ARBITRATION AWARD

Case No: **PSHS1192-17/18**

Commissioner: **Allan Kayne**

Date of award: **28 July 2020**

In the matter between:

PSA OBO MARK ANTON (APPLICANT/UNION)

and

DEPARTMENT OF HEALTH – GAUTENG (RESPONDENT)

DETAILS OF THE HEARING AND REPRESENTATION

1. The applicant referred an unfair dismissal dispute related to misconduct to the Public Health and Social Development Sectoral Bargaining Council ("the Council"), in terms of section 191(1) of the Labour Relations Act 66 of 1995 ("the LRA"). Condonation for the late referral of the dispute to arbitration was granted on 10 April 2019 with the actual arbitration proceedings only commencing on 07 October 2019 and culminating on 30 June 2020, several postponements being noted along the way due to circumstance beyond the control of the parties. The hearings were initially conducted at the SG Lourens Nursing College and later at the Steve Biko Academic Hospital, both institutions situated in Pretoria. It was agreed that the parties could submit closing arguments in writing which they subsequently did on 10 July 2020.

2. The applicant, Mark Bronwin Anton ("Anton") was represented by Lesiba Masenya, an official of Public Servants Association of South Africa ("PSA"). Initially, Faith Masoka represented the respondent, while later in the proceedings, Tebogo Makhubela appeared in her stead.

3. The applicant and respondent submitted 82-page and 39-page bundles of documents, respectively, to be utilised during the arbitration proceedings.

4. A short *in loco* inspection was conducted at the request of the applicant on 17 June 2020 to assist with understanding the flow of patients from the Registration Area on level 3, to the Pharmacy Waiting Areas (old and new) as well as to the Ophthalmology Clinic on level 6.

5. The proceedings were electronically recorded, and the record filed with the Council's administration.

6. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

BACKGROUND

7. The applicant was employed by the respondent since 01 June 2006 and was based the Steve Biko Academic Hospital ("SBAH") in Pretoria from 01 October 2008 and, at the time of his dismissal, on 11 December 2017, worked as a Registration Clerk (salary level 6).

8. The charges preferred against the applicant read as follows:

> ***"Charge 01***
>
> *You are guilty of **Gross Dishonesty** in that on the 18th August 2016, you gave Pharmacy Section an impression that Patient GT 42462208 was registered on the Medicom System whereas you know that the visit for the 18 August 2016 was not registered on the Medicom System and as a result medication was issued to this patient without billing her.*
>
> ***Charge 02***

*You are guilty of **Contravening the Internal Circular Number: 38 of 2015** in that on the 18th August 2016, you collected medications from Pharmacy for patient Vally Angeline GT Number 42510237, Mphuti Thobileng GP Number 63200144, Jayshree Tanna GT Number 42462208 and Mohamed Yunus GT Number 42461281 whereas you were aware that it was unprocedural.*

Charge 03

*You are guilty of **unauthorised possession of medication and patient cards** in that on or about the 24th August 2016, you were found in possession of medication and card hospital belonging patient Vally Angeline GT Number 42510237, Mphuti Thobileng GP Number 63200144, Jayshree Tanna GT Number 42462208 and Mohamed Yunus GT Number 42461281 whereas you know or ought to have known that it was wrong to do so.*

Charge 04

*You are guilty of **causing damage to State Property** in that on or about the 24th August 2016, you broke two windows at Ellahof Court which is the building of the Department." (sic)*

9. He was dismissed on 13 April 2017, having been found guilty of four charges of misconduct, which outcome was upheld on appeal by the Department of Health – Gauteng's Member of the Executive Committee ("MEC") on 11 December 2017.

ISSUE/S TO BE DECIDED

10. I must determine whether the applicant's dismissal was both procedurally and substantively fair and, if not, to order the appropriate relief. The applicant seeks retrospective reinstatement.

11. Procedurally, the following issues were in dispute:

    11.1. The presiding officer of the applicant's disciplinary hearing demonstrated bias;

    11.2. The authenticity of the applicant's appeal outcome; and

11.3. That the respondent failed to comply with its own appeal provisions in terms of the Resolution 1 of 2003 of the Public Service Co-ordinating Bargaining Council (“PSCBC”).

12. Substantively, the applicant denied committing the four acts of misconduct. Alternatively, if it was determined that he was guilty of any or all of the allegations levelled against him, he was unaware of the rules or standards of conduct he allegedly breached, that the rules or standards were neither valid nor enforceable, the respondent acted inconsistently in the application of discipline and that the sanction of dismissal was, in the circumstances, inappropriate.

SURVEY OF EVIDENCE AND ARGUMENT

13. The following constitutes a summarised version of the respective evidence of the parties and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

RESPONDENT’S EVIDENCE

Frans Monama (“Monama”)

14. Monama testified under oath that he was the Director of Patient Affairs and Logistics at SBAH and that the applicant’s wife, Patricia Mohlake (“Mohlake”), arrived at his office on Wednesday, 24 August 2016, and presented him with a plastic bag containing patient medication and appointment cards as well as the applicant’s cellular telephone. He immediately called security and the applicant’s supervisor, Jazzman Moatshe (“Moatshe”) and the medication was unpacked, noting that in each separate packet, the medication was labelled and accompanied by an appointment card, which were dated 18 August 2020. According to Monama, no employee ought to be in possession of medication belonging to patients as the Chief Executive Officer (“CEO”) had previously, in Internal Notice 38 of 2015, advised that employees were not permitted to collect medication on behalf of patients. In any event, the applicant's position in the hospital required him only to register patients who presented themselves to

collect medication. Mohlake drafted a written statement, at Monama's request, which detailed what had taken place between her and the applicant on Thursday, 18 August 2016 and Friday, 19 August 2016, when the applicant smashed windows at their residence in Ellahof and was subsequently arrested by the South African Police Services ("SAPS"). In addition, in her statement she referred to the medication that she found in the applicant's bag upon his return from the pub on 18 August 2016.

15. Charge 01: According to Monama, all patients were required to be registered on the Medicom system before medication was dispensed to them by the Pharmacy. In the case of patient Tanna, medication was dispensed to her on 18 August 2016 despite her not being registered on Medicom that same day, and the applicant was not authorised to have her medication in his possession.

16. Charge 02: Monama submitted that the applicant collected the medication for the four patients, yet he was aware that, in doing so, he was contravening Internal Notice 38 of 2015 which had been communicated to all employees by their supervisors following his weekly meetings with them, and at which time the information was disseminated to all. He presented into evidence each individual bag of medication, detailing the contents thereof.

17. Charge 03: The applicant was found to be in possession of five sets of medication and patient appointment cards which he, at no stage, was permitted to have in his possession.

18. Charge 04: In his position, Monama was responsible for all hospital-owned buildings and residences. Ellahof was one such residence, and the photographic evidence presented showed the windows that the applicant had allegedly broken according to his wife. A quotation included in the applicant's bundle indicated that the cost to repair the two windows amounted to R600.

19. It was his view that, as a result of the applicant's misconduct, the working relationship had deteriorated to such an extent that reinstatement, should his dismissal be found to be unfair, would not be possible. Despite the applicant being dismissed by the respondent, he had continued to reside at Ellahof without any rent being paid.

Cross-examination

20. Monama confirmed that, although the applicant did not report directly to him, he fell within his area of responsibility which included that of patient administration. Internal Notice 38 of 2015 was drafted in part by Monama, its purpose being to provide guidance to all as to the institution's operations. This internal notice was superseded by Internal Notice 07 of 2017 on 31 January 2017 which stated that agents were not permitted to collect medicine on behalf of patients, medicine could only be collected by another with written consent from a patient accompanied by identification of the collector, that such a collector could collect no more than two sets of patients medication (one for the patient and one for him/herself) and that hospital employees would not be prioritised if required to collect such medication while acting in the role of a caregiver to the patient.

21. The witness denied that he took advantage of the situation in order to rid the employer of the applicant or that Mohlake had been placed under duress to draft her statement on 24 August 2016. The disciplinary action ensued as the applicant's wife had presented medication issued by the SBAH, which did not belong to him, that she had found in his possession and had returned same to the institution. The medication was not supposed to be in his possession and was not stored correctly.

22. Monama testified that the procedure ordinarily followed by patients collecting repeat medication was for them to report to the registration desk, submit their appointment card, register them on Medicom, check for any payment due and, if necessary, to have it receipted by Finance, and to provide the patient with his/her file containing the prescription. The patient was then required to report to the Pharmacy with the file where the medication would be dispensed, along with face-to-face counselling. It was, therefore, wrongful of the applicant to have medication belonging to patients in his possession at his home, particularly as he had only been required to register them on Medicom.

23. He identified patient Tanna's prescription chart in the respondent's bundle which listed several medicine names although he was unable to confirm who was authorised to sign the document, adding that the applicant had acted dishonestly

by not registering the patient on Medicom and by collecting the medication for her.

24. Monama stated that he was not acquainted with Osborne Gould ("Gould") or that he acted as a collection agent for patients' medication. He was not aware of this practice and noted that it had never been reported to him. He denied receiving an email from Gould, dated 24 May 2016, testifying that he had never seen it but noted that it was addressed to his Secretary, Della-Reese Neels ("Neels"). Reading the email into the record, Gould's complaint related to being prevented from collecting medication as an agent, on behalf of pensioners who had authorised him to do so. The witness, however, remained adamant that such collections were not permitted and that any official conducting him/herself in this manner would be charged. He proceeded to identify a further complaint from Gould, dated 28 June 2016, in which Gould addressed further concerns regarding the collection of medication by agents. Monama submitted that he was unaware of the complaint which would not have been dealt with by him but would have been forwarded to the appropriate institutional official.

25. Referring to the quotation for the replacement windowpanes, Monama indicated that he was unaware who had sourced it, if they had been repaired and, if so, who had effected the repairs.

26. According to Monama, it had never been brought to his attention that it was not solely the applicant who collected medication on behalf of patients.

27. Patients attending the institution were categorised broadly into those who were required to pay for services and those who did not. Regardless of the categorisation of the five patients in question, Monama submitted that all visits had to be captured on to Medicom for statistical purposes and that failing to do so would impact the funds supplied by Treasury to provide this service to the public. He denied that, as the five patients were all non-paying, the hospital's revenue had not been affected.

28. The witness was unaware of the process to be followed when a patient was not issued with their medication on their appointment date and was required to return

the following day to collect same. He denied visiting the applicant's wife and mother and advising them prematurely that the applicant had been dismissed.

Jazzman Moatshe ("Moatshe")

29. Moatshe testified under oath that he was employed as a Supervisor of Administration on levels 3, 4 and 5 since 2010. As the applicant's superior, he monitored the performance of his employees and was aware of a level of discontent being experienced by management where the applicant was based in Opthalmology. The applicant was moved to Medicine Repeat Registration on level 3 with effect from 13 June 2016. In this role, he was required to obtain the Tivoli queueing system ticket from patients, request the file, retrieve it, check the prescription's validity, register the patient on Medicom, sign and date the prescription confirming that it had been processed on Medicom, direct the patient to pay any outstanding amounts (if necessary) and then direct the patient to the Pharmacy where, once assisted, their medication would be dispensed to them.

30. On 24 August 2016, upon reporting to Monama's office, he found the applicant's wife and mother there with several blue packets of medicine on the table. His wife advised that, on 18 August 2016, she and the applicant quarrelled, she took his telephone and bag from him and, upon opening it, she found the bags of medication and appointment cards, the contents of which she presented to Monama. Moatshe did not recognise the statement presented to him apart from being able to identify from its content that it appeared to have been written by the applicant's wife regarding the incident of 18 and 19 August 2016.

31. He was tasked with checking if each of the five patients to whom the packages of medicine belonged that had been by the Pharmacy on 18 August 2016 had been registered on Medicom and confirmed that none had been registered for medicine repeats on 18 August 2016. Tanna, who was an H1 patient, ought to have paid R40.00 for her visit on 18 August 2016, with the remainder of the patients being H0 patients who were not required to submit any form of payment for their medication. However, according to Tanna's prescription, the applicant signed that he registered her on Medicom on 18 August 2016, yet upon checking the Medicom system, no such visit was recorded for that day. The only visits

recorded by Tanna was those of 14 April 2016, 16 September 2016 and 13 October 2016. He recalled no problems with the system on 18 August 2016.

32. Moatshe identified Internal Notice 07 of 2017 as specifying that no employee may collect medication for more than two patients, one of which could be for themselves, and that the notices (both 38 of 2015 and 07 of 2017) had been provided to SBAH employees and enlarged and placed in full view of patients. It was his understanding that if a patient were unable to collect his/her medication, he would have to authorise another to do so in the form of an affidavit and the collector would need to comply with the provisions of the institution's notice.

33. Charge 01: Tanna was not registered on the Medicom system for a visit on 18 August 2016 and, upon telephoning one of the numbers on her file during the investigation, he learned that she was in the hospital. He located her at Internal Medicine ("INR") and was advised that she did not know the applicant and had not appointed anybody to collect medication on her behalf. She was able to identify the medication purported dispensed to her as being those that ought to have been issued to her.

34. Charge 02: According to Moatshe, the applicant contravened the requirements of Internal Notice 38 of 2015 and did not follow the procedure required therein.

35. Charge 03: Moatshe submitted that the applicant was aware of the specific requirements regarding the collection of medication on behalf of patients, as outlined in the notice, and that he had ensured that all the communication of the contents of the notice had been widely disseminated to all employees within his area of responsibility as well as being placed on relevant notice boards.

36. Charge 04: Although he was not personally involved in the investigation, he had learned that the applicant had thrown a "baksteen" through the windows of the flat where he resided.

37. He testified that, as a result of the applicant's misconduct, he would not believe that reinstatement would be appropriate in the circumstances and that his dismissal emphasised the need for everyone to work correctly.

Cross-examination

38. Moatshe confirmed that he was the applicant's superior at the time of the incident with approximately 36 to 38 employees reporting to him. Standard operating procedures guided his team members in terms of the regulations, and the Uniform Patient Fee Schedule ("UPFS") used to classify patients and how much each was to pay for treatment.

39. He identified Internal Notice 38 of 2015 as a circular which applied to everyone in the hospital and which had been received and circulated to all in the form of copies, posted on noticed boards for employees and patients and which had additionally been explained to the applicant. The circular required that no employee was permitted to effectively collect more than two sets of medication (one of which had to be their own) from the Pharmacy. In other words, an employee could only collect medication for somebody else in their care.

40. He identified Tanna’s record on Medicom, screenshots of which were included in the applicant’s bundle, which reflected visits on 14 April 2016, 16 September 2016 and 13 October 2016, noting that there was no transaction reflecting 18 August 2016, meaning that Tanna had not been registered that day. This he confirmed on 24 August 2016, the same day that Mohlake had brought the medicine to Monama.

41. As a supervisor, Moatshe was able to perform corrections on Medicom, examples of which included the incorrect categorisation of patients, cancellations and cash counter transactions; the applicant, on the other hand, enjoyed limited functionality on the system and, notably, was unable to cancel transactions as could he, Myburgh and other supervisors. Unless a terminal was left unoccupied, but logged in under a supervisor's name, cancellations could not be performed without the user’s knowledge. There were, however, crisis situations, where supervisors did have to assist clerks with the registration of patients, although this was not the norm. Moatshe testified that it was impossible for anybody, including Myburgh, to have deleted Tanna's visit on Medicom. There was a particular procedure to be followed if patients had returned to collect medication sooner than the 28-day cycle, and it entailed the completion of forms, verification of the incorrect transaction, nullification of the billing and cancellation of the visit as patients were required to attend to the hospital only on their appointment date.

42. He identified an appointment card for Tanna, dated 17 August 2016 from Gastroenterology on level 6 (GE06) but was unable to identify if a payment was received for that day. He conceded that a patient could be required to attend more than one clinic in a day, in which case, only a single payment would be required. However, all pay points processed their transactions on Medicom. He identified a receipt issued from Medicom, to Tanna, dated 17 August 2016, in respect of her visit to the Gastroenterology Clinic that same day, using the same patient number, for which it appeared that she had paid R40. If Medicom had been "down", registrations and payments would have been performed manually and later updated to the system. Regardless of if she had been attending both the Gastroenterology Clinic and to collect her medicine repeat (originally issued by Internal Medicine), she was required to register on both occasions, and it would have been possible for her to collect the repeat medication on the following day if constrained by time. Based on the documentation to hand, she had paid for her visit on 17 August 2016 but not for her medicine repeat on 18 August 2016, which potentially resulted in a loss of revenue to the respondent, albeit only R40.

43. He clarified the procedure followed by the Registration Clerks to include: calling patients based on ticket numbers, requesting files, receiving files in batches of 10, checking the patients' files for script validity and repeatability, recalling patients, verifying their details on Medicom, registering the patient, signing the prescription as proof of registration, before sending the patients to the Pharmacy to collect their medication.

44. According to Moatshe, SBAH introduced a robotic system to pick medication for patients in order to address service delivery issues. Along with the robotic system, the queuing system, known as Tivoli, was also introduced to ensure that patients were seen based on their order of arrival, but also prioritising specific categories such as the elderly and disabled.

45. Moatshe maintained that even if the applicant had simply misdated his signature on Tanna's prescription, he would have faced similar charges as it was not attributable to human error. Errors identified were reported to him, and he was required to ensure that they were corrected.

46. He denied collecting medication on behalf of patients of the hospital yet was aware that agents by the name of Gould, Winston and Joe did so. Each would be required to present permission from the patients in order to collect medicine on their behalf. Notably, none of the agents were employees of SBAH. Although the Internal Notice forbad them from doing so, they continued to do so by presenting the permission from the patients in question. Referring to a letter from Yunus Mahomed, dated 16 September 2016, Moatshe did not view it as an example of such consent required by agents.

47. Although presented with a statement, purportedly drafted by Gould, stating that he had given four packets of medication to the applicant on 19 August 2016 (sic), including that of Tanna, which he would later collect from the applicant's home, Moatshe recalled how he and Monama confirmed with Tanna that she had not requested the applicant or Gould to collect it on her behalf.

48. There had never been a reason to discipline the applicant before this incident. Yet, he maintained that the applicant's failure to comply with the respondent's procedures had resulted in him losing trust in him. What exacerbated the situation was that had Mohlake, not advised them of what her husband was doing, it would have probably continued unabated.

49. Moatshe noted the difference between the statements of Gould and the applicant. Gould, on the one hand, stated that on 19 August 2016, he gave the applicant four packets of medicine to keep for him. Anton's statement, on the other hand, indicates that he (the applicant), on 18 August 2016, collected medication from the Pharmacy for patients Mphuthi, Tanna, Yunus and Vally.

Magriet Myburgh ("Myburgh")

50. Myburgh testified under oath that she was the Information Manager at the SBAH, whose responsibility included that of the Medicom system. She identified the screenshots introduced into evidence by the respondent, explaining the content of the fields relating to Tanna's visits. She noted that, had the patient attended the hospital on 18 August 2016, such an entry would have been included between the visits of 14 April 2016 and 16 September 2016. The omission of such a transaction indicated that a visit on 18 August 2016 was not registered.

Had Medicom been out of operation, the missing transaction would still need to be processed but would reflect that it was not captured at the time. It was imperative that all visits be processed on the system for statistical purposes regardless of whether they were liable to pay for the visit or not. In Tanna's case, she ought to have been billed for the medicine repeat but had not. Myburgh recalled seeing Internal Notice 38 of 2015, which prohibited employees from collecting medication on behalf of patients. If Anton had collected her medication from the Pharmacy, not only would he have been dishonest but would have acted in breach of the notice.

51. Similarly, patient Mohamed's record reflected that he was not registered on Medicom, despite medication being dispensed in his name on 18 August 2016; the only visits registered on his patient record reflected 13 May 2016, 28 June 2016 and 27 July 2016. Patient Mphuthi's record only reflected three visits in 2015; however, she noted that the screenshot presented appeared not to include all the transactions for that patient evidenced by the record number at the bottom of the screen. Patient Rahiemah Vally's record indicated that she visited the Internal Medicine Clinic on 10 August 2016; however, no medicine repeat visit reflected.

Cross-examination

52. Myburgh recalled being part of the Medicom implementation team in 2002, explaining that the system comprised an Oracle database on the hospital network. Although it performed the functions for which it was originally intended, due to its age and inability to integrate with the web, other more advanced systems could not be linked to it. The only instance where a transaction was not reflecting on Medicom could be attributable to the clerk not capturing it or not saving it.

53. She identified patient Tanna's appointment card and medication, reflecting the date of 17 August 2016, pointing out that it did not relate to a medicine repeat visit but rather to treatment at the Gastroenterology Clinic. (GE06). Even if a patient were required to attend two clinics on the same day, each would need to be registered on Medicom using that particular clinic's code, although only a single payment would be required from the patient.

54. Myburgh denied that certain computers within the Registration area did not direct information to the Pharmacy, explaining that what was being alleged was impossible as the Pharmacy did not make use of Medicom and missing data could only be attributed to clerks failing to capture the information or failing to save it. The purpose of signing and dating the patient's prescription chart was to alert the Pharmacy that the patient's visit had been recorded on the system in order that they dispense their required medication.

55. According to Myburgh, only supervisors and team Leaders, including Moatshe, were provided with additional functionality on Medicom to remove visits. This was, however, not available to clerks. Although the applicant had been processed medicine repeat visits on some of the patient's records, there were no medicine repeats processed by him on Medicom on 18 August 2016, despite patients Tanna and Mohamed being signed and dated by him on 18 August 2016 confirming that he had registered them. Although they did not reflect if the applicant himself collected the medication from the Pharmacy, the stickers affixed to the prescription charts confirmed that they were dispensed. The witness restated several times that neither the respondent's employees nor

agents, appointed by patients, were permitted to collect medication on their behalf. Only in instances where patients were under the direct care of an employee, would it be possible for that employee/caregiver to collect medication on the patient's behalf, which specifically excluded agents.

56. She stated that she had not personally generated the screenshots but could see, according to the username appearing on them, that one Matlou had done so. She further noted that cancelled visits were not deleted from Medicom but were simply marked as being cancelled, thus retaining the transactional record on the system.

Application for postponement

57. On resumption of the proceedings on 08 June 2020, Tebogo Makhubela appeared for the respondent and brought an application for postponement as a result of Faith Masoka taking ill and being advised by her treating practitioner to convalesce at home. She had been scheduled to return to work on 08 June 2020, however, was still feeling unwell. Although she believed that she could take over the case, she was concerned that she was not fully apprised of Moatshe's evidence in chief which had been led in November 2019 and his cross-examination by the applicant which was unable to be completed before the matter was adjourned. She was additionally unsure of Masoka's prognosis or the time that she would not be available. In the event that the application was not granted, she requested copies of the audio recordings relating to Moatshe's evidence in chief to be provided to her.

58. The applicant party objected to the request to postpone the proceedings as it was at a critical phase and had been pending for an extended period. Masenya noted that several postponements had taken place since November 2019 which the applicant had not objected to, but effectively, the applicant had been without earnings for approximately 30 months since his dismissal, which was compounded by the impact of COVID-19 which had further delayed finalisation of the matter.

59. Having considered the application and the circumstances surrounding it, I ruled that, as the respondent was unable to determine if and when Masoka would be

well enough to continue, it would not be in the interest of justice to postpone the proceedings. As Makhubela was in a position to take over from Masoka and the respondent's witnesses had already been prepared, copies of the audio recordings would be made available to her in order to review Moatshe's evidence in chief, she would be required to proceed with the remaining, already prepared witnesses, and the application for postponement would not be granted. Moatshe’s cross-examination would be deferred to allow her sufficient time to review the recordings.

60. For ease of reference, Moatshe’s evidence in chief and cross-examination are included together and not separate.

Thapelo Mothoagae (“Mothoagae”)

61. Mothoagae testified under oath that, at the time of the applicant’s dismissal, he was an Assistant Director in the Directorate of Administration and Logistics which included Security and Facilities Management. He recognised the applicant as an SBAH employee and that he was also a resident at one of the hospital-owned accommodation facilities.

62. He had assisted in the investigation of the applicant’s misconduct after Monama alerted him as to what the applicant’s wife had advised. He and Moatshe had first verified if patients to whom the medication ought to have been issued had been registered on Medicom. Once all the documentation was collated, the applicant was asked to explain his version, which he recorded in the form of a statement, and the matter was subsequently referred to the Labour Relations Department.

63. He was tasked with visiting Ellahof to investigate Mohlake’s claim that the applicant broke the windowpanes, and he confirmed that the windows reflected in the photograph included in the applicant’s bundle, were those that had been broken. The second and third panes in the photograph showed how they had been damaged by a stone being thrown through them with remnants of the glass still being attached to the frames in front of hard white cardboard.

64. He recognised Mohlake's statement and proceeded to read it into evidence. He further identified the quotation for R600 obtained to replace the broken panes of glass at the unit where the applicant resided.

Cross-examination

65. Mothoagae confirmed that he had not met with the applicant’s wife but had been provided with a copy her statement of 24 August 2016 regarding the damage to the hospital’s property and that he and Moatshe checked if the patients were registered on Medicom. He recalled Moatshe advising that the individuals were patients, but none of them were registered on the system on 18 August 2016. Subsequently, he visited Ellahof to verify the damage to the windows of the applicant’s unit.

66. He confirmed being aware of Gould's written statement presented, which reflected that the medication was rightfully his, and which he was still to distribute to the patients in question.

67. He acknowledged that he had, after his visit to Ellahof, never checked if the windows had been repaired or who had actually effected the repairs and was uncertain, apart from reading Mohalke's statement, if it was indeed the applicant who had broken them.

Maesela Peter Ramokolo (“Ramokolo”)

68. Ramokolo testified under oath that he was the Assistant Manager at the Main Pharmacy of SBAH situated on level 3.

69. According to the witness, the regulation of the collection of medication was established in terms of Internal Notice 38 of 2015, dated 01 June 2015, which emphasised the importance of medicines being issued directly to patients, rather than to third parties and which applied to all employees and patients of the hospital. Agents were not permitted to collect medication on behalf of patients and only where duly authorised by the patient could caregivers collect medicine on their behalf, the number of which would be limited to two (one being for the patient and the other for the caregiver).

70. According to the applicant's statement, the patients had waited to receive their files in the morning, and they would then hand in the files at the Pharmacy and return to him with their registration cards, allowing him to collect their medication from the Pharmacy at the end of his shift. In doing so, the applicant contravened the notice which disallowed employees from doing this.

71. Ramokolo submitted that the applicant should not have been in possession of any medication belonging to patients of the hospital and, even if he claimed to have acted as an agent, he was required to present proof that the medication was dispensed lawfully and that he was appointed by the patients to collect the medication on their behalf.

72. Ramokolo explained that, in the Pharmacy, upon receipt of a patient's file, it would be checked to establish if the patient had been attended to in one of the clinics and had been issued a prescription for medication or if the patient was due to receive a medicine repeat. To confirm that the registration of the patient had taken place, the Registration Clerks were required to sign and date the prescriptions as proof of this. Referring to Tanna's prescription, he confirmed that, as a Pharmacist, he would check the validity of the script and any repeats. In her case, she had first been seen on 21 July 2016 and, according to the file, had been registered as a medicine repeat on 18 August 2016.

73. Referring to patient Mahomed's letter granting Gould permission to collect his medication, Ramokolo identified a number of discrepancies including the date of 16 September 2016 which was a month after the incident and more than a year after the internal notice had been issued and, the letter only provided permission to Gould and not to the applicant to collect his medication.

Cross-examination

74. Ramokolo confirmed that, prior to the implementation of Internal Notice 38 of 2015, there was inadequate regulation of to whom medicines were issued. Pre-implementation, employees freely collected medication on behalf of patients. However, post the implementation, collections by employees were restricted to collection for themselves and/or where they performed the role of caregiver to

the patient as face-to-face counselling of the patient, prior to dispensing, was always desirable

75. According to the notice, face-to-face counselling was necessary when dispensing medication to a patient. If this was not possible and the only available option was for medication to be collected on a patient's behalf then, agents were not permitted to do so, only caregivers of patients were allowed, collections were limited to medication for a single patient or the patient plus the collector, and first-time users of chronic medication had to be seen by the Pharmacist. The notice had been widely distributed to all employees within the institution, via their supervisors and departments, and prominently displayed in every window where medication was collected.

76. He acknowledged that he was aware that Gould and Winston collected medication on behalf of patients, adding that they were required to obtain authorisation from the patient and were required to present proof thereof and identification. Although the collection of medication by agents was not permitted according to the notice and was, by no means encouraged, there were circumstances where patients had no alternative available to them but to request such agents to do so. In any event, Registration Clerks were required to ensure that no more than two files were issued to such an agent in order to comply with the notice. The Pharmacist dispensing medication was more concerned that the correct medication was being dispensed to the correct patient, that a Doctor had issued the prescription and that the patient had been registered on Medicom. He submitted that there was no evidence to hand which confirmed that the applicant had in fact, collected the medication for all of the patients.

77. Ramokolo was requested to read Gould’s email to Neels into the record to which he added that, although he was not aware of that email as it had never been directed to him, Gould was entitled to express his opinion as he had.

78. Asked if Moatshe ever collected medication from the Pharmacy, the witness replied in the affirmative, explaining that he usually called ahead when this was necessary. The problematic situations where this was necessary were often

those were patient files had been delayed or where the patients were under investigation, and it was essential that their files not be released directly to them.

79. Ramokolo confirmed, again, that Tanna's script all appeared in order and, based on it having been signed and dated by the applicant implying that the patient was registered, there was nothing out of the ordinary to suggest that the medicine should not have been dispensed on 18 August 2016. Had the patient been in attendance on the previous day at the Gastroenterology Clinic without collecting her medication and subsequently returned the following day, she was required to register afresh to have the medicine dispensed to her. Had it been as a result of the Pharmacy closing without the patient being attended to, requiring her to return the following day, this would have been noted on the file. Had she elected not to continue waiting to be assisted by a Pharmacist, this would not have been reflected on her file.

80. He identified the patient Tanna's bill for 17 August 2016 which she settled noting that it reflected a consultation at Gastroenterology and nowhere reflected that the purpose of her visit was for a medicine repeat, reemphasising that each visit to a clinic or for a medicine repeat required a separate registration.

APPLICANT'S EVIDENCE

Mark Anton ("Anton")

81. The applicant testified under oath that he had been employed at the SBAH as Client Information Clerk from 01 October 2008 and from 01 January 2010 as a Registration Clerk. In the latter position, his daily duties broadly included requesting patient files via Tivoli (the queuing/prioritisation system), calling patients to his desk via intercom and processing the registration of the visit on Medicom.

82. Charge 1: He disputed that the Medicom screenshot of patient Tanna's visits was an accurate reflection of her visits as he had registered her on 18 August 2016. He believed that the missing registration for that date might have been cancelled as he had followed the standard procedures, confirming that he registered her by signing her prescription chart and dating it 18 August 2016. He supported his

claim that the screenshot was incomplete by referring to a bill issued to patient Tanna for her visit on 17 August 2016 where she had paid her R40 fee for a visit to the Gastroenterology Clinic. This transaction was missing on the screenshot, and he suspected that it might have been deleted along with his registration on 18 August 2016. Nowhere on Tanna's chart had warfarin been prescribed yet she had apparently identified warfarin as being hers; however, patient Rahiema Vally had actually been prescribed this. Ordinarily, where a patient was required to visit a clinic and collect repeat medication, both would require an individual registration. However, only a single fee was payable in respect of the first transaction. He explained that, on 17 August 2016, while on duty at the registration desk, he was approached by a lady at 13h40 who explained she had a medicine repeat for that day. She had just undergone a gastroscopy procedure in the Gastroenterology Clinic and was very uncomfortable. Coupled with the construction underway at the hospital, she would not be able to collect her medicine but had given the agent, Osbourne Gould, her appointment card to collect it the following day. She should therefore not have been billed for collecting medication on 18 August 2016. Along with Tanna's medication, Anton confirmed that he had printed an appointment card for her so that he could take the medication out of the hospital; the original appointment cards had remained with Gould, with the exception of patient Mphuthi for which he had the original.

83. All registrations were captured on the Medicom system, which he described as being unreliable, often freezing, requiring users to start a new instance of the program and which led to many problems. On occasions, they would have to revert to a manual system of processing patient registrations and these transactions would not appear on any screenshots subsequently generated. Any errors made on Medicom would require correction by a supervisor (who could cancel visits) or by Myburgh (who could delete visits) but who was exceptionally strict with them threatening them with disciplinary action.

84. Charge 2: Anton denied that he had collected the four patients' medication on 18 August 2016 but rather that Gould had come to him and he had registered patients Angeline Vally, Mphuthi and Mohamed (requesting their files from Records) and similarly that he registered patient Tanna, whose file had been left

at “voicemail” – a term used where patients did not respond to being called – from the previous day. He was acquainted with Mphuthi’s son as she had been a patient at Ophthalmology and on 17 August 2016 when she reported to the Pharmacy, she noted its relocation and the construction underway. As her eyes had been dilated, it was not possible to wait to collect the medication that day. Accordingly, Anton included patient Mphuthi’s file in the batch of four for Gould to collect from the Pharmacy, which explained why the original appointment card was utilised and not a blank one. Following the collection of the four sets of medication from the Pharmacy, Gould returned to him with five sets of medication, the additional one being for patient Rahiema Vally. He slipped them under Anton's window and asked him to retain it for later collection as he urgently needed to go to Johannesburg via taxi. Anton believed that not only had the medication price list presented during his disciplinary hearing been tampered with but the medication for patient Mphuti was not for just a single month but would have lasted at least three and had been manipulated.

85. Reading his statement that he drafted on 24 August 2016 into the record, he explained that he was not himself when he had done so as he had been incarcerated for the duration of the weekend. He acknowledged that he did not want to create a link between agents being assisted by employees and had, therefore admitted that he personally collected the medication. This was based on what Moatshe had directed him to do. He was not aware of any standard operating procedure regulating his work, noting that he first became aware of Internal Notice 38 of 2015 when it was presented to him by the investigating officer as he had never been briefed by Moatshe in this regard and had also never been provided with any training or induction by the respondent. The notice was dated 01 June 2015 at which point in time he was still working at Ophthalmology where the Charge Sister routinely ensured that employees were apprised of the contents of such notices and they would sign for receipt thereof. He denied that he actually collected the medication from the Pharmacy on 18 August 2016.

86. Anton explained that one of the additional terms in use within the hospital was that of “magogo” in which patients paid R100 to clerks in order to prioritise the

collection of their files and R200 for them to collect their medication on their behalf. Any agreement to this effect would be between the employee and the patient. He had been taught by his colleagues how to manipulate the system by requesting the files the day before the patient's appointment in order to achieve these ends, and he believed that this was in order. However, they would never collect medication from the Pharmacy on behalf of patients. He was also aware of the four agents who operated in SBAH, clearly in contravention of the internal notices published by the institution, for whom they did favours. Notably, Moatshe assisted Joe and Winston and would often collect up to twenty ticket numbers from Sr Makgatho at the beginning of the day to allocate to him. As a Registration Clerk, he would then request the files from Records, register the patients on Medicom and issue the files to Winston to collect the medication from the Pharmacy. As such the internal notice was not a true reflection of the day-to-day happenings at the hospital which was more appropriately described in Gould's email to Neels, dated 24 May 2016.

87. Charge 2: Anton emphatically denied that, despite indicating to the contrary in his written statement of 24 August 2016, he had not collected the patients' medication from the Pharmacy on 18 August 2016.

88. Charge 3: He denied that he had been in possession of patient medication without the necessary authorisation. To this end, Mphuthi's son had provided him with verbal consent to collect his mother's medication on 18 August 2016 and had provided him with her appointment card. He did not recall providing patient Rahiema Vally's card to Gould, only that he received medication for her from Gould in the packet and proceeded to generate an appointment card so that he could leave the hospital with it in his possession. He did not agree that the medication was in his possession without the necessary authorisation as this had been provided to Gould, who had provided same to him and was supported by Gould's written statement to this effect.

89. Charge 4: Anton confirmed that he had been jailed for common assault on 19 August 2016 when his wife called the SAPS after an altercation with him. No charges had been filed relating to damage to property, and he denied breaking any windows. He had previously resided in unit 1 and moved to unit 2 after a

dispute with the respondent pertaining to renovations. Since he moved into the unit, the two windows of the small room were broken, and Monama had forbad the contractors to effect any repairs to his unit. According to his wife's written statement that had been presented into evidence, it did not specify which two windows had been broken and did not tie up with the photographic evidence.

90. On 24 August 2016, he arrived at the SBAH to see Monama as his wife had advised him that she had provided his telephone to Monana. He was directed to wait in Moatshe's office which he duly did. Moatshe and his superior were called by Monama and spent considerable time there. Upon Moatshe's return, he asked Anton what he had done as he had encountered the applicant's wife and mother-in-law in Monama's office. He accused Anton of getting them into trouble. He explained to Anton that he had to verify a list of four patients' medication (excluding patient Mphuthi's) for Monama and advised Anton that, if asked, he should say that he collected them and that Moatshe would advise Monama that Anton was not the only employee who collected medication on behalf of patients. Some 20 minutes later, he was called to Monama's office. In an adjacent office, he could hear his wife's voice and saw his mother-in-law with Ida Phasha. Maseko presented the bags of medication that his wife had apparently brought in to them at which point Moatshe advised him that it was not only Anton who collected medication on behalf of patients, but many others, to which Monama instructed him to call on those individuals to explain. Realising he had implicated himself, Moatshe froze. The issue of the broken windows was never discussed with him during that session. He only became aware of the quotation sourced at his disciplinary hearing on 21 November 2016 but had, already repaired them. He had hoped to do them sooner but only managed to do so in October 2016 after receiving his bonus.

91. He failed to understand how Moatshe, who had described him as a hard worker, now believed that he could no longer be trusted especially when he had only emulated his behaviour and conduct, indicating that he was singled out as a scapegoat.

92. The applicant questioned the authenticity of his appeal outcome, which contained a glaring error, referring to his place of residence as Eikenhof, instead

of Ellahof, but more particularly that it did not give him any direction, nor did it specify from where it originated. He deemed the layout to be unprofessional, questioning why reference had been made to his conduct while employed at the Switchboard, his rental dispute and why only one of the pages made use of a footnote. He was only issued with the last page of the outcome and had to request the first five pages to be provided to him. He took issue that the document did not set out his right to refer an unfair dismissal dispute to the Council and he concluded that Phasha's intern had simply created it in her office and affixed the last page to it. The appeal outcome differed vastly from Phasha's letter to him which accompanied by his disciplinary hearing outcome, initially confirming his dismissal. He questioned why it had taken from April 2017 to December 2017 for the respondent to finalise his appeal.

Cross-examination

93. The applicant testified that messengers routinely visited the departments within the hospital to distribute notices and circulars to supervisors who were tasked with disseminating same to their team members. At the time that Internal Notice 38 of 2015 was issued, he was based in Ophthalmology where the Charge Sister ordinarily ensured that notices were routinely signed for by all employees. He denied that the notice was ever communicated to him by Moatshe and Pitjeng during his tenure at the Registration Area. He agreed that the notice, at the time of his dismissal, indeed applied to him, reiterating that it was never communicated to him and he only learned of it during the investigation. He was of the view that the notice was actually directed at level 3 employees and that it did not apply to him when it was issued in 2015 as he was working on Ophthalmology at the time where medicine repeats were not facilitated. Had it been brought to his attention, he would have complied, noting that it was not his responsibility to ensure that he was aware of it and that he had never undergone any induction training during his tenure at SBAH where it might have been explained to him.

94. He denied that it was common practice for employees to collect medication on behalf of patients but acknowledged that they sometimes did favours for patients.

Agents handled collections on behalf of patients, and everybody did this. He accordingly believed it to be acceptable.

95. Anton maintained that patient Tanna's screenshot did not accurately reflect what had taken place on her record as her registration of 18 August 2018 was not shown, in fact, none of her August 2016 visits were noted. He claimed that he definitely registered her and confirmed this by signing her prescription chart. Even her other medicine repeat visits appeared not to be reflecting on Medicom.

96. He confirmed that patients visiting a clinic and collecting a medicine repeat on the same day were required to register in both locations but would be exempted from any fees in respect of the second registration. In Tanna's case, she usually made use of Gould to collect her medicine repeats and only visited the hospital when she had to attend a clinic. She would, therefore, have been exempt from paying two fees in respect of 17 August 2016.

97. He had not wished to expose Moatshe during his cross-examination. However, He maintained that it was Moatshe who had directed him what to include in his statement of 24 August 2016 which he had drafted under duress and which contained errors (such as the number of patients and dates of incarceration) as he was not permitted to see the medication included in the packets. Moatshe had not wanted any mention of agents in the statement as it would implicate him and others in the hospital. Anton conceded that, in hindsight, his actions contravened the provisions of Notice 38 of 2015, admitting that, on occasions, once a patient had handed his file in at the Pharmacy and then returned to him to provide him with the appointment card, he would wait until after his shift and go and collect that patient's medication from the Pharmacy for them. He attributed his wife finding the medication in his bag being as a result of him not having access to his telephone to call Gould to collect it.

98. Anton explained that Gould's statement regarding him (Gould) collecting the medication from the Pharmacy was a more accurate version that what he had documented in his own written statement.

99. While he testified that his wife's statement had been written by his mother-in-law in which she indicated that she was in the bathroom at the time the windows were

broken, it did not specify which windows were damaged and did not take into account that the small bedroom's windows had been broken since they moved into the unit. He denied breaking any windows in the unit but that he repaired the broken windows when he received his bonus as the children needed to sleep in that room. This was supported by the respondent's photographs which showed the broken windows to be in respect of that room. He believed that the respondent's motivation in pursuing all the charges was to get him out of SBAH and Ellahof.

100. Although the five patients' medication was found in his bag, Anton was not in agreement that he was not authorised to have it in his possession as Gould's statement, as an agent, confirmed that he had verbally requested and authorised the applicant to retain it for him until he could collect later. In addition, Mphuthi's son had similarly verbally consented to him obtaining his mother's medication, although he (Anton) was not the caregiver to any of the patients in question.

101. Anton further submitted that, as agents were reluctant to leave the patients' original appointment cards with an employee, he would utilise a blank appointment card on to which a patient sticker was affixed to serve as proof that the medication had been obtained legally from the Pharmacy.

102. According to Anton, patients were not required to pay employees who collected medication on their behalf.

103. The applicant stated that Monama had been the puppet-master who had orchestrated the entire process and that Moatshe had assisted in cancelling Tanna's registration of 18 August 2016. He suspected foul play as supervisors, and system administrators could delete and cancel such transactions on Medicom. He was confident that he had registered Tanna on 18 August 2016 as he would not have signed her prescription chart to this effect otherwise.

104. He believed that the respondent had tried to make the situation look worse than it was by including eye medication for patient Mphuthi that would have lasted for more than a month. He based this on his experience obtained while working in Ophthalmology, believing that the respondent had added additional items into the packet.

105. He stated that he had seen previous communication from the respondent's Office of the MEC and that such correspondence included a date stamp, noting that his appeal outcome did not. He maintained that it did not originate from her office and had been created internally in Phasha's office by the intern there at the time. This was supported by the fact that he was not provided with an original document, no letterhead was utilised, no date of finalisation was indicated and no option to dispute it was indicated. He further believed that the union official assisting him at the time had colluded with the employer in order to prevent the process from following its required course.

106. He denied that the trust relationship between himself and the respondent had been broken as the disciplinary action taken by it was in respect of a first offence by a hard worker.

Ida Phasha ("Phasha")

107. Phasha testified under oath that she was a Labour Relations Officer ("LRO") at the SBAH. In her role, she had both initiated and chaired disciplinary processes and was guided by the respondent's disciplinary code, its policies and procedures, and PSCBC Resolution 1 of 2003. She recognised the applicant's charge sheet and confirmed that a Mr T Mashele had initiated the case against the applicant but could not recall if she, herself, had attended the proceedings owing to it being four years back. Although not the author of the document presented into evidence, she recognised it as the presiding officer's outcome and not an investigation report.

108. Ordinarily, the process followed when dealing with cases of misconduct was to draft a report by interviewing the affected employee and witnesses to the case to confirm the validity of the allegations and, if grounds were established, to proceed with drafting a notice of a disciplinary hearing to be signed by management. Although there was no investigation report included in the applicant's bundle of documents, she testified that this did not necessarily imply that an investigation was not performed as each Labour Relations Officer approached their cases differently and she could not talk on Mashele's behalf.

109. Although not the LRO tasked with investigating and initiating the applicant's matter, she viewed the charges preferred against him as being very serious. Any decision to place him on precautionary suspension (or not) would have been taken by the investigating officer, taking into account if the accused's presence in the workplace, pending disciplinary action, could jeopardise a fair running of the process. In some instances, certain categories of severe misconduct may not have warranted such a precautionary suspension from duties.

110. Once a disciplinary hearing had been concluded and the outcome presented by the presiding officer to the respondent, the LRO would be required to draft formal correspondence to the affected employee advising them of the outcome and associated sanction. The letter to the applicant, signed by the Acting CEO, Dr Mathebula, on 10 April 2017, was such an example which she prepared, which further included details of the appeal process that could be invoked within five days from date of issue. She recalled that the applicant had appealed his dismissal and the associated documentation pertaining to the matter would have been sent to the appeal authority for consideration, along with the appellant's motivation. She further identified the recommendations of the Appeals Advisory Committee which had been approved by the respondent's MEC for Health, Dr Gwen Ramokgopa, dated 04 December 2017, in which the MEC upheld the original decision to dismiss him.

111. She denied being involved in the compilation of the recommendations of the Appeals Advisory Committee which was, in effect once approved by the MEC, constituted the outcome of the appeal process. While the task of the committee was to present a recommendation to the MEC, it was ultimately the MEC's decision which would stand, taking into account the recommendation, if the appellant's sanction was to be changed. The outcome, once approved by the MEC, was issued to the appellant, in this case, the applicant, who confirmed receipt thereof on 11 December 2017 by signing next to the signature of the MEC. It was not necessary to draft a separate letter confirming this outcome as the requirement was only for it to be served on the appellant.

112. Asked why the applicant had not been issued with the original appeal outcome signed by the MEC, Phasha explained that the documentation would typically be

emailed in a .PDF format to management, printed out and issued to the appellant. Had the applicant requested that the original email be forwarded to him, this could have been arranged at the time.

113. In terms of PSCBC Resolution 1 of 2003, an appeal ought to be finalised with 30 days from its date of submission to the appeal authority. In the applicant's situation, this was not the case.

114. Phasha could not recall if she was present during the investigation into the applicant's conduct on 24 August 2016, conceding that she was perhaps there but was not tasked with assisting with the investigation. As an LRO, it was routine for her to be advised of all cases being investigated by her colleagues.

115. She testified that she was aware that the collection of medication on behalf of patients was not permitted in the hospital; even being requested to retain a patient's medication for them would prompt questions being asked by Security on exiting the hospital and, in the absence of any proof that she was authorised to be in possession of that medication, she would find herself in hot water. Presented with such a request, she would, therefore, not be willing to assist.

116. Phasha was unaware of any other employees who had faced similar charges to that of the applicant. She held the view that, given that the applicant had been found in possession of medication belonging to the state, without any form of authorisation as well as the other three charges for which he had been found guilty, progressive discipline would not have been appropriate and that, in the circumstances, the sanction of dismissal was appropriate considering the charges were very serious.

Cross-examination

117. Phasha could not recall if the applicant requested the original email to be forwarded to him at the time of the appeal outcome being issued to him.

118. As she had not been tasked with investigating the allegations made against the applicant, she was the incorrect individual to be questioned and any questions pertaining to the investigative part of the process ought to have been directed to Mashele.

119. Although PSCBC Resolution 1 of 2003 required appeals to be finalised within 30 days, she attributed the delays experienced in finalising appeal outcomes being that the office of the MEC was a political one.

Piet Motsweni ("Motsweni")

120. Motsweni testified under oath that he was the Deputy Director of Human Resources at the SBAH responsible for overseeing employee relations. Part of his responsibilities included the management cases, allocation of investigative officers and presiding officers, and dealing with any subsequent appeals by directing them to the appeal authority via courier/driver, the process of which entailed submitting the appellant's claim, the disciplinary hearing outcome and the associated bundle of documents for consideration. Where the appeal authority sought clarity, this would be provided to them on request.

121. He confirmed that the document drafted by the appeal authority's Advocate Mashudu Tshivashe constituted their recommendations to the MEC, who subsequently would approve or not approve it with his/her decision being the one communicated back to the institution and appellant to give effect thereto. The applicant received his appeal outcome on 11 December 2017 and signed to this effect on the document in the presence of a witness who had countersigned.

122. Although a separate letter was directed to the applicant advising him of the outcome of his disciplinary hearing, dated 10 April 2017, it was not essential to draft a letter confirming the outcome of his subsequent appeal as the recommendation and approval served this very purpose. He found no discrepancy with the font and layout of the appeal recommendation/outcome, apart from additional notes added to the copy by the applicant party and all paragraphs followed one another numerically. He explained that the footnote included on one of the pages was not out of the ordinary and was used in legal writing as a reference to a cited case or resource mentioned in the body. He saw no reason to doubt the authenticity of the appeal outcome.

123. Motsweni submitted that although PSCBC Resolution 1 of 2003 required that the respondent should attempt to finalise an appeal within 30 days from it being lodged, the complexity of the matter would need to be taken into account. He

attributed the time delay in finalising the applicant's appeal to a transition period. He refuted the applicant’s claim that a failure to hand down such a decision within prescribed time rendered the dismissal invalid.

124. Although he could not recall if he had been present at the time the appeal outcome was presented to the applicant, he stated that it would have been highly unethical for only the last page of the outcome to be issued to Anton.

Cross-examination

125. Motsweni submitted that all internal notices and circulars were communicated to employees of the SBAH via their line managers. In some instances, individual letters were provided to each employee and, very often, communication was disseminated via email to users, with copies being printed and issued within the individual departments and placed on noticeboards.

126. He confirmed that the respondent previously used to draft a letter to an appellant to accompany their appeal outcome. However, it was effectively a duplicate of the outcome, and this process had been stopped.

127. While he conceded that the appeal was not processed within the 30 days provided for in terms of PSCBC Resolution 1 or 2003, but that the applicant was not prejudiced as a result as he continued his employment with the respondent for more than a year, despite being notified of his dismissal in April 2017, while the appeal was pending. His dismissal only became effective when he received the outcome of the appeal on 11 December 2017.

128. The appeal outcome consisted of a .PDF file sent from the office of the MEC, the original of which was most likely stored at the respondent’s Head Office in Johannesburg. The document received via email and presented to the applicant was the entire version of what had been received.

Sipho Michael Maseko (“Maseko”)

129. Maseko testified under oath that he was employed by the respondent as a Security Manager at the SBAH, tasked with protecting the institutional property.

Private security companies were responsible for the day-to-day security operations at the hospital.

130. He identified the bags of medicine as being those relating to the charges preferred against the applicant. He confirmed that, for an employee to leave the hospital premises with medication, the officer would be required to check for an appointment card, check the actual medication and correlate the sticker on the item to that on the card. An employee was, however, only permitted to collect one set of medication for a third party plus their own, unless special arrangements had been made. This had been confirmed in an internal notice disseminated by management. He was unaware of agents continuing to operate in the institution who collected medication on behalf of others. Based on what was before him, the applicant must have either passed through the security gate or bypassed it on exiting the hospital and no record to this effect would have been noted as only incidents were recorded in the occurrence book. He could not explain how this had taken place.

131. He identified his Mothoagae's investigation report submitted to the Labour Relations Office although he was not the author of it and could not recall precisely where he was on 24 August 2016. He identified an incident report, completed by him, on 24 August 2016, in which he set out the events of that day following him being called to the office of Monama where he found Monama, Pitjeng, the applicant's wife and the applicant's mother in law. The incident report detailed the content of each of the five packets of medicine and that they were awaiting advice from management as to the next steps, which would require the involvement of Labour Relations and the SAPS. He recalled, although not documented in the incident report, that the applicant's wife had claimed that Anton had stolen from the SBAH and that, during a fight, he had also thrown a stone through their residence's window, almost injuring her while she sat in the sitting room/dining room. Monama and Mothoagae, thereafter, oversaw the matter.

132. According to Maseko, he was not aware of any other employees of SBAH who had been found in possession of medication belonging to the hospital, in particular a Charles Ramofe who had allegedly been caught on CCTV, explaining

that any incident would have been investigated in order to determine how it should be managed, but noting that he was not aware of such.

133. Maseko was unaware of who Joe, Winston and Gould were, noting that he may be able to identify them if he saw them.

134. Presented with the applicant's written statement of 24 August 2016 he testified that he seemed to recall asking the applicant to draft it but could not be sure. He identified Mohlake's statement of the same day, recalling that she was requested to draft it.

135. Other than his involvement which he had outlined in his testimony, he played no further role in the investigation.

Cross-examination

136. Of importance to Security when an employee left with medication was to ensure that an appointment card was present and the medicine was labelled, confirming that it had been correctly dispensed.

137. He conceded that the incident report that he compiled was not a comprehensive reflection of what had taken place. Instead, it only reflected that which he had been involved in and what he had seen but that others had continued with the investigation thereafter. However, what he had documented was truthful.

138. According to Maseko, the institutional policy did not allow employees to leave the premises with more than two sets of dispensed medication (one of which had to be their own) and security was required to prevent such occurrences.

139. Maseko reiterated that he was unaware of who Charles Ramofe was.

140. It was standard practice to ask all parties to a situation to draft written statements setting out what was in their personal knowledge and also to prevent different versions from appearing after the incident.

141. He testified that he was aware that the applicant had initially resided in unit 101 of Ellahof but had moved to unit 102 and that he had visited the block of flats on several occasions in the course of his duties.

Additional witnesses

142. On 30 June 2020, the final day of the hearing, the applicant advised that one of the witnesses that it had subpoenaed, Dela-Reese Neels, had not presented herself for questioning as she was writing an examination. Notably, the applicant party did not produce a copy of the subpoena securing her presence for that day but instead, the applicant advised that it had decided to abandon its right to secure her testimony as a subpoenaed witness for two reasons; the first being that her statement presented into evidence had been covered by other witnesses and never disputed by the respondent and secondly, in order to expedite the finalisation of the matter which had been in abeyance for several years.

143. At the same time, the applicant party confirmed that it had, unsuccessfully, attempted to secure the evidence of Gould, who had expressed to them, his reluctance to participate in the process as it could affect his livelihood and continued operation as an agent at SBAH. While aware of the option to compel him and/or Winston to testify at the arbitration by having a subpoena issued to them, the applicant was of the view that their testimony would not change any of the evidence submitted by the other witnesses and was of the view that the respondent had never challenged Gould's statement, presented into evidence.

ANALYSIS OF EVIDENCE AND ARGUMENT

The evidence

144. The parties led an extensive amount of evidence during the course of these proceedings, much of which was repeated over and over, culminating in two conflicting versions of events being before me. Faced with two opposing versions of events, the Labour Court, in ***Sasol Mining (Pty) Ltd v Nggeleni and Others* (JR 1595/08) [2010] ZALC 141**, held, at paragraph 9, that:

"One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him.

…

The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their

demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version."

145. Given the mutually exclusive versions of events before me, I must determine the most probable version, taking into account the credibility of the witnesses who testified during the proceedings.

146. It is common cause that the disciplinary action against the applicant has its roots in the visit by his wife, Patricia Mohlake, and mother-in-law, to the hospital on 24 August 2016, and their presentation of the packets of medication that she found in his bag on 18 August 2016. Although Mohlake's motivation for doing may have been an act of revenge in respect of the assault which allegedly took place on Friday, 19 August 2016, for which the applicant was arrested, it is unclear why such a key witness, despite initially being included on the list of witnesses to be called by the applicant, was omitted from the proceedings and I question the rationale behind both parties failing to call on Mohlake to explain herself to the tribunal, either voluntarily or by having her subpoenaed. That both parties believed it acceptable to rely on a simple statement, not even an affidavit, purportedly drafted by the applicant (and/or her mother) which constitutes nothing but pure hearsay, is inexplicable. Accordingly, Mohlake's statement on which much emphasis was placed, stands to be rejected outright.

147. Further claims made by the applicant that his wife's statement had been made under duress can, therefore, not be considered at all as he was simply not present at the time an cannot confidently vouch to this effect.

148. Throughout the proceedings, the focus of the applicant party was directed at minute detail in respect of the evidence of the witnesses, even its own witnesses, in an attempt to discredit each of them. It must be borne in mind that the events of August 2016 took place almost four years prior and minor discrepancies, such as who exactly was present in Monama's office on 24 August 2016, especially where such an individual was not critical to the meeting, have no bearing or

relevance to whether or not the applicant committed the misconduct. On several occasions, witnesses testified that they could not recall whether or not they were present in respect of various events along the disciplinary cycle, attributable primarily to it having taken place four years back. Another such example was that the appeal outcome stipulated that he resided in Eikenhof, rather than Ellahof. While technically incorrect, the typo had no impact on the findings made in the document. Similarly, the photographic evidence showing two broken windows and the dispute that ensued as to the position of the entrance to Ellahof in the photographs added no value to what I needed to consider which was if the applicant committed misconduct.

149. It bears noting that, on numerous occasions, I reprimanded the applicant party for the line of questioning undertaken by the representative on the instruction of the applicant. In many instances, the questions put to witnesses were simply not within the purview of that witness' knowledge. Yet, the applicant expected witnesses to explain a document, to which they were never a party to, and its contents. Specifically, Gould's email to Neels and the line of questioning directed to Phasha who was not actively involved in the investigation process and where these questions may have more appropriately been dealt with by Mashele, who was never called as a witness, were noted. On other occasions, questions put to witnesses misstated facts, words or definitions (such as the robotic automation pilot project implemented to improve service delivery) which resulted in the witnesses being utterly confused as to the actual question or how it ought to be answered. In one such instance, when I intervened, the applicant was asked to explain the question that he put to the witness as it simply made no sense. He was unable to do so and advised that he had merely asked what the applicant had directed him to. While the applicant made full use of the opportunity afforded to him to examine every detail of the events leading up to his dismissal, much of the evidence adduced was irrelevant to the dispute to hand and would have no material impact on my decision. Issues relating to his performance appraisal results and previous disciplinary record after his employment at SBAH are only a few of such examples which added no value whatsoever to my determination of the dispute, the purpose of which was to establish the facts and, based on

those facts, to make a finding as to whether the applicant's dismissal was both procedurally and substantively fair.

150. Gould as a key individual in this particular matter was notably absent during the proceedings and his statement, email communication to Neels and formal complaint directed to the SBAH, constitute hearsay evidence and in the absence of any of the individuals to confirm their authenticity, have similarly been disregarded during this process.

151. A further element of the documentary evidence which I rejected pertains to Internal Notice 07 of 2017, dated, 31 January 2017. While this notice was largely accepted as being a revision of Internal Notice 38 of 2015, the purpose of which was to clarify the collection of medicines from the Outpatient Pharmacy, it was not in force and effect at the time of the applicant's alleged misconduct in August 2016. Although its content is mostly similar to its earlier version of 2015, it did not apply at the time when the applicant was charged and cannot, therefore, be considered.

152. Patient Mohamed's statement, presented into evidence by the applicant, is similarly problematic and constitutes hearsay. More importantly, the statement, not even an affidavit, comprises a simple letter in which the patient confirms that he "hereby" appoints Gould as his agent to collect his medication. The letter, although stamped by the hospital, is dated 16 September 2016, almost a month after the applicant's alleged misconduct in which it was his position that Gould was authorised by the patient/s to act as their agent. In the form presented, it holds no evidentiary value in these proceedings.

153. After Mohlake's visit to Monama, the applicant drafted his own statement in which his opening sentence reads: *"I, Mark Bronwin Anton hereby state that on the 18th of Aug 2016 I collected medication from the Pharmacy for Mrs Mphuthi, Ms Tanna, Muhamed Yunes, Vally" (sic).* Concerningly, this version changed during the arbitration proceedings to a more absurd and less believable one that Gould had collected the medication from the Pharmacy and had provided it to him for later collection as Gould needed to attend to business in Johannesburg. Although Anton testified during his evidence in chief that he was not himself when drafting

the statement, having spent the weekend in jail, he then contended that Moatshe had told him what to write in the statement so as to avoid implicating his colleagues. This, however, was never put to Moatshe in cross-examination and, accordingly, it remains an untested second version of events.

154. While vehemently denied by the applicant that he was found to be in possession of medication and patient cards, without the appropriate authorisation, he conceded that the medication returned to the hospital by his wife had been removed from the hospital by him (for later collection by Gould) and that Gould had verbally consented to him doing so. Considering that none of the patients reflected as being registered on Medicom on 18 August 2016, and there was no evidence presented of any current written consent by any of the patients for either him or Gould to collect it, the only logical conclusion would be that he was not authorised to have it in his possession. To compound matters, on his own version, Anton testified that he was aware that, in order to pass through security, he would be required to present some supporting documentation to show that the medication had correctly been dispensed and, he saw nothing wrong with creating a blank appointment card, containing a patient sticker to be used when checked by security as the agent would never release the original appointment card to the employee. By its very nature, the need to create a supporting document is nothing more than an irregular procedure created by those involved to hide their other irregular activities.

155. In his defence, the applicant suggested a number of other possibilities which would explain the events of 18 August 2016. In the first, his submission is that the Medicom system was not operational on the day in question but he failed to present any evidence to support this claim, other than anecdotal explanations of how Clerks managed if the system froze. In his second version, he suggests that patient Tanna was not registered on 18 August 2016, as she had been present on 17 August 2016 for a procedure at Gastroenterology and a medicine repeat but was not well enough to wait for her medicine. This version is in direct opposition to his earlier testimony, which was supported by the other witnesses that patients attending a clinic and receiving a medicine repeat ought to be registered in both locations, although would only be required to pay for a single

visit. Lastly, in his third version, he suggests that, at the behest of Monama, Tanna's registration of 18 August 2016 was deleted by a supervisor or by Myburgh who had access to do so. Notably, the ability to delete such a transaction was never explored with Myburgh as the System Administrator, and it was established, in evidence, that cancelled transactions were simply marked as such and were never deleted from the Medicom system.

156. Coupled with his testimony, his signature and date on Tanna’s prescription chart and that Ramokolo confirmed that the purpose of such a Registration Clerk’s signature was to signal to the Pharmacy that the patient had been registered on Medicom, he intentionally attempted to mislead them that he had done so, when in fact he had not. While the first charge preferred against him at his disciplinary hearing specifically relates to Tanna not being registered, presumably as she was the only paying patient, Anton offered no explanation as to why the other non-paying patients were similarly not registered on the system despite evidence being led by the respondent as to the importance of ensuring that all transactions were correctly captured for statistical purposes.

157. It bears noting that references made by either party to the applicant’s conduct and performance when he first commenced employment at SBAH, through the evidence of Myburgh and Motsweni, were deemed irrelevant to the matter before me and all references thereto were disregarded.

158. Internal Notice 38 of 2015 formed much of the basis for the respondent's case in attempting to establish that the applicant had contravened a standard of conduct and, while he agreed that, in hindsight, it did apply to him as an employee of SBAH, its contents had never been brought to his attention until the investigation into his conduct was underway. I find this improbable. As a longstanding employee of the respondent who appears to be most adept with the procedures in his domain, it would be impossible for him to have never encountered this vital set of rules which set out how medication was to be collected by patients. While I agree that it may have targeted employees involved in the processing of medicine repeats and that the applicant was, at the time of its distribution, working in Ophthalmology, it applied across the board to all employees and patients and, based on the evidence of Moatshe and Ramokolo had been

disseminated to all employees and copies had been placed strategically on notice boards and in areas where patients (and employees) could see them. Given that the applicant worked in at the Registration Area on level 3 and, relieved at times in the Pharmacy waiting area, his claims that he was not aware of its contents stands to be rejected. During Moatshe's cross-examination, despite being afforded the opportunity, it was never put to him that he had not called the applicant's attention to the provisions of the internal notice. Similarly, the applicant never challenged or tested Moatshe that he (Moatshe) had led by example and had been instrumental in showing him the corrupt and incorrect methods to be utilised in the department.

159. Although some of the witnesses understood its contents marginally differently from one another, the gist of Internal Notice 38 of 2015, when read in its entirety is as follows:

159.1. Its purpose was to regulate the collection of patients' medication.

159.2. Face-to-face counselling by the Pharmacist directly with the patient was the most desirable option. However, in certain circumstances where this could not reasonably be complied with, the following would apply:

159.2.1. Agents were not permitted to collect medicine.

159.2.2. Only caregivers of patients who were under the caregiver's direct care were permitted to collect medication on the patient's behalf subject to proof and authorisation being provided.

159.2.3. A collection by a caregiver was limited to one patient unless the caregiver was also collecting his/her own medication, in which case both could be collected at the same time.

159.2.4. Patients receiving medication for the first time had to be counselled by the Pharmacist.

159.3. Collections for patients of old age and children's homes would require approval by Pharmacy management.

160. Accordingly, while the notice clearly prohibits the collection of medication via agents, on the applicant's evidence and that of Ramoloko, it is apparent that this

irregularity persists, even to this day. However, it does not exonerate or release the applicant, and his colleagues, from their duty to act in good faith and to comply with the instructions issued to them by the institution that they do not involve themselves in such practices.

161. Although Phasha was subjected to extensive questioning as to the correct procedures to be adopted in taking disciplinary action against an employee, it was noted that she was not directly involved in the investigation into the applicant's conduct. The evidence she presented was factual, clear and cogent. When she presented what she thought had taken place with the applicant regarding a precautionary transfer, she was quickly corrected by the applicant. She immediately acknowledged her error, reiterating that she dealt with many matters since then and that this particular one dated back three to four years.

162. The evidence of Phasha and Motsweni was convincing as to the process followed by the institution in giving effect to the applicant's dismissal and, despite the applicant's unsubstantiated claim, much of which was based on factually inaccurate statements and pure conjecture that he viewed the appeal process as being flawed, based on the outcome rendered, both witnesses successfully and logically rebutted the applicant's claims that it was fraught with irregularities. The mere fact that it did not use the word "outcome", or was printed on a letterhead, or that each page did not contain a footnote, or that it did not contain a stamp from the MEC's office can in no way result in the process being flawed. In each instance, the respondent clarified how it had received the outcome from the MEC and had proceeded to give effect to the appeal authority's recommendation, which the MEC had approved. Had the applicant believed that the document was not authentic, he was free to challenge it directly with its author being the appeal authority and/or the MEC.

163. Referring to the fourth charge preferred against the applicant relating to him allegedly breaking two of the windows of the hospital-owned flat in which he resided, the respondent failed to present any convincing evidence that Anton had done so. It relied on Mohlake's submission made to Monama and others, which was supported by an inadmissible written statement of her account, which failed even to specify which windows were broken. I accordingly accept the applicant's

submission that the two windows of the small room, being the same ones photographed by security, were previously broken and it is not clear as to who caused that damage. In addition, the applicant, at his own cost repaired these windows in or about October 2016.

164. The applicant holds the view that, as a first-time offender, it was inappropriate to dismiss him. However, in this regard, I disagree. Even as a first-time offender, dishonest behaviour demonstrated by an employee talks to the very heart of the employment relationship and such conduct often has the effect of rendering a continued employment relationship untenable and impossible. Although the applicant is self-described as a hard worker, his superiors testified that they could not see their way clear to working with the applicant again, given his dishonest behaviour.

165. The applicant's case further stands to fail as key aspects of his evidence, notably that Moatshe had directed him what to document in his statement and that Moatshe would cover form him, were never put to Moatshe during cross-examination and, accordingly, never adequately tested.

166. Therefore, taking into account the evidence before me in the light of the four charges made against the applicant, my findings are as follows:

166.1. The respondent successfully demonstrated how the applicant dishonestly, on 18 August 2016, by signing and dating patient Tanna's prescription chart, gave an impression to the Pharmacy that he had registered her on Medicom, based on the accepted procedure to sign the chart once the patient was registered, when he knew that he had failed to do so. As a paying patient, albeit a minimal amount, it would have impacted the hospital's revenue as medication was dispensed against her name without her actually being registered and billed for it.

166.2. There is no doubt that the applicant was reasonably aware of the content of Internal Notice 38 of 2015 and its strict provisions put into place to prevent abuse of the system and, as a Registration Clerk, it was incumbent on him to enforce this. His self-admitted conduct that he registered the patients for Gould to collect the medication, adding to it Mphuthi's file, unfortunately, demonstrates that, despite being abundantly aware of the respondent's expected standards of conduct, he chose to act outside thereof. However, charge 2 was specifically worded and alleged that he had collected the medication on behalf of patients Angeline Vally, Mphuthi, Tanna and Mohamed. Although he casually admitted to doing this on occasion after the completion of his shift, the respondent presented no compelling evidence to support that he had done so on 18 August 2016. On the other hand, the applicant's explanation that the medication was collected by Gould and provided to him for safekeeping was equally unconvincing when compared to his earlier written statement in which he admitted to having done so. The respondent has, therefore, not shown that the applicant personally collected the patients' medication in contravention of the internal notice.

166.3. Anton consistently denied that he was found in possession of medication and patient cards for which he had no authorisation. In this regard, the facts are quite simple. He acknowledged that the bag containing the medication brought in by his wife belonged to him. He acknowledged

that he had assisted Gould by retaining the medication, supposedly for later collection by Gould, and had prepared to generate blank appointment cards for four of the packages which he could just to justify to security why it was in his possession. That Gould had provided him with verbal consent when Gould himself had presented nothing that would even suggest that he was mandated by each of the patients (with the exception of Mohamed, which was issued a month after the incident) to collect their medication is far-fetched and nothing more than an attempt to explain away his misconduct.

166.4. Lastly, it is apparent that two windows were broken in the flat in which the applicant resides, and photographs of the broken panes were taken in or about August 2016. Other than that, there is no real evidence to hand that would convince me that the applicant intentionally damaged state property on 24 August 2016 by breaking these windows, following an altercation with his wife, who presented no evidence of her own to this effect.

167. Although the applicant made bald claims that his appeal outcome was not managed in accordance with prescribed procedures and that he doubted the authenticity of the final outcome issued to him on 11 December 2017, he failed to support his claims with any evidence. Accordingly, based on the actual evidence before me that the applicant was issued with an appeal outcome which included recommendations from the appeal authority and which had been accepted and approved by the respondent's MEC, I hold the view that the document is what it purports to be.

168. On the other hand, the respondent acknowledged that the applicant's appeal was filed within the required time frame given to him following his dismissal. It then took the respondent from mid-April 2017 until 11 December 2017 to finalise the outcome thereof. While I accept that the respondent's submissions that the Office of the MEC is a political one which was subject to many changes at the time, these circumstances provide no respite to the respondent and no excuse for not complying with an accepted process concluded in the form of a collective agreement. Notwithstanding the respondent's disregard for this collective

agreement, it is imperative to establish if this failure prejudiced either party. It is common cause that the applicant continued to render service as an employee of the respondent between the date of the notification of his dismissal until it was confirmed on 11 December 2017. He enjoyed his full remuneration and benefits during the period of eight months and, apart from the proverbial sword of Damocles hanging over his head for the period in question, suffered no prejudice as the result of the respondent's dilatory conduct.

The law

169. Section 185(a) of the LRA prescribes that every employee has the right not be to be unfairly dismissed and, section 188(1) provides that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for the dismissal is, *inter alia*, a fair reason related to the employee's conduct or capacity, and that the dismissal was effected in accordance with a fair procedure.

170. According to section 188(2), any person considering whether or not the reason for the dismissal is a fair reason, or whether or not the dismissal was effected in accordance with a fair procedure, must take into account any relevant code of good practice. In addition, section 138(6) of the LRA provides that, in addition to any code of good practice, a commissioner arbitrating a dispute must take into account any guidelines published by the Commission in accordance with the provisions of the LRA. In this regard, the CCMA Guidelines: Misconduct Arbitration (the Guidelines), published by the CCMA in terms of s115(2)(g) of the LRA, which became effective from 01 April 2015, are relevant.

Procedural fairness

171. Item 4(1) of Schedule 8, the Code of Good Practice: Dismissal ("the Code") provides the guidelines, to be used in assessing the procedural fairness of a dismissal. Implicit within the Code is that it, as part of the LRA, reinforces the primacy of collective agreements. Accordingly, both employees and employers are bound by the provisions of any collective agreement concluded between them and/or their representative bodies.

172. PSCBC Resolution 1 of 2003 sets out the disciplinary code and procedures for the public service, the scope of which includes both the applicant and respondent *in casu*.

173. Paragraph 8.8 provides that:

"Departments must finalise appeals within 30 days, failing which, in cases where the employee is on precautionary suspension, he/she must resume duties immediately and await the outcome of the appeal while on duty."

174. While the applicant rightly is of the view that the respondent ought to have finalised his appeal within 30 days, had he been suspended from duty, he would have been entitled to resume his duties while awaiting the outcome after a period of 30 days had elapsed. In the matter to hand, he was not suspended and continued to render services to the respondent while awaiting the outcome of his appeal.

175. Despite the respondent's attempts to explain away its dilatory conduct, the excuses preferred do not hold water and the respondent failed to comply with the provisions of its own disciplinary code.

176. Item 67 of the CCMA Guidelines: Misconduct Arbitration provides that:

"When deciding whether a disciplinary procedure conducted in terms of a collectively agreed procedure involves any procedural unfairness, the arbitrator should examine the actual procedure followed. Unless the actual procedure followed results in unfairness, the arbitrator should not make a finding of procedural unfairness in a dismissal case."

177. In the circumstances, the delay in processing the applicant's appeal was just that; a delay. There was no prejudice suffered by either of the parties, in fact, the applicant continued to remain in employment pending the outcome, and no apparent unfairness was experienced by either the applicant or respondent, despite the respondent's non-compliance. Guided by Item 67 of the Guidelines, a finding of procedural unfairness is unwarranted. Accordingly, the dismissal of the applicant was effected in accordance with a fair procedure despite not complying with appeal provisions of the respondent's disciplinary code.

178. Although the applicant expressed a view initially that the presiding officer of his disciplinary hearing demonstrated bias, no evidence to this effect was led by either party during the course of the proceedings and, as a hearing *de novo*, the fairness of the respondent's decision to dismiss should be determined within the context of this award.

179. Although the applicant contends that he has misgivings regarding the authenticity of his signed outcome of appeal, presented to him in the presence of a witness from the appeal authority and which was accepted by the respondent's MEC, his claims are nothing more than conjecture which remains unsubstantiated. While the onus in dismissal disputes, in terms of section 192 of the LRA rests with the employer to demonstrate the fairness of the dismissal, it is insufficient for an employee to simply present an unsubstantiated claim regarding an element of that fairness and expect an employer to have to respond to it. The basis on which he asserts his claims was shown to be invalid.

180. In conclusion, the dismissal of the applicant was, therefore, effected in accordance with a fair procedure.

Substantive fairness

181. Item 7 of the Code provides the criteria to be used in assessing the substantive fairness of a dismissal for misconduct and reads as follows:

"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."

182. It became apparent during the proceedings that this matter related to a dispute of fact between the applicant and the respondent in which two conflicting versions pertaining to whether or not the applicant contravened rules or standards regulating conduct in the workplace were at odds. Only if it was determined that he did contravene a rule or rules, would the breach/s need to be evaluated against the remaining four factors of Item 7 of the Code.

183. In my analysis, I concluded that it was successfully shown by the respondent, on the balance of probabilities, that the applicant was guilty of misconduct in that he was grossly dishonest (charge 1), not only attributable to his actions relating to the registration of patient Tanna but that his dishonesty extends to more than a just her registration which was not captured. His awareness of the blatant disregard for standards of conduct required by employees of SBAH and his failure to report such corrupt activities, despite his assertion early in the process that he was a whistleblower, are unfathomable. The other element of misconduct successfully demonstrated by the respondent was that he was found in possession of medication and appointment cards issued by the hospital for which he had no authorisation whatsoever (charge 3).

184. Neither his dishonesty nor his unauthorised possession of goods that were not his and for which he had no authorisation can be seen to be unreasonable by any stretch of the imagination. It would be the expectation of any employer that its employees adhere to these fundamental requirements which talk to the employee's inherent duty to, at all times, act in good faith and in the best interest of the employer.

185. On the evidence presented by the respondent, I am left with no doubt that, despite the applicant's claims to the contrary, he was fully aware of the content of Internal Notice 38 of 2015 and how it applied to him as a longstanding employee of the institution. By its very nature, it refers to the main reason why patients would report to the Registration Area where the applicant was based, being to collect medicine from the Outpatient Pharmacy. It is highly improbable that, during his tenure, he had never once been exposed to this vital piece of communication.

186. While the applicant cries foul that the respondent has acted inconsistently in the application of discipline presenting a single name to one of the respondent's witnesses who could not place the individual, all that he has succeeded in doing is demonstrating that there exist grave irregularities in the administrative processing of registrations for medicine repeats at the SBAH which fly in the face of the respondent's operating guidelines. Interestingly, this was never challenged by the employer with witnesses confirming that agents continue to operate, unchallenged, within the institution.

187. In the circumstances, the respondent has successfully shown that the applicant's serious and dishonest conduct contributed to an irrevocable breakdown in the trust relationship that ought to exist between an employer and an employee. Despite the applicant's claim that he was a first offender and that dismissal would be inappropriate in the circumstances, he fails to understand the gravity of his misconduct and maintains his innocence to this day. Accordingly, despite his service with the employer and the impact that his dismissal has had and will have on him and his family, he is the architect of his own fortune, and I am of the view that, there being no other alternatives available to the employer, considering the circumstances of the applicant's conduct, the only option available it was to dismiss him for misconduct.

188. In conclusion, the respondent discharged the onus required of it in terms of section 192(2) of the LRA which provides that it is the responsibility of the employer to prove that the dismissal of the employee was fair.

AWARD

189. The dismissal of the applicant, Mark Bronwin Anton, by the respondent, the Department of Health – Gauteng, was both procedurally and substantively fair.

190. The matter is, accordingly, dismissed.

Allan Kayne