



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: **Thuthuzela Ndzombane**

Case No: **PSHS1184-19/20**

Date of award: **09 July 2020**

In the matter between:

**NEHAWU OBO NDIKHO BUQA**

(Applicant)

and

**DEPARTMENT OF HEALTH-WESTERN CAPE**

(Respondent)

---

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration hearing was scheduled for and heard on 01 July 2020, under the auspices of the Public Health and Social Development Sectoral Bargaining Council at Western Cape College of Nursing in Athlone. The applicant, Mr. Ndikho Buqa, was represented by a Union Official, Mr. Phoko from NEHAWU. The respondent, the Department of Health-Western Cape, was represented by a Senior Labour Relations Officer, Mr. Ngqame. Parties submitted bundles of documents which were marked "A, B and C" and were accepted and admitted as they purport to be.
  
2. I proceeded with the matter in terms of Section 138(5) (b) (i) of the Labour Relations Act 66 of 1995, as amended ('the Act'). The proceedings were digitally recorded and typed notes were taken. Both parties agreed to submit their written closing arguments by no later than 03 July 2020.

## **BACKGROUND**

3. The applicant stated that he was employed by the respondent on 09 May 2011 as the Administration Clerk at New Somerset Hospital. He earned a monthly salary of R14000.00 [fourteen thousand rand] prior to his alleged unfair dismissal on 31 January 2020. At the disciplinary hearing he pleaded guilty on the charge levelled against him. He is very sorry and apologises for his misconduct and he would not repeat it again. At the time he took the property of the patient he thought it was lost property and had no value anymore. However, he believes that the sanction of dismissal was too harsh under the circumstances.
4. In addition, there are certain employees of the respondent who had committed the same misconduct in the past but they were not dismissed. If he succeeds with his dispute he requested to be retrospectively reinstated on the same or similar positions. He is willing to be transferred whenever the respondent deems fit. The procedural fairness of the dismissal is not placed in dispute.
5. The respondent stated that the applicant was charged with the following misconduct:
  - a. Charge 1: You allegedly made yourself guilty of an act of misconduct as contained in the Disciplinary Code and Procedure for the Public Service, Resolution 1 of 2003, Annexure A in that you while on duty, conducted yourself in an improper, disrespectful and unacceptable manner when you on or about 21 August 2019 removed the private property ( Adidas black back pack) of a patient admitted to New Somerset Hospital without permission from the kit room at Emergency care, with the intention to permanently deprive the rightful owner of her property.
6. At the disciplinary hearing the applicant pleaded guilty on this charge. The respondent views it in a very serious light especially that the misconduct involves a patient. All the patients who are admitted in the hospital put trust on them with their health and belongings. As a department they should be able to take care of them without adding anxiety. The trust relationship between the parties is irretrievable down. The respondent denies that it applies similar rules inconsistently in the workplace.

## **ISSUE TO BE DECIDED**

7. I am required to determine whether or not the applicant's dismissal was substantively fair.

## **RESPONDENT'S CASE:**

8. Ms. Salama Basardien stated that she is employed by the respondent as the Head of Nursing at New Somerset Hospital and she presented the following evidence under oath. The patient was admitted to the hospital for an operation. Her husband came to hospital to fetch some of her belongings including a back pack bag. They proceeded to search the bag at Emergency Kit room where the patient's property was stored. The belongings were not found and the husband had to leave without them. At that stage they did not suspect any person any wrongdoing to any person in that the belongings may have taken.
9. They are the custodian of the patient's property and they take responsibility for such. The bag was missing and clothes were emptied out of the bag. The search took between seven to nine hours. During the search the applicant pointed to them as to where they should search. At that point the applicant did not inform them that he took the bag. One of the nurses insisted that the bag was placed at Emergency Kit room.
10. On the following day, the patient was so in pain because of the operations, she had to come from 5th floor to fetch her bag which was not there. Apparently, the applicant approached the patient and handed over the bag. Thereafter, he told them not to worry because the patient got the bag. It later transpired that the applicant had left the premises of the hospital to go and fetch the bag at his house.
11. Time was wasted on the search whilst the applicant knew that he took the bag. She and the operational manager are the only persons who are aware of a certain entrance. This is a secret entrance in the hospital. It bothers her that the applicant used that entrance to leave the hospital. As a society they should take care of the most vulnerable people. The applicant stole from the poor and the most vulnerable person in society. The staff felt very threatened by the applicant because he told them to testify in his favour at the disciplinary hearing.

12. During the search they decided not to tell the patient that the bag was missing because they did not want to add another anxiety on her. The patient was in pains because of the operation. As a practice in the hospital if a patient's property is lost they will do collections among themselves to refund a patient. There has been lot of patient's properties which got lost in the hospital but they did not know who was responsible for such activities.
13. Employees and management were relieved that the bag was found. This conduct creates a bad name and image for the hospital. According to her this transgression warrants a dismissal.
14. Prior to attend these proceedings she had approached several units to establish if the applicant were to come back would they work with him. All of them they indicated that they would refuse to work with the applicant. At Emergency Unit there is no time to watch the back of other people because it is very busy there. And other units refused to accept him.
15. There was harm that was caused to the patient because the bag should not have left the Emergency Kit room where it was stored and the premises of the hospital. Enoch Timakhwe worked during a public holiday. On that day she received a phone call which stated that Enoch Timakhwe was in possession of the hospital property. Pictures of the incident were sent to her via WhatsApp. She confronted Mr Timakhwe that he took ibuprofen tablets. From the onset he admitted to the incident without any hesitation. His justification was that he was at work and he did not want to leave but his leg was swollen. The place he was working in was very cold. Because he did not want to leave work, he decided to take the medication without permission.
16. His function is to make implants for the theatre and this is a critical position. He did not want to stay away from work. Although she informed him that it was wrong to take the medication without permission but she understood him that he did so to the benefit of the respondent. This is the reason that he was not dismissed. She did not have any reason to distrust him. A written warning was issued against him. She also took into account that the workplace he worked in is very cold. Timakhwe's situation is different to that of the applicant because the applicant did not admit from the onset about his misconduct. He allowed the search to go on and he took the bag of the patient. She

cannot comment about other inconsistency issues raised by the applicant because they did not occur in their hospital.

### **APPLICANT'S CASE**

17. Mr. Nditho Buqa stated that he is the applicant in this matter and he presented the following evidence under oath. At the disciplinary hearing he pleaded guilty on the charge leveled against him. Upon returning the bag to the patient he apologized and the apology was accepted. He explained the misunderstanding to her that he thought it was a lost property (no value) hence he took it. Due to his explanation the patient acceptable his apology. Prior to him to fetch the bag at his house he did not inform the patient that he took the bag. And he did not tell the patient the whereabouts of the bag.
18. Subsequent to that he apologized to the managers and to fellow employees. This apology crusade was initiated by him. After returning the back to the premises he was made aware that the managers went as far as to check the cameras.
19. During the disciplinary hearing he submitted these mitigating circumstances: *from the start he was honest and remorseful when he found out that what he perceived at the time was correct was not the case. He immediately and voluntarily returned the bag. He took the bag for his son that stays with his parents. His son informed him that his grandfather had used the extra money which was meant for the school bag. The grandfather used for his medical attention. His wife was pregnant and he took the bag because he thought it was going to be thrown away. Unclaimed items are thrown away after some time. He apologized to the patient for putting her through emotions. The patient accepted his apology and they left in good terms.*
20. He also apologized to the operational manager but was told the matter has been forwarded for further investigation. At the disciplinary hearing he showed honesty and regret hence he pleaded guilty. His actions were wrong he does not condone them and he is willing to be given a second chance. He would never be involved in an improper and unprofessional manner again.
21. He is the bread winner, pays his children school fees, school transport, educational plans, insurance policy and groceries. He also pays for his spouse tertiary studies. He is seeing a social worker and psychologist because he cannot cope for fear of losing

his job and financial problems". The dismissal is not appropriate. He feels that he was treated differently and unfairly.

22. Mr. Timakhwe committed the same misconduct that involved dishonesty like him but he was not dismissed. The property of the state was not recovered through the actions of Mr. Timakhwe. The sanction was a mere written warning. Ms. Malusi stole a mop in 2014 but she was not dismissed instead she was given three months suspension without pay and a final written warning. Mr. Manuel took goods from the stores in 2011. He received one-month suspension without a salary and a final written warning which was valid for a period of six months. Mr. January stole a compressor and he was given a final written warning. He believes that the relationship between him and the respondent still exist. He is prepared to be transferred to another section within the department if they do no longer trust him with patients. He is unemployed, at that time of the incident his wife was five months pregnant and they have since separated because of the dismissal. Currently, he is taking care of his three children.

23. I will refer to closing arguments and cross examination where necessary in my analysis.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT**

24. The respondent bears the onus to prove on balance of probabilities that the dismissal was effected with a fair procedure and for a reason in terms of Section 192(2) of the Labour Relations Act 66 of 1995, as amended ("the Act"). The applicant does not challenge the procedural fairness of his dismissal.

25. In this regard I must consider item 7 of the Code of Good Practice on Dismissal. The Code states that an arbitrator must consider whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace; and if a rule or standard was contravened, whether or not the rule was a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer and dismissal was an appropriate sanction for the contravention of the rule or standard and the CCMA arbitration Guidelines.

26. It is well accepted that an employee cannot be involved in acts of dishonesty or to engage in illicit activities. It is common cause that the respondent has a rule that regulate acts of dishonesty. There is no dispute about the reasonability of the rule. What appears to be at stake here is whether the sanction meted out was fair or not. In addition, there is a dispute whether the rule is applied inconsistently by the respondent in the workplace.
27. In employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded. Dishonesty therefore can consist of any act or omission which entails deceit. This may include withholding information from the employer, or making false statement or misrepresentation with the intention of deceiving the employer or taking the employer's property without permission. It is perfectly clear that a rule guarding against dishonesty is reasonable and it may invite a sanction of dismissal. Likewise, where the state is an employer it will be unfair for the state to do business with its employees as such will give unfair advantage to its employees and will also suppress the competition. This could also result to corrupt activities at the expense of the state.
28. The respondent is therefore called upon to discharge the onus on balance of probabilities, in that; the dismissal was effected for a fair reason. In my view, in weighing the probabilities, one has to assess logic, sense and the context of the dispute in its entirety. If, therefore one cannot make a finding based on the above factors the credibility of the witnesses should enter the fray. It should be remembered that one cannot evaluate one aspect of evidence in isolation to the entire evidence.
29. It is common cause that the applicant took a bag of a patient from the Emergency Kit room and proceeded to take it to his house without permission. As shown above at the disciplinary hearing he pleaded guilty to this transgression. By implication he admits to be involved in an act of dishonesty. Under cross-examination he conceded that the misconduct is of serious nature. It is common cause that the patient was admitted at the hospital in order to undergo an operation. Apparently, her spouse arrived at the hospital to fetch her belongings. Due to the actions of the applicant the husband had to leave the hospital without his wife's belongings. Obviously, this was a disservice to a person who took upon himself to come and fetch the belongings of his wife. There is no way that this discomfort did not bring pain to them. Logic therefore dictates that the

husband incurred travelling costs to travel to the hospital for nothing as he returned back to his residential place without his wife belongings.

30. The applicant does not dispute that the patient was housed at 5th floor in the hospital which is far from the Emergency Unit. Whilst the patient was in pains because of the operation she had to come down to collect her belongings. This obviously had put strain on her. She had to contend with her operation and including her worries with regard to her belongings. This situation does not present a good image and a professional conduct on the side of the respondent towards its patients. It is unthinkable that a person who works for a hospital will even consider stealing from the poor and the most vulnerable people in our society. This type of actions should be condemned and be rejected with contempt. There is no justification whatsoever to take patient's belongings whether it is lost property or not.
31. For the above reasons I am bound to follow the judgment in *Hulett Aluminum Pty Ltd v Bargaining Council For the Metal Industry & Others* [2008] 3 BLLR 241 (LC) at paragraph 42 where the court stated that “turning to the issue of the seriousness of the offence, the presence of dishonesty tilts the scales to an extent that even strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed. In other words, whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship”.
32. I have taken into account that the applicant had a clean disciplinary record prior to this incident and the patient appears to have accepted his apology. Although it appears that the patient accepted his apology, I am not persuaded that this should be the only determining factor in so far as it relates to trust in employment relationship.
33. The question that should be asked is whether the applicant's conduct broke the employment relationship. Evidence shows that the management and including other units do not want to work with the applicant as they believe that the trust relationship is irretrievably broken down. In this regard, the Labour Appeal Court in *Woolworths (Pty)*

*Ltd v Mabija and Others* (2016) 37 ILJ 1380 (LAC), the Court stated that “the fact that the employer did not lead evidence as to the breakdown of the trust relationship does not mean that the conduct of the employee regardless of its obvious gross seriousness or dishonesty, cannot be visited. In some cases, the outstandingly bad conduct of the employee would warrant an inference that the trust relationship has been destroyed”.

34. In my view, it is the nature and the seriousness of misconduct that determine the break down in employment relationship. I am mindful that I must consider all the factors including but not limited to the harm caused by the applicant's conduct, I also need to consider whether additional training would result in the applicant not repeating the same misconduct, the effect of dismissal, his long service with clean disciplinary record, his remorse if any and consistency. I am convinced that dishonesty is a serious misconduct as highlighted in *Hulett Aluminum* supra.
35. It will normally be unfair to require an employer to retain in its employment someone who is correctly found guilty of misconduct involving dishonesty and whom it does not trust. I have taken into account the gravity of misconduct, the fact that he is unemployed; that he did show remorse (even though this appears to be suspicious and opportunistic because he was informed by other employees that management had viewed the video footage). I also took into account that he did not deny that he was part of the search that took place between five to seven hours knowing that he took the belongings. At that stage he did not disclose that he took the belongings but he acted as if he was innocent and honest whilst he knew he was deceitful.
36. In then turn to the issue of inconsistency. In making up his case the applicant cited four cases which involved acts of dishonesty where those employees were not dismissed. Based on the outcome of these cases he believes that he should not have been dismissed. Although, in proving his case, he only relies on inconsistency to show the unfairness. In *ABSA Bank Ltd v Naidu & Others* (2015) 36 ILJ 602 (LAC), “the Court cautioned that although the element of consistency is an important factor to take into account in the determination of fairness in dismissal, it is not only one of the factors to be taken into account in the process and it is by no means decisive of the outcome. The Court held further that the fact that another employee has committed a similar transgression in the past and was not dismissed cannot and should not regarded as a

licence to every other employee to commit very serious offence. The parity principle was never intended to promote or encourage anarchy in the workplace”.

37. But the difficulty about the applicant's contention is that all these forms of dishonesty occurred five to six years ago before this incident. All these employees were subjected to disciplinary process only the outcome of the disciplinary hearing are different. It appears that the applicant want to benefit from these different sanctions. It will be the miscarriage of justice that if a wrong sanction is made then an employer should be held at ransom to continue with meting out a wrong decision. For the above reasons I am not convinced that the respondent should be punished for giving different sanctions for the same misconduct which occurred six years ago.
38. I therefore find that there is no compelling evidence submitted to require me to interfere with the sanction of the respondent as the actions of the applicant were destructive in nature and had gone to the heart of the employment relationship which is based on honesty and trust. There are no mitigating factors, even if they are how strong they can be, will avert the sanction of dismissal under these circumstances. Having considered the evidence before me I find on balance of probabilities that the respondent has discharged the onus that the dismissal of applicant was for a fair reason.

#### **AWARD**

39. I find that the applicant's dismissal was substantively fair. Consequently, this application is hereby dismissed.

A handwritten signature in black ink, appearing to read "Thuthuzela Ndzombane".

**Thuthuzela Ndzombane**

**Sector: Public Health**