37. She knows the applicant as a shift supervisor. On the 16 March 2018 she was on duty (night shift). In the morning she was bringing her paper work and heard a commotion in the office. When she arrived in the office, the applicant and Ms. Magwaza were arguing. They tried to intervene and solve the problem. She did not see the applicant hit Ms. Magwaza.

38. She did not see any object held by the applicant.

39. She tried to stop Ms. Magwaza and Mr. Gumede was holding the applicant back.

40. Under cross examination she stated as follows:

41. She did not see anybody hitting each other.

APPLICANT'S CASE

WALTER MANDLA MPUNGOSE

42. The salient aspects of his evidence are recorded below.

43. At the time of the incident he was a shift supervisor. He was last paid on the 15 January 2020 because he was not continuing that month. On that day he was coming to the hospital to do night shift and was told that he was dismissed.

44. He was suspended from the 14 April 2018 and thereafter for 10 months until he challenged it. The matter was settled. He was at work until his dismissal. During his appeal he reported for work.

45. He challenges his dismissal. He was found not guilty on charge 1. In respect of count 2 he did not say those words. No witness touched on this allegation.

46. On count three this is a false allegation. Ms. Magwaza came to his office and shouted that he must repair her car. He said that since she phoned him at home and he told her that he did not touch her car but she kept on saying that he was going to repair it. She was angry.

47. He did not assault her and as a supervisor he knows that he is not supposed to hit anyone. The law does not allow assault. He has been working for 25 years for the Department and 12 years as a supervisor. This is a case she is building up against him because on the day he was not close to her car or touch it.

48. Under cross examination he stated as follows:

49. He knew he could not hit an employee. During the argument he did not have anything in his hands.

50. Ms. Magwaza went to the police station and anything could have happened on the way. He disputes the medical records.

51. He was in court and was not represented when the witnesses of the employer testified. Dr Brits was cross examined by his lawyer. The magistrate asked Dr Brits to come to court.

CLOSING ARGUMENTS

52. The parties agreed to submit written closing arguments on or before the 14 July 2020. The arguments were taken into account in arriving at my decision.

ANALYSIS OF EVIDENCE AND ARGUMENT

53. This matter relates to the dismissal of the applicant for misconduct after an appeal.

54. The applicant challenges the procedural and substantive aspects of his dismissal and believes that he was unfairly dismissed and prays for retrospective re-instatement.

55. The respondent contends that his dismissal was fair and prays for the matter to be dismissed.

56. The charges of misconduct were as follows:

COUNT ONE

It is alleged that on the 16 March 2018 at Eshowe Emergency Medical Services you intimidated Ms Z L Magwaza (Emergency Care) whereby you referred to her that “I’m going to kill you”

COUNT TWO

It is alleged that on the 16 March 2018 at Eshowe Emergency Medical Services you insulted Ms Z L Magwaza (Emergency Care) whereby you referred to her “she must not tell you kak”

COUNT THREE

It is alleged that on the 16 March 2018 at Eshowe Emergency Medical Services you assaulted Ms Z L Magwaza (Emergency Care) with a wheel spanner which resulted to injury on the chest.

57. The applicant was found not guilty of count one.

58. I have taken cognizance of the decision in *Sweeney/ Transcash* [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitute a rehearing de novo on the merits. The award must accordingly be based on evidence led at the arbitration, not on the record of the disciplinary hearing.
59. Further an arbitration is a new hearing which means that the evidence concerning the reason for the dismissal is heard afresh before the arbitrator. The arbitrator must determine whether the dismissal is fair in the light of the evidence admitted at the arbitration.
60. The arbitrator is not merely reviewing the evidence considered by the employer when it decided to dismiss to determine whether the employer acted fairly. This does not prevent the arbitrator from referring to any enquiry record in so far as it is admitted as evidence in the arbitration.
61. The Code of Good Practice: Dismissal promotes progressive discipline; it distinguishes between single acts of misconduct that may justify the sanction of dismissal and those that may do so cumulatively. The Code identifies gross dishonesty, wilful damage to property, endangering the safety of others, assault and gross insubordination as examples of what may constitute serious misconduct that may justify dismissal as a result of a single contravention.
62. In this matter it is clear from the submissions submitted by the parties that the following may be reasonably gleaned.
63. The applicant was given a notice to attend a disciplinary hearing, attended the hearing, and was found guilty after a hearing and received his letter of dismissal. He challenges the procedural and substantive aspects of the dismissal.

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

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

- (a) The conduct of an investigation;
- (b) Notification to the employee of any allegations that may flow from that investigation;
and
- (c) An opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee;
and
- (d) Communication of the decision taken including the reason for the dismissal; and
- (e) A reminder of rights to refer a dispute to the CCMA or to a bargaining council or to dispute resolution procedures established in terms of a collective agreement.

65. In deciding whether a procedure was fair commissioners should not adopt an overly technical approach and should bear in mind that the purpose of the recommended procedure is to provide an opportunity for dialogue and reflection regarding whether a fair reason for dismissal or some other sanction exists.

66. The applicant was given an opportunity to present his version and challenge the respondent's version and was given the outcome of the hearing and advised of his rights.

67. As a consequence of the above I believe that the procedural aspect of the dismissal to be fair.

68. The applicant was charged with an act of misconduct and was subjected to a disciplinary hearing.

69. The question arises whether the above-mentioned infractions/ misconduct if are such that it warrants dismissal.

70. Although it is the prerogative of the employer to set standards that the employee is expected to render service it must do so in keeping with the guiding principles of the LRA.
71. Although the applicant was afforded the opportunity to challenge the allegations against him, I find that the evidence of the applicant and the complainant was contradictory the one alleging and the other denying the incident.
72. The applicant at the outset challenged the J 88 (medical report) of Dr Brits and at the criminal trial after the employer's witnesses had testified the magistrate subpoenaed Dr Brits to corroborate his medical evidence. At the arbitration Dr Brits did not testify. I must record that the complainant Ms. Magwaza, after the alleged incident, went to the toilet, called Mr Laing, went to the Police Station, then the doctor's room and waited for about two hours before being treated and then went to the hospital.
73. At the arbitration it was clear that Ms. Magwaza called the applicant the night before in respect of the damages to her motor vehicle which he denied and she cut the call. The next day armed with the denial of the applicant she ought to have approached Mr Laing about the matter. The employer's witnesses Mr. Laing did not see the incident, Mr Gumede restrained the applicant and did not see any assault and Mrs Ntuli had prevented Ms. Magwaza perpetrating any assault or being assaulted.
74. All the employer's witnesses who were present in the room when the confrontation took place did not see any assault and also without the corroboration of Dr Brits medical evidence the employer failed to discharge the onus that the applicant assaulted Ms. Magwaza. Therefore, the substantive aspect of the dismissal is unfair.
75. I have considered the following approaches to remedies in terms of the CCMA Guidelines: Misconduct Arbitrations in arriving at my decision:
109 When a dismissal is found to be unfair, the arbitrator must determine an appropriate remedy. Section 193 of the LRA permits an arbitrator to direct an employer who has unfairly dismissed an employee to reinstate the employee, re-employ the employee or pay compensation to the employee. An arbitrator must provide reasons in an award for the remedy that is awarded.

76. In *Sidumo and another v Rustenburg Platinum Mines Ltd & others* it was held that in terms of the LRA a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all the relevant factors and circumstances.

77. As a consequence of the above I determine that the dismissal of the applicant was procedurally fair but substantively unfair.

78. The applicant sought retrospective re-instatement and in this regard I have considered his employment history, the substantive unfairness and the clean record of the applicant in arriving at my decision.

79. As a consequence of the above, I make the following award:

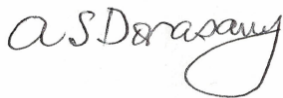
AWARD

80. I find that the applicant's dismissal was procedurally fair but substantively unfair.

81. I determine that the respondent/employer must reinstate the applicant in a position similar to the one that he held at the time of his dismissal (Shift Supervisor). The employer must reinstate the applicant on 27 July 2020 and the applicant must report for duty on that date.

82. The respondent/employer must pay the applicant back-pay in the sum of R198 750.00 by no later than 15 August 2020. The back-pay amount is calculated as follows:

(a) Monthly salary	R 26 500.00
(b) i. Half salary for January 2020	R 13 250.00
(c) ii. Salary for February to July 2020 (6X R 26 500.00)	R 159 000.00
(d) iii. Birthday Bonus- (April-)	R26 500.00
TOTAL	R198 750.00



Arbitrator: Anand Dorasamy