



# ARBITRATION AWARD

Case No. **PSHS218-11/12**

Date of award: **29 April 2014**

Panelist: **Lungile Matshaka**

In the matter between:

PSA obo Sharp M

Applicant

And

The Department of Health and Social Development- Gauteng

Respondent

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## DETAILS OF THE HEARING AND REPRESENTATION

1. The matter was set down for arbitration hearing as a part-heard on 03 February 2014 at the Department's SG Nursing College in Pretoria. Adv. G Kerr-Phillips, instructed by Martins Weir-Smith Attorneys, represented Ms Elizabeth JM Sharp ("the Applicant"). In turn Ms K Maphunye, Assistant Director: Labour Relations represented the Department of Health and Social Development- Gauteng ("the Respondent").
2. The matter was initially held on 23 September 2011 and due to time constraints the proceedings were adjourned and continued on 22 March 2013, 10 & 11 July 2013, and finalised on 3 February 2014.
3. The parties requested and were enabled to submit the closing arguments by 31 March 2014 respectively. Only the Respondent complied.

## **ISSUE TO BE DECIDED**

4. I am required to determine whether or not the Applicant's dismissal was both substantively and procedurally fair, and if not, to consider the Applicant's request for re-instatement.

## **BACKGROUND TO THE ISSUE**

5. The Applicant, Ms M Sharp, commenced her employment with the Respondent on 4 July 1995 as a Senior Clerk at Steve Biko Academic Hospital. At the time of her dismissal she was earning an annual salary of R128 000.00. She was also a PSA shop steward.
6. Clinic clerks had a grievance in respect of their having to go to records to "pull" files and had lodged a grievance in this regard. On 24 June 2009, a meeting was held to discuss the Clinic Clerks' grievance ("the meeting").
7. An incident that ensued at this meeting resulted in the Applicant's dismissal.
8. On 28 August 2009 the Applicant was accordingly charged and given a notice to attend a disciplinary hearing in terms of **Clauses 6 and 7** of the **Disciplinary Code and Procedure for the Public and Service** as contained in **Resolution 1 of 2003**. The charges were as follows:

### **Charge 1:**

*"Displays disrespect towards others in the workplace or demonstrates abusive or insolent behaviour: In that on the 24 June 2009, you failed and disobeyed management's instruction when you were told to leave their meeting at discussion room 3.*

### **Charge 2:**

*"While on duty, conducts yourself in an improper, disgraceful and unacceptable manner: In that on the 24 June 2009, you were screaming and shouting at management including Mr. Ngcobo.*

### **Charge 3:**

*"Incites other personnel to unprocedural and unlawful conduct: In that on the 24 June 2009, you influenced the Clinic clerks to leave the meeting."*

9. Subsequent to hearing sessions held on 09 October, 17 October, 18 November and 02 December 2009 and as well as 27 May 2010 the Applicant was found guilty and dismissed.
10. The Applicant is contesting both the substantive and procedural unfairness of his dismissal. As relief she is seeking re-instatement.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

### ***The Respondent's evidence and submissions***

The Respondent's first witness, Mr Andries Sebothoma, to be referred to as "Andries" testified as follows:

11. He confirmed his position as a Deputy Director: Personnel Administration at Steve Biko Academic Hospital. His responsibilities include the overall management of administration of clerks. He knows the Applicant as a former employee.
12. On 24 June 2009 a meeting was arranged through the office of the HR Director. In essence Andries' evidence confirmed that the HR Director, Mr Ngcobo, wanted to hear what the clerks' problems were.
13. The Applicant had been present at the meeting but that she had not been invited. Mr Ngcobo asked the Applicant to excuse herself and this was not to be. Following an altercation between Mr Ngcobo and the Applicant, the security's services were alerted to avail themselves and eventually had to remove her by force.
14. Andries made the point that the Applicant was not invited to and was not supposed to attend the meeting as she had neither been working with the clerks nor being a supervisor over the clerks.
15. Another PSA official who turned up also failed to convince the Applicant to excuse herself.
16. The Applicant demanded that the clerks must leave the meeting. At this juncture the security physically removed her from the venue of the meeting.

Under cross-examination Andries responded as follows:

17. He confirmed that the meeting was intended to listen to the clinic clerks' concern following a grievance lodged by them to Labour Relations.
18. At the end of meeting it was accepted and agreed to that the clerks would no longer go and draw files from the Recording Section.
19. He further confirmed that this was a management meeting before it became a formal grievance. The latter would be set up by Labour Relations.

20. He denied that the Applicant arranged the said meeting with him and that she had also enquired as who will be attending it. He further confirmed that the Applicant was talking loudly and that she had made it clear that if she was leaving, the clerks must also leave. However, they did not leave.
21. The second witness, Mr F Monama (Monama), confirmed his position as a Deputy Director: Administration and Logistics. In essence his evidence was materially the same as that of Andries.
- 21.1 He confirmed that the meeting was a management interaction with the clerks regarding their concerns in relation to fetching records.
- 21.2 Under cross-examination he confirmed that the Applicant was forcefully removed from the meeting because she had refused to excuse herself when asked to do so.
- 21.3 He was not aware that the clerks had lodged a grievance, but was aware that the clerks had concerns. He further confirmed that it was resolved that the clerks would not have to go to the Records Department to retrieve files.
22. The third witness, Mrs S Moswanya testified as follows:
- 22.1 She confirmed that she is a Registered Nurse at the Urology Department and acting as a Unit Manager. At the time of the meeting, she had been a PSA shop steward.
- 22.2 On 24 June 2009 she had been called to a meeting. On entering the room she found security personnel holding the Applicant both sides dragging her out. The Clinic Clerks advised her that there was supposed to be a meeting with the Applicant and management. Mrs Moswanya merely asked the clerks to sit down and listen to what management had to say and thereafter she left the room.
- 22.3 Under cross-examination she confirmed that whether a shop steward, who was not a clerk, could be invited by the clerks to a meeting, depended on the issue to be addressed in the meeting.
- 22.4 She would not have been surprised if the clerks invited her to a meeting where the issue to be addressed was how the clerks were to draw file records.
- 22.5 Even if management did not invite a shop steward to a meeting to discuss a grievance and it was the clerks who invited a shop steward to such a meeting, the shop steward was entitled to attend. She would be surprised if management asked her to leave such a meeting or forcibly removed her as in the Applicant's case.
23. The fourth witness, Mr Ngcobo, testified as follows:
- 23.1 He is a Director of HR and Logistics. He knew the Applicant as an Admin Clerk and also serving as a PSA shop steward.
- 23.2 He had a meeting with key board operating clerks with regards to the latter not wanting to retrieve files from the Records Department.

- 23.3 Just before the meeting commenced the Applicant came in. She immediately pointed that it could not be held without her. He responded by stating that this was a management meeting regarding as to why the clerks were not doing what they were supposed to do.
- 23.4 The Applicant was based at the Oncology Department and was not supposed to be part of the group i.e. keyboard operating clerks. After explaining to the Applicant, the latter indicated to the group that they must leave with her, as the meeting cannot proceed without her. He could not understand why the Applicant had gone to the extent of getting other employees to commit misconduct. He kept on directing her to leave as this was not grievance meeting until the security was directed to remove her.
- 23.5 Mr Ngcobo further pointed out that there are four (4) recognised unions on the Respondent's premises. No union was invited to attend the meeting in question.
- 23.6 The normal route was then followed leading to the Applicant's dismissal confirmed on appeal by the MEC of the Department.
- 23.7 Under cross-examination Mr Ngcobo responded as follows:
- 23.8 The Applicant walked into the meeting without being invited.
- 23.9 As a management representative he was resolving a system that blocked. He further pointed out that if the clerks had wanted the Applicant to be present at the meeting, they should have told him that they needed representation before calling the Applicant.
- 23.10 On informing the Applicant at the commencement of the meeting that it was a management meeting, the Applicant informed him that she had a right to be at the meeting as the clerks had invited her.
- 23.11 Mr Ngcobo conceded that the suspension letter did not afford the Applicant the opportunity to say why the suspension should not be effected. He further conceded that he had not been present when his instruction regarding the calling of the clerks had been carried out.
- 23.12 He further conceded that the meeting agreed with the contents of the clerks' grievance and resolved the matter amicably.

### ***The Applicant's evidence***

24. In her testimony under oath the Applicant testified as follows:

- 24.1 The Clinic Clerks' grievance, as at the date of the meeting, had been ongoing for two (2) years and was common knowledge. It had further been common knowledge at the workplace as numerous meetings had been held with management regarding the issue. It was therefore not possible for Mr Ngcobo or those who reported to him not to have known of the existence of the grievance when the meeting had been called.

- 24.2 The issue of the Clinic Clerks' having to attend to pulling record files had risen as a result of the records clerks' manipulating the system of overtime pay resulting in it being suspended. The Clinic Clerks filled in the gap.
- 24.3 On 3 June 2009 Labour Relations signed the Clinic Clerks' collective grievance.
- 24.4 On the 23<sup>rd</sup> June Mr Sebothama, an Assistant Director: Administration, phoned the Applicant and advised the latter to notify all the Clinic Clerks about the meeting scheduled for the 24<sup>th</sup> June at 8h00.
- 24.5 Mr Sebothama knew that the Applicant was a PSA representative for the clerks and that the latter had made it clear that they would not meet management on the issue unless they were represented.
- 24.6 On further discussions with Mr Sebothama, the meeting was then arranged for 13h00.
- 24.7 It was clear that she could attend the meeting and she asked Mr Sebothama who else would be attending the meeting. The latter advised that Mr Ngcobo, Mr Phatla, Mr Manama, Mr Soma and Mr Sebothama would be attending the meeting.
- 24.8 Mr Sebothama further advised her that Labour Relations would not be attending on the understanding that it would be informal meeting in an effort to try and resolve the dispute.
- 24.9 Before the meeting, the Applicant met the Clinic Clerks who advised her in no uncertain terms that they did not want to attend a meeting with management without her.
- 24.10 At the scheduled time all those expected from the management including Mr Ngcobo to attend did arrive 10 minutes later.
- 24.11 Mr Ngcobo then advised all those present that he wanted to start the meeting, whereupon the Applicant had spoken to Mr Ngcobo in a polite manner and advised that she could not understand why Labour Relations was not present as she felt uncomfortable with the number of managers in attendance. She accordingly requested that the meeting be postponed in order for a PSA representative to attend.
- 24.12 Mr Ngcobo became upset when she asked for the postponement and spoke in an abrupt, direct and threatening voice that she would have to leave the meeting as it was his "meeting".
- 24.13 She responded by pointing out that she represented the Clinic Clerks, that there was a formal collective grievance, that he knew of the formal collective grievance and that she would not leave the meeting.
- 24.14 On Mr Ngcobo's insistence for her to leave, she again said that she was not leaving, and if she has leave, the clerks would be leaving with her.
- 24.15 Mr Ngcobo then said to the clerks that if they left the meeting they would be fired. He further advised her that if she did not leave the meeting he would call security to remove her.

- 24.16 Not long thereafter she was able to speak to Mr Claude Naicker of the PSA over the phone and explained the situation. The latter in turn advised her that it was not conducive to conduct a meeting in such circumstances and that she and Clinic Clerks should leave the meeting and ask for another meeting time.
- 24.17 A few minutes later, three security guards in the company of Mr Ngcobo and his deputies arrived. They were repeatedly told to take her out of the room. They complied and dragged her out of the room. In the process Mr Ngcobo had also assisted by pushing her when she tried to balance herself by holding the door knob.
- 24.18 It was for this reason that she laid a criminal case against Mr Ngcobo although nothing had happened in respect of that case.
- 24.19 She was suspended for in excess of three (3) months and more than sixty (60) days had passed before her disciplinary hearing commenced.
- 24.20 Under cross-examination the Applicant responded as follows:
- 24.20.1 As a shop steward she was aware of the grievance procedure and that if a grievance was not resolved, management were to fill in the form accordingly.
- 24.20.2 Management had however never filled in the grievance form and it was therefore not possible to say that the dispute had not been resolved and to take the step to the next level. It was therefore not possible to have declared a dispute with the Public Health Sector Bargaining Council as the internal formal grievance procedures first had to be exhausted. The procedure had commenced when she had lodged the collective grievance in June 2009.
- 24.20.3 In response to the proposition that Mr Ngcobo had testified that she had not been invited to the meeting, she testified that Mr Ngcobo had not spoken to her and that he had not been there when Mr Sebothama has spoken to her in respect of the meeting.
- 24.20.4 It had not been correct for Mr Ngcobo to allege that the meeting was a management meeting as the meeting had "*not been arranged like that*", "*we and the clerks were not part of management*".
- 24.20.5 Mr Sebothama had deliberately led her and the Clinic Clerks into a trap.
- 24.20.6 Mr Sebothama had informed her that the meeting was an attempt to resolve the collective grievance.
- 24.20.7 The Applicant denied the proposition that what was to be discussed at the meeting was not the collective grievance.
- 24.20.8 While security had been dragging her out, Mr Ngcobo had "*slammed*" her leg in the door.
- 24.20.9 The confrontation referred to in **charge 1** was a reference to her being dragged out of the meeting.
- 24.20.10 With reference to **charge 2**, she had not screamed or shouted at anybody.

25. Under re-examination, the material aspects of the Applicant's evidence were:

25.1 She confirmed that Mr Ngcobo had conceded that she had told him that the clerks had invited her to the meeting;

25.2 She confirmed that Mr Sebothama had testified he could not remember telling her to come or not to come to the meeting.

26. The second witness, called by the Applicant was Mrs Tshwarelo Montle. She testified as follows:

26.1 In June 2009 she was a Clinic Clerk who attended the meeting. The day before the meeting the Applicant called her and advised her that Mr Sebothama had phoned her to arrange a meeting that involved the collective grievance.

26.2 It had been the Applicant who had arranged to attend the meeting and that she had in turn called the other Clinic Clerks as the Applicant had requested her to inform other Clinic Clerks.

26.3 She would not have attended the meeting without representation and, in the absence of representation, would not have attended the meeting.

26.4 The only issue that had been discussed at the meeting had been the collective grievance and, after the Applicant had been removed from the meeting, it had taken approximately 15 minutes to complete.

26.5 The grievance had been resolved in that it was no longer necessary for her and other clinic clerks to attend at records.

26.6 Under cross-examination, she responded as follows:

26.6.1 She could not remember precisely when the collective grievance had been lodged in, but could confirm that it had been before the meeting. It had been the Applicant who had invited her to the meeting.

26.6.2 She confirmed that it would have been incorrect for Mr Ngcobo to dismiss the Clinic Clerks had they left the meeting.

26.6.3 When the Applicant had been informed that management would not be attending the meeting, she had been given the wrong information.

26.6.4 She had informed the Applicant of the outcome of the meeting.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

27. As a point of departure, a dismissal will be substantively fair if the employer can show that there was a fair reason for dismissal. A fair reason will include:

- Misconduct by the employee;
- Incapacity on the part of employee (s 188)(1)(i); or
- The employer's operational requirements (s188) (1) (ii).

28. Procedural fairness refers to the fairness of the process that precedes the dismissal.

29. In the present case the focus will only be on the alleged misconduct of the Applicant as indicated by the three (3) charges levelled against her.

30. Not all misconduct will justify dismissal and generally it is not appropriate to dismiss an employee for a first offence or for a single act of misconduct unless the misconduct is of such a serious nature that a continued relationship becomes intolerable (*item3 (4) of Code of Good Practice: Dismissal*).

31. Only the key aspects for purposes of this award will be focused on in terms of the substance and procedure.

32. Turning to the present case, it is common cause that Clinic Clerks had a grievance in respect of their having to go to Records Section to "pull" files and had lodged a grievance in this regard. It is further common cause that a meeting was held to discuss the Clinic Clerks' grievance.

33. In relation to said meeting it is significant to make the following observations:

33.1 The Respondent's evidence was to the effect that the meeting was a management meeting because it was called by management, in particular Mr Ngcobo to hear the Clinic Clerks' concerns.

33.2 The meeting was not a grievance meeting as HR and Labour Relations were not part of it. Mr Ngcobo is nevertheless the head of HR and Labour Relations.

33.3 However, I have noted that the Respondent's first witness, Andries Sebothoma, did not dispute the fact that the final outcome of the meeting (*that the clerks would remain in their department*) was precisely what their grievance had been about.

33.4 The Respondent's second witness, Mr F Monama, pointed out that the meeting had not been a management meeting or a grievance meeting as, if it were a management meeting, it would only have been attended by management and there would be minutes of a management meeting, whereas if it had been a grievance meeting, then the shop steward and labour relations should have been there.

33.5 Further, had the meeting been a grievance meeting, it would not have been lawful to tell a shop steward to leave the meeting.

33.6 Therefore, since no one seems to know what type of meeting it was no one could possibly be certain as to whether it was an act of insubordination to be there and an act of insubordination to refuse to leave.

33.7 According to the Respondent's submission, the inference is, that if it was a grievance meeting and on the Department's version it may be inferred it was, since a grievance was solved as a result of the

meeting, she could never have been, or formed an intention to be insubordinate, since she was entitled to be there.

33.8 Further, the issue is that it is perfectly acceptable that the Applicant might genuinely have differed from him and could not be held to have been insubordinate or lacking respect for him as the representative of the Respondent because she held a common different view.

33.9 I have no reason not to accept that there is no merit in the evidence of Mr Ngcobo that had the Clinic Clerks wanted her to be present they should have told him. The Applicant on her own version told that that was why she was there and having been so told he did not ask them if she was correct.

33.10 It therefore follows that the Applicant, in refusing to leave the meeting, and thereafter, was not rude, abusive, insolent, disrespectful, improper or disgraceful and that there was simply no basis for her to have been found guilty of the charges levelled against her. I therefore find that her dismissal was substantively unfair.

33.11 Regarding procedural fairness of the Applicant's dismissal I have noted the following:

33.11.1 Prior to her suspension, she had not been afforded an opportunity to provide her side of the story as to why she should not be suspended. This was apart from the fact that, being a shop steward, it was incumbent on the Respondent to first approach her union on the issue;

33.11.2 The Applicant was suspended in excess of three months and more than 60 days had passed before her disciplinary enquiry commenced;

33.11.3 In terms of **PSCBC Resolution No. 1 of 2003** being the ***Disciplinary Code and Procedures for the Public Service***, if an employee was suspended as a precautionary measure, the employer is to hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter (**Clause 7.2.C**);

33.11.4 At the disciplinary enquiry, the chairperson had refused to advise her as to his rank and it was accordingly not possible to establish whether he had a higher rank than that of the Department's representative;

33.11.5 Further, **Clause 7.3.B** stipulates that the chairperson of the disciplinary enquiry must be on a higher grade than the representative of the employer;

33.11.6 After the disciplinary enquiry the Applicant received judgment, but was not given any reasons as to why she was found guilty;

33.11.7 Yet **Clause 7.3M** makes it abundantly clear that if the chairperson decides an employee has committed misconduct, the chairperson must inform the employer of the findings and the reasons for it.

34. Taking into account what has been highlighted above, I can only find that on a balance of probabilities the dismissal of the Applicant was both substantively and procedurally unfair.
35. Regarding to the Applicant's re-instatement, because there has been a considerable delay on the part of the Applicant in pursuing the matter after the initial hearing of the 23<sup>rd</sup> September 2011, I am unable to re-instate her with full retrospective effect. No explanation was given as to why the matter was only pursued on 22 March 2013, more than a year later.
36. The only outstanding issue that I have to apply my mind on is that of costs relating to the Respondent's lack of attendance of the hearing on 02 December 2013.
37. The Applicant's representative placed on record that the failure to finalise the matter on that date was seriously prejudicial to the Applicant, especially since the hearing of the matter had taken so much time. It was further submitted that the failure of the Department or its representative to appear on the day in question, without any explanation was in fact contemptuous behaviour and consequently a punitive costs order should follow so that the honourable Chairperson could indicate his displeasure, *inter alia*, because of the discourtesy that had been shown to him.
38. Further, what has to be stressed is the fact that the date of the 2<sup>nd</sup> December 2013 was agreed upon by both parties in the previous hearing.
39. Section 138(10) of LRA read together with CCMA Rule 39 empowers commissioners to make costs awards if, in their opinion, a party has acted in a "*frivolous*" (ill-considered) or "*vexatious*" (perturbing or provoking) manner, either by proceeding with or defending a dispute in arbitration, or by his or her conduct during the arbitration proceedings.
40. According to John Grogan (**Labour Litigation and Dispute Resolution, 1<sup>st</sup> Ed. 2010, page 157**) the rules do not expressly state whether commissioners may award costs on the attorney and client scale, or whether they are limited to party to party costs.
41. However, the learned author goes on to say that, there seems to be no reason why, in exceptional cases, commissioners should not make awards on a punitive scale.
42. In the present case, apart from the fact that the Respondent's representative was timeously aware of the date having agreed to it, she opted not to make any submission when given an opportunity to do so.
43. It is on the above basis that I have to accept that the Respondent's conduct in terms of its representative in not availing herself as per her undertaking, and further, not taking the opportunity to make a submission in that regard justifies costs order on a punitive scale i.e. attorney and client, only for the 2<sup>nd</sup> December 2013.

## AWARD

I make the following award:

44. The dismissal of the Applicant was both substantively and procedurally unfair.
45. The Respondent is ordered to re-instate the Applicant in its employ on terms and conditions no less favourable to her than those that governed the employment relationship immediately prior to her dismissal.
46. The re-instatement in **paragraph 45** is to operate with retrospective effect from **02 December 2013**.
47. As at the date of the award the remuneration due to the Applicant as a result of the retrospective operation of re-instatement amounted to **R63 999.99**, six (6) months' remuneration (based on her yearly remuneration of **R128 000.00**) minus such deductions as the Respondent is in terms of the law entitled or obliged to make.
48. The amount (**R63 999.99**) referred to in **paragraph 47** it to be paid to the Applicant on or before 30 May 2014.
49. The Applicant is to tender her services to the Respondent on 12 May 2014.
50. Punitive costs order sought by the Applicant for the **2<sup>nd</sup> December 2013** hearing session is hereby granted, and if need be, to be confirmed by a Panellist assigned by the Council.

A handwritten signature in black ink, appearing to read 'Lungile Matshaka', written on a light-colored background.

Lungile Matshaka

PHSDSBC Panellist