



# ARBITRATION AWARD

Commissioner: **Janine Carelse**

Case No: **PSHS165-20/21**

Date of award: **17 November 2020**

In the matter between:

**HOSPERSA obo DAMON WYNNE**

**APPLICANT**

and

**DEPARTMENT OF HEALTH – WESTERN CAPE**

**RESPONDENT**

---

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration hearing was initially set down on 19 August 2020. The matter proceeded on the said date and was part-heard. The matter was adjourned to 9 November 2020 and was finalised on said date and was heard at the Respondent's premises, Western Cape Nursing College in Athlone. The proceedings were digitally and manually recorded, and the matter proceeded in English. An interpreter, Mr. Anthony Nondala, interpreted from Afrikaans to English and vice versa, when required.
2. The applicant was present and represented by Ms. Olivia Floris, a HOSPERSA shop steward. The respondent was represented by Mr. Abraham Solomon, a labour relations official employed in the respondent's labour relations unit. The applicant referred an alleged unfair dismissal dispute relating to misconduct.

3. Both parties handed in bundles of documentary evidence on which they relied in support of their cases. The parties' representatives further tendered oral closing argument.

#### **ISSUE TO BE DECIDED:**

4. The issue to be decided is whether the applicant's dismissal was substantively and procedurally fair. If I decide that the applicant's dismissal is substantively and/or procedurally unfair, I must decide what the appropriate remedy will be for such unfair dismissal.

#### **BACKGROUND TO THE MATTER:**

5. The applicant was employed by the respondent as a Senior Admin Clerk. The applicant was charged and found guilty of three incidents of insolence towards his supervisor, Rhoda, and the line manager, Samson. The first incident allegedly occurred on 4 September 2019, the second incident allegedly occurred on 14 October 2019 and the third incident of insolence allegedly occurred on 25 November 2019. The applicant was dismissed subsequent to a disciplinary hearing. The applicant challenges both the procedural and substantive fairness of his dismissal and wishes to be reinstated with retrospective effect. The applicant was dismissed on 2 July 2020 and at the time of his dismissal he was employed by the respondent for a period of 19 years.

#### **SURVEY OF EVIDENCE AND ARGUMENT:**

##### *Evidence*

##### *Respondent's evidence*

6. Mr. Andre John Albert Muller (Muller) testified for the respondent under oath and stated that he was appointed by the hospital to act as a presiding officer. He stated that he read out all of the applicant's rights at the commencement of the proceedings and this is what he always does. He stated further that the first issue was that he took into account a final written warning that expired, and the second issue was that he considered an occasion when he saw the applicant in the passage when he was supposed to be at his office for enquiries. The applicant's disciplinary hearing started in December 2019 and ended in April 2020. During that period on a particular day, he found the applicant in the

hospital and he instinctively checked his time and it was between 11:00 and 12:00 when the applicant was supposed to be in his office. He noted that they were busy with a formal enquiry and yet the applicant continues to be out of the office during the enquiry times. Even if he removed his observation from the minutes of the hearing outcome, it will not be material to the decision reached.

7. He stated further that the applicant did not object when the final written warning was handed in at the hearing in the respondent's bundle. He stated that he did consider the final written warning against the applicant. The warning was issued on 30 May 2020 and it expired at the end of November 2019. He averred that it was fair for him to consider the warning, as the first incident was on 4 September 2019 and the second incident occurred on 25 October 2019 and therefore the misconduct was done within the 6 months before the final written warning lapsed.
8. Under cross-examination he stated that when he said: "mense soos u kan nie geduld word in die staats diens nie" he was not being biased. He is an employee in the public sector, and they cannot tolerate conduct with which the applicant was found guilty of. He averred that nowhere in the charge sheet was there an issue of assault. The applicant only made a grievance after the union mentioned it to him. There is a standard rule in their office that they must be in their office between 11:00 and 12:00 and there was an altercation between the applicant and Rhoda that the applicant would not be in his office during the enquiry times. When he saw the applicant in the passage, he did not ask him what he was doing in the hospital. The minute the employer speaks to him about the case, he withdraws. He is not aware of any collusion.
9. Mr. Shaun Rhoda (Rhoda) testified for the respondent under oath and stated that he is an admin officer and responsible for managing the office and supervises staff and he also responsible to manage salaries and personnel administration. The applicant worked in the general personnel when he worked as an admin officer. He was the applicant's supervisor and had to ensure that the applicant adheres to the policies and the rules of the office. Since he started there was a rule that you must be in the office between 11 and 12 for enquiries. With reference to charge 1 – the applicant did not qualify for a pay progression in 2018 and 2019. He did email the applicant for the meeting for work

performance. The applicant disrupted the meeting, as he always does. When he talks, he will speak above him. He was the chairperson of the meeting and his manager was there as a witness. The applicant did not give him a chance to address the meeting and sometimes he does not listen. Once cannot transfer the message to the applicant in the meeting and it seems like the applicant wants to be the chairperson of the meeting. the tone of his voice is also disrespectful. He did inform the applicant what the agenda of the meeting will be and at the commencement of the hearing, he explained the reason for the meeting and the applicant knew what the purpose of the meeting was. The applicant raises his voice.

10. Insofar as charge 2 is concerned, he stated that the office rule is that you must be at the office between 11 and 12 and on the day of the incident, the applicant was late again, twenty five minutes late and he arrived at the office at 11:25. He called the applicant to his office and he came to his office and he asked him where he was. He immediately became defensive and raised his voice and became defensive. He asked him to leave the office because he did not want any conflict, but he refused. He had to put the applicant out of the office by his shoulders. He pushed him out by the door. He closed the door and eventually he left. The applicant always says: "wie is jy om vir my te se". he told him that in his office. He said "jy se nie vir my nie". He told him to leave the office. There were a lot of staff in the office.

11. With reference to charge 3 he stated that he was a witness in the incident. The applicant did not listen his manager. His manager opened the meeting and as she started speaking, the applicant interrupted the meeting. The meeting did not conclude. He told the applicant not to speak to his manager like that. His manager referred both him and the applicant to ICAS to resolve the conflict between the two of them. They started out as clerks but after he was promoted the applicant started with his stuff because he had to address him on certain issues, like punctuality. The problems with the applicant started in 2017 already and before that he and the applicant were friends. The applicant did not like it that he became his manager.

12. Under cross-examination he stated that the applicant was rude at the meeting where his work performance was discussed. He interrupts all of the time and does not want to

listen. The applicant did not appeal any of his warnings and he never lodged a grievance even though he is a shop steward and he is aware of the rules. He used to tell him, if he has a problem with him, lodge a grievance. He denied that he was given the tools by the investigating officer to trap the applicant. His office has a thin wall and if there is a meeting in the office, all of the people will hear and that is why he requested a meeting in the manager's office.

13. In relation to charge 2 – he stated that the applicant was persistent, and he denied that he hit the applicant against his shoulders and his head. The applicant opened a criminal case of assault against him. On the day of the incident, the clerks were there when the confrontation happened, and the applicant's eyes were such that he sensed the applicant would do something. He denied that he coerced any of the applicant's witnesses not to testify at the arbitration. The applicant was 90% of the time late for enquiries, even though he spoke to the applicant many times about his late coming. He denied having colluded with Samson.
14. Under re-examination he stated that his office has glass windows and people can see into his office. His office is not soundproof, and anyone can hear and see what is happening. He never punched the applicant. He shoved him out of his office. The applicant only made a criminal case against him in January 2020
15. He does not think that he will be able to work with the applicant again because of the formal hearing and the other stuff. Last year he did not want to go to work because he has to face the same issues every day. Even after the formal hearing was done, the applicant did the same thing over and over again.
16. Ms. Philomaine Samson (Samson) testified for the respondent under oath and stated that she is the line manager in the people management department. The applicant used to work in the same department as an admin clerk. On 3 September 2019, Rhoda called a meeting to discuss performance issues with the applicant and she sat in as a witness because of the bad relationship between the two of them. He wanted her to sit in as a witness. When they were alone, he could not discuss the performance issues. It was a

problem and he always told her that the applicant did not agree and would refuse to sign the quarterly reports.

17. On the day they met at 09:00 and Rhoda was the chairperson and she was the witness and he told the applicant that the reason why he is there is to discuss his work progress. Before they could start discussing the progress report, the applicant was in charge of the meeting and did not give Rhoda a chance to talk. She told him that he is disrespectful to Rhoda and also disrespectful towards her too. They had to adjourn the meeting because they could not discuss the report. When Rhoda started to talk, the applicant took control of the meeting and was in charge of the meeting. It is clear that the roles were reversed because when the applicant talks, he will raise his voice. He will point his finger at Rhoda when he talks and raise his voice. The roles are opposite. She tried to intervene on numerous occasions where she tried to calm the situation a few times, but the relationship was at a stage where she could not intervene. She looked for a way to accommodate the applicant and she went to see where they could place the applicant at a different place, but the feedback was that he could not assist her because nobody wanted to accommodate the applicant. She did refer the applicant and Rhoda to conflict mediation, and they went on six-week session and she received a report back from ICAS in 2017.

18. A week prior to the 25th the applicant was booked off sick for a few days and he called in on the 21st and on 22nd. She was on leave and on that specific day Rhoda was not in and they know they must call the immediate supervisor, if not available they can speak to her. If she is not at work, they must phone Wolfaardt. She stepped out for a few minutes and when she came back, she received an email from one of the managers that the applicant called her. She asked him why he did not phone her, and he said that he did phone and that he can phone another manager. The morning of the 25th she called a meeting between the applicant and Rhoda and the discussion was supposed to be about the phone call and just to recap. The applicant raised his voice and intervened and he was pointing his finger and clearly in control of the meeting. She did not have a chance to explain why they are there on that specific day and he did not show remorse on the 25th. That is unacceptable behaviour.

19. She averred that they work in a very stressful environment and it affected her and Rhoda's health and there was a time when Rhoda was absent a lot. People come to her and they see the conflict between them, and they approach her. They had numerous meetings with the staff too about the conflict situations in the office.
20. Under cross-examination she stated that the applicant was informed about the performance meeting and referred to the relevant email. Rhoda said that he told the applicant verbally about the meeting. The applicant speaks to them with so much disrespect and the tone of his voice is disrespectful. They did not want the applicant gone. The staff in the office know the rules and follow the rules. The applicant knows that he must phone his own supervisors. None of the other staff does what the applicant does. Rhoda is the second supervisor since she has been there. The person that was there prior to Rhoda, experienced the same problems and she has a file of people with the same issues on record. It isn't something new. She denied that she did not do anything about the applicant's complaint about Rhoda assaulting him.
21. Ms. Mobomiso Ndukiswa (Ndukiswa) testified for the respondent under oath and stated that she works at Tygerberg hospital as an admin clerk in the general personnel office. She works with salaries. She is currently in general personnel office in Tygerberg. She knows the applicant because she worked with him. On 14 October 2019 she was busy at her desk on a call when she heard what sounded like an altercation and when she looked up, she saw that it was the applicant and Rhoda. She could not hear what they said. There were people in the office and Rhoda was pushing the applicant out of his office and the applicant was pushing back. What happened last year between the applicant and Rhoda was too much. What happened between the applicant and Rhoda affected the whole office and the office is an open place and everyone sees what is happening. They are about six clerks and it happened in front of all of them.
22. Under cross-examination she stated that she can see through the window from where she sits, and Rhoda's entire office is glass. On the day of the incident, she did not hear what was being said. She stated that she was not treated differently. The applicant was the aggressor most of the time. Both Rhoda and the applicant raised their voices. The relationship between Rhoda and the applicant became worse when Rhoda became

supervisor. They were friends before that, and the relationship was good. She stated that Rhoda has said things to her, but he apologises when he is wrong. Rhoda does not raise his voice at her. She won't say that Rhoda attacked the applicant, as she did not see him assault the applicant. She won't say they victimised or intimidated the applicant.

23. Mr. Sibusiso Mabentsela (Mabentsela) testified for the respondent under oath and stated that he knows the applicant because they worked together from 1 December 2014 until he left on 21 March 2020. On 14 October 2019 he recalls that he was sitting at his table helping somebody. The office was a bit busy and what he noticed is that the applicant and Rhoda were both against the door at Rhoda's office and Rhoda was trying to let the applicant out, but he was forcing himself in the office. The reason why he looked in that direction is because he could hear that something is happening. Rhoda is against the door and one person on other side and other person on other side. He only noticed when they were pushing the door. He heard the applicant saying that he is not scared of Rhoda when he left his office. The applicant and Rhoda were friends and in 2017 he saw that their relationship is not well. Such incidents happened more often, and they would talk at the office and he would talk to the applicant and he would ask him to leave because it is not good for them at the office.

24. Under cross-examination he stated that the applicant was the closest to the office and he was the furthest. He only looked when he saw them tugging at the door. Everybody in office did notice the altercation between the applicant and Rhoda. The applicant was doing most of the arguing. He could hear the applicant talking and that's when he looked in the direction. He did not see Rhoda hit the applicant. He conceded that he spoke to the applicant and told him that he will testify against him when it comes to that. The applicant would raise the issue between him, and Rhoda and he told him that what he is doing is not right. The only problem he had is that the applicant was in Rhoda's office most of the time. Rhoda treated all of them the same. He cannot say Rhoda was always perfect. Rhoda should also have handled the situation better.

### *Applicant's evidence*

25. The applicant testified under oath and stated that he was employed by the respondent as the chief administration clerk at Tygerberg. He has been working there for 19 years. He stated that everything changed when Rhoda became supervisor in 2017. They were colleagues working in same unit. He did not apply for the supervisor post because his password was blocked online. He could not apply for the post and he wanted to apply but because of problem with password, he could not apply. Before Rhoda became supervisor, he invited him to his church, and they became house friends and he attended prayer meetings at his house. It continued after he became the supervisor and they socialised together, and he invited him to his son's 21st birthday and they used to drink and braai together. They never had arguments or altercations at these private events. Rhoda abused his position as a supervisor. He would treat him different compared to the rest of his colleagues and would try to do things that upset him and provoke him. Rhoda would raise his voice at him and say to him, remember its 2020. He stated that he could not express himself or convey a message because Rhoda will never give him a chance to respond. He averred that Rhoda discusses his shortcomings in the presence of other people.
26. On 4 September 2019, Rhoda sent him an email regarding a meeting, and he received the email on the same day. He requested an agenda and he asked Rhoda to explain what it is about. He is not sure whether he read it. He asked Samson what the meeting is all about and Rhoda said to him, you know what the meeting is about. He said that there should be an agenda so that he can prepare himself. He told him that it is about his work performance. He said that it's the first time that he hears that. He stated that Rhoda would give him a lower mark than Samson and he could not understand how a supervisor can overrule a line manager. He stated further that both Rhoda and Samson shouted at him and that he did not raise his voice at all. He just said that it is not right and that it is unprofessional the way they spoke to him. He does not feel like he was fairly treated. He was scared and he couldn't take the bullying anymore. He is familiar with the grievance and he did not lodge a grievance because he was scared of bullying by Rhoda. He would say, you can do what you want to do.

27. He averred that on 14 October 2019 Rhoda wanted to smash the door in his face and he put his foot down as a stopper to prevent the door from hitting him. He did not lay a complaint and he continued helping the client. Rhoda was the aggressor on 14 October 2019, and he was not rude. He was simply trying to explain himself and he just said get out of my office and he punched him. The moment he stood up he said leave my office and then punched him. He contended that after he returned from hospital, Rhoda said that he must ask the doctor if he cannot board him.
28. With reference to charge 3 he stated that when the doctor booked him off for an eye inspection on or about 21 November 2019, he called in and he could not get hold of Rhoda or Samson and he tried again and one of his colleagues informed him that Rhoda is not on duty and he called to Samson's office and the policy states that they must inform the supervisors between 07:30 and 08:00 if they are not coming to work. A29 is the policy that he is referring to. He could not get hold of Samson and they are not allowed to leave a message with fellow colleague, and he is aware of that. They must leave message with somebody on high level in same component. He called Davids and he said that he will send them an email to inform them. He denies speaking over them. They will always raise their voice above his.
29. Under cross-examination he denied disrupting the meeting where his work performance was discussed. On 14 October 2019 Rhoda punched him twice in his office. The person who witnesses the assault is Mrs Kaysen, but she does not want to testify. The other staff members were busy. He went to Samson and he told her about it. He did not follow up with Samson because he thought Samson is going to take action. He was waiting on samson to take the incident further because she is the line manager. He did nothing about the assault against him by Rhoda. He laid a case against Rhoda in January after his hearing started. There was no medical report. He expected that an investigation must be done after he lodged a grievance. The investigating officer did not ask him anything. He expected Samson as the line manager to take it up. He did not follow up about the incident that he reported.
30. He does not know why Rhoda would shout at him for being 3 mins late. Rhoda did not give him a chance to explain and he jumped out of his seat and punched him. Rhoda

gets upset because he has a speech problem. He told Rhoda “dit is nie die manier om met my te praat nie”. He was not disrespectful at Samson and he did not point at her. Samson called him in, she and Rhoda and she said: “luister hier meneer, ek is die supervisor and nie mr Davids nie”. “Jy skakel my tot jy my in die hande kry”. The way that Samson approached him, the tone of her voice and she was totally unprofessional and rude towards him. He conceded that he received a final written warning for being disrespectful. He denied being disrespectful and stated that he was just giving his opinion. He did not challenge the final written warning.

31. Under re-examination he stated that he only realised five months later that he was being assaulted. He was traumatised and he only realised afterwards that he was assaulted. When he speaks to people, he makes use of his hands to express himself and demonstrate. Samson could have misconstrued this demonstration with his hands.

32. Ms. Maria Piet (Piet) testified for the applicant under oath and stated that she knows the applicant for a while now. She goes to him when she has a problem with her paperwork. She also knows Rhoda and there was an occasion when she and her colleague was there, and the applicant was on the phone and Rhoda was knocking against the window to say that he must help them. Rhoda was aggressive. He explained with his fingers. He said that the people are waiting there, why doesn't he help the people. The applicant is not an aggressive person or argumentative.

33. Under cross-examination she stated that she cannot remember the date of the incident that she is describing. She cannot recall the date. The applicant did not go to Rhoda's office on the day. She cannot recall the date.

34. Ms. Berenice Adams (Adams) testified for the applicant under oath and stated that she knows the applicant since 2001 when she started working at Tygerberg hospital. She knows Rhoda too. On one day she was with Piet at the applicant's office, and he got a call and asked them if he can answer the phone. Rhoda was very upset and aggressive, and he was worked up and he came out and he had an attitude. She and Rhoda had a fall out previously when he said “Mev Adams hoekom is jy nog nie getroud nie?” Rhoda treated the applicant like a child in front of his colleagues. Rhoda has anger management

issues. She has argued many times with Rhoda. She cannot recall the date of the incident.

35. Under cross-examination she stated that she reported Rhoda's actions towards her. Rhoda is a busy person. She cannot say exactly what the date was that the incident between Rhoda and the applicant occurred. Rhoda asked the applicant what he was busy with and said that he must help them. She cannot say if the applicant received an urgent call on that day or not. She stated that Rhoda had previously worked in the kitchen and stated that she argued with him on several occasions when he worked in the kitchen.

36. Mr. Ivan Bloems (Bloems) testified for the applicant under oath and stated that he knows the applicant. His mother worked for 40 years for the hospital youth and she told him that if she dies then he must go to the applicant because he was the person who helped her with the sorting out of her papers. He does not work for Tygerberg hospital. He is unemployed. He worked for agm, an organisation working with Tygerberg lab. He went to the hospital to find out whether there is money funds owing, after his mother passed away and the applicant was sitting behind his desk and he said that he must come in and he greeted him and he greeted back. He was busy on his laptop and when he was done, he said that he can explain. In that time when he was busy, he heard banging against the window, and he was shocked, and he looked, and he asked the applicant what is going on and it looked like the person was hitting the window broken. He said, laat daai man gaan and kom jy hierso. The applicant told him that it was his senior and he said that he was rude. He could see that the applicant felt bad and they were both shocked. He felt like he did not want to be part of that. he told him that he is not feeling good and he feels bad that Rhoda was so rude with the applicant. The incident occurred in 2019. Rhoda took the files and he screamed at the applicant and said that he did not do his work.

37. Under cross-examination he stated that he was introduced to the applicant and he did not tell any of the other officials why he was there. Rhoda did not know why he was there. He was at the applicant's desk on two occasions. He is not aware of the incident where Rhoda allegedly assaulted the applicant. He did not work physically with Rhoda. He worked twice with the applicant and he only went to the applicant on two occasions.

## ANALYSIS OF EVIDENCE AND ARGUMENT

38. Section 192(1) of the Act provides that an employee bears the onus of proving the existence of a dismissal, whilst subsection (2) requires the employer to prove the fairness thereof. In this matter it is not in dispute that the applicant was dismissed.

### *Substantive Fairness*

39. In determining whether the applicant's dismissal was substantively fair, the factors listed in Schedule 8 of the Act under Item 7 of the Code of Good Practise: Dismissal is taken into account.

### Charge 1

40. With reference to this charge, Samson and Rhoda testified about how the applicant spoke to them and that he pointed his finger at Rhoda. Samson corroborated Rhoda's version that the applicant spoke to him in a disrespectful manner and that the meeting had to be adjourned because the applicant would not allow Rhoda to conduct the meeting. Documentary evidence was adduced to show that the applicant was advised of the agenda of the meeting, albeit short notice. Even if the applicant was not advised of the agenda of the meeting prior to the meeting, there is no reason for the applicant to act disrespectfully towards his seniors. He could have requested an adjournment of the meeting in order to prepare for the meeting. Samson and Rhoda both testified that when they met with the applicant, it seemed like the roles were reversed and that the applicant was the supervisor.

41. On the contrary, most of the applicant's testimony, if not all of it, was not put to the respondent's witnesses. On this basis, I do not accept the veracity of his testimony insofar as it relates to this charge. Moreover, none of the applicant's witnesses were present at the meeting that was held on 4 September 2019 and they can therefore not attest to what happened in the meeting that was held on 4 September 2019 between the applicant, Rhoda and Samson.

42. In view of the above mentioned, I find that the respondent has succeeded in proving, on a balance of probabilities, that the applicant was insolent towards his supervisor during the course of the meeting held on 4 September 2019.

#### Charge 2

43. Insofar as this charge is concerned, all of the respondent's witnesses, save for Samson witnessed the incident that occurred on 14 October 2019 and according to them, the applicant was the aggressor and spoke the loudest when compared to Rhoda. Mabentsela testified that when the applicant exited Rhoda's office, he told Rhoda that he is not scared of him. They further testified that they did not see Rhoda assault the applicant, however, both Rhoda and the applicant were tugging at the office door. Rhoda was pushing the door towards the applicant so that he could leave, and the applicant was pushing the door back at Rhoda, trying to get back into the office.

44. According to the applicant, Rhoda punched him. This evidence was not corroborated by any other evidence. The truthfulness of that evidence is questionable considering a number of factors, particularly, the fact that the applicant only lodged a grievance a few months after the alleged assault when his disciplinary hearing was underway. Moreover, the applicant alleged that he was traumatized, but by the same token testified that he continued working as normal thereafter. This is not the conduct of somebody who is traumatised. He further stated that he only realised that he was assaulted a few months later. This version is not plausible and not supported.

45. What is more, the applicant's version that he was scared of being bullied and victimised is not supported. The respondent's witnesses testified that the applicant was the aggressor in most instances and that he spoke back to Rhoda. There is unchallenged evidence that the applicant spoke the loudest on the day that this incident occurred, and he told Rhoda that he was not scared of him. There is also evidence of the applicant pushing Rhoda's office door towards Rhoda. In the circumstances it is highly unlikely that he was scared of Rhoda. The applicant's version is not probable.

46. Again, the applicant's witnesses were not present when the incident occurred and could not attest to what happened on 14 October 2019. In the result, I find that the respondent

succeeded in proving that the applicant is guilty of insolence towards his supervisor on 14 October 2019.

### Charge 3

47. Both Samson and Rhoda testified about what happened in the meeting on 25 November 2019. Both of them testified that the applicant disrupted the meeting and was acting insolent towards Samson and Rhoda. Rhoda stated that the applicant did not give Samson a chance to speak and acted as though he was in control of the meeting. Samson testified that the applicant was pointing his fingers at her. The applicant's version that he spoke with his hands and that it may have seemed like he was pointing fingers was not put to any of the respondent's witnesses and therefore that evidence remains untested. As stated above, material aspects of the applicant's version were not put to Rhoda and Samson and on that basis the truthfulness of his testimony is questionable. The applicant did not come across as a reliable witness. Once again, none of the applicant's witnesses were present to witness what happened at the meeting between the applicant, Samson and Rhoda. Samson and Rhoda came across as reliable and credible witnesses and both their testimonies were consistent. In the result, I am satisfied that the respondent has succeeded in proving the applicant is guilty of this charge on a balance of probabilities.

48. I find that dismissal was the appropriate sanction for the following reasons:

49. The applicant showed no remorse, even in the face of overwhelming evidence against him. Samson testified that she sent the applicant and Rhoda on a six-week ICAS sessions and this only helped the relationship for a short period thereafter. She further testified that she tried to accommodate the applicant by looking to have him placed at another office, however, nobody was prepared to assist the applicant.

50. It is common cause that the applicant was issued with a final written warning on 30 May 2019 for insolence and that it was valid for a period of six months. It is further common cause that the applicant committed the same misconduct within the period that the final written warning was valid. It can thus be seen that the applicant was disciplined

progressively and that he has not been rehabilitated through being disciplined progressively.

51. The relationship between the applicant and Rhoda has had an effect on the morale of the team. Surely the respondent cannot be expected to tolerate such conduct on the part of any of its employees. The evidence is clear that the working relationship between the applicant Rhoda and Samson has severed completely and that it is not capable of being restored.
52. The applicant has been employed by the respondent for a period of 19 years with a blemished disciplinary record.
53. I find that the above-mentioned factors far outweigh the applicant's years of service and that the respondent has succeeded in proving that the applicant's dismissal is substantively fair, on a balance of probabilities.

#### *Procedural Fairness*

54. I have taken into consideration Item 4 of Schedule 8 of the Code of Good Practice: Dismissals (the code) in the Labour Relations Act of 1995 as amended to determine the procedural fairness of the applicant's dismissal. All that the code requires is that there must be an investigation and that the employer must inform the employee of the allegations in a form and language that the employee can understand. This process promotes simple and non-technical approach as highlighted in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* (2006) 27 ILJ 1644 (LC).
55. The applicant challenged the procedural fairness of his dismissal on the basis that the chairperson took into account a final written warning issued against the applicant that expired and secondly, he was biased in that he considered an occurrence beyond the charges, when he observed the applicant in the passage between 11:00 and 12:00, when the applicant was supposed to be at his desk for enquiries. Muller, who chaired the applicant's hearing, testified that he did mention what he observed in the outcome of hearing and the reason why he mentioned it is because the applicant's disciplinary

hearing was ongoing at the time, yet the applicant was found in the hospital and not at his desk at a time when he was supposed to be available at his desk for enquiries. He stated further that this observance would not have changed his outcome in any event. Based on Muller's testimony, I find that his observance does not render the applicant's dismissal procedurally unfair. Furthermore, it was found that the final written warning issued to the applicant on 30 May 2019 was valid at the time of the alleged incidents of misconduct. In the result, I find that the respondent has succeeded in proving that the applicant's dismissal had been procedurally fair, on a balance of probabilities.

## **AWARD**

56. The applicant's dismissal was substantively and procedurally fair.

57. The applicant's claim is dismissed and his dismissal is upheld.

58. There is no order of costs.



.....

**Janine Carelse**