



# ARBITRATION AWARD

Panellist/s: Lungile Matshaka  
Case No.: PSHS264-10/11  
Date of Award: 15-Nov-2011

In the ARBITRATION between:

IN THE PUBLIC HEALTH & SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

HELD IN MAHLABATHINI

**CASE NO:** PSHS264-10/11

**DATE OF AWARD:** 11 November 2011

In the matter between:

**PSA obo Ndebele S B**

Applicant

And

**Department of Health – Kwazulu Natal**

Respondent

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**ARBITRATION AWARD**

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration hearing was held as a part-heard at Nkonjeni Hospital Boardroom at Mahlabathini on 26 October June 2011. It took place under the auspices of the Public Health & Social Development Sectoral Bargaining Council. Mr D Govender, trade union official of PSA, represented the Applicant, while Ms N A Gumede, Assistant Manager Labour Relations, represented the Respondent.
2. The initial hearing was held at the same venue with the same parties in attendance on 07 September 2011 and due to the Respondent's as well as the Applicant's key witnesses respectively not being available the proceedings had to be adjourned.
3. The proceedings were mechanically recorded and witnesses gave evidence under oath.

## **ISSUE TO BE DECIDED**

4. I am required to determine whether the Respondent's conduct in terms of section 186(2) (b) of the LRA constituted an unfair labour practice when it imposed a sanction short of dismissal for misconduct charges levelled against the Applicant.

## **BACKGROUND TO THE ISSUE**

5. The Applicant started working for the Respondent in 1991 as a General Assistant (Cleaner) and later was promoted to the position of the Recording Officer (Level 4).
6. The present dispute arose from an incident when on 28 February 2008 six patients, who paid admission fees to acquire services but were not issued with the receipts. Subsequent to investigations conducted three employees including the Applicant were charged with the following allegations:

6.1 *“On the 20<sup>th</sup> February 2008 a patient paid twenty rands to receive hospital services and you were expected to give a receipt but you did not issue it;*

6.2 *In terms of the disciplinary code and procedure contained in Resolution 1 of 2003 your action constitutes a misconduct which is fraud/theft.”*

7. The outcome of the disciplinary hearing led to the Applicant being issued with a Final Written Warning as well as a suspension of salary for 3 (three) months. The other two employees namely: S Gumede and C R N Mathebula, who faced the same allegations as a sanction only received a Final Written Warning on the basis of negligence and not fraud. In the case of the Applicant, according to the presiding chairperson, he treated him differently because he had a previous conviction.
8. The Applicant is now challenging the substantive and procedural fairness of the sanction and as relief he seeks an appropriate remedy.
9. On the other hand the Respondent submits that the imposed sanction imposed on the Applicant was appropriate taking the previous conviction into account. It therefore prays that the matter be dismissed.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

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

10. The Applicant testified that he has 20 (twenty) years of service at Nkonjeni Hospital where he is still based. He confirmed that he was on duty on 20 February 2008. His actual duties during 2008 entailed registering patients on arrival and issuing cards for those who are coming for the second time. He further confirmed that he did work as a cashier whenever such duties were allocated to him.

11. On the day in question i.e. 20 February 2008, his supervisor was one Ms Mathebula. He further confirmed that he was once charged for misconduct. That matter went to court only to be referred back to the Department. At the internal hearing he was found guilty and given 1 (one) month suspension without pay. He did not challenge the conviction on the basis that his representative took long to refer the matter to the Council.
12. The Applicant further testified that the purpose of the register is to show that the patient was there, paid the money and a receipt has been issued.
13. In cross-examination the Applicant confirmed that after registering the patient the cashier would then ask him or her to pay. He further confirmed that on this particular Ms Mathebula received the money. It was put to the Applicant that the patient would say that he gave him the money and he did not issue the receipt. He stood by his word that he gave the money to Ms Mathebula.
14. The Applicant's witness, Ms C Mathebula, confirmed that she was employed at Nkonjeni Hospital as a clerk for the past 16 years. On 20 February 2008 following an incident at the work place she was charged together with the Applicant. They were both found guilty and issued with a final written warning respectively. On the day in question she was the only cashier. The Applicant in turn was retrieving patient cards. She further testified that patients who did not pay are usually referrals and those coming for reviews. She recalled that Mr Khoza made them to pay as they should have done.
15. She further testified that she was aware that the Applicant's sanction was a final written warning together with 3 months suspension without pay. In cross-examination she conceded that the six patients identified should have paid the standing fees.

### ***The Respondent's evidence***

16. The Respondent's first witness, Ms K Mbatha, confirmed that she is being treated for epilepsy at the hospital. She always comes for some pills here at Nkonjeni Hospital. Sometimes she would pay and sometimes not. With regards to the incident of 20 February 2008 on arriving at OPD (Out Patient Department) she paid R20.00 and the same was given to the Applicant but the latter did not give her a receipt. Thereafter she joined the queue for the doctor. Not long thereafter a security came and asked for their cards with no receipts. They were all taken to a senior person for further questioning.
17. In cross-examination Ms Mbatha confirmed that she was picked up by a Government Vehicle from his home. She further confirmed that she was not working and only getting a grant. She further confirmed that she saw the Applicant at the OPD in front. As to the possibility that she could have given the money to another staff member, she insisted that the money was given to the Applicant.
18. The second witness, Ms Z T Zungu, testified that she is employed at Nkonjeni Hospital as a Security Guard since 1 July 2002. Her duties entail protecting government property, the public and maintaining peace within the institution.
19. In relation to the incident of 20 February 2008 she was posted at OPD where doctors consult patients. On the said date a patient came to her and advised that she has paid today, yet she did not usually pay. She then did a random search regarding the matter. She then took 6 (six) patients in front and approached her senior, one Mr Khoza, who then consulted them. Later the Principal Security Officer, one Mr Ntshangase, came in and also asked for the six patients who she had initially called in. The latter were asked to identify the staff who accepted payment. In this process Ms Mbatha identify the Applicant in her presence.
20. The last witness, Ms Neliswa Thabathe, confirmed that she was working at Nkonjeni Hospital as Finance Manager since 2007. Her duties entail being responsible for the OPD budget, transport, mortuary, registry and hospital assets. After doing a situational analysis

she observed abnormal practices in that OPD staff was not familiar with fees manual book. This also explained why revenue was far below than what would have been expected for a 244 bed hospital. Immediately measures were put in place to turn around situation.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

21. As a point of departure, Section 186(2) (b) of the LRA defines '**Unfair Labour Practice**' as meaning an unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.
22. Grogan in his book entitled **Dismissal Discrimination & Unfair Labour Practices 1<sup>st</sup> Ed, 2005, page 65**, makes the point that just as in dismissals there must be a valid reason for a warning or demotion and that the employees must be given an opportunity to 'state their case' before the decision is taken whether to impose a sanction.
23. Turning to the present case, it is common cause that the Applicant faced misconduct charges relating to hospital services that he was supposed to have issued a receipt for, and did not issue it. In terms of Resolution 1 of 2003 the Applicant's actions constitute fraud / theft. He was found guilty and in terms of the Disciplinary Code he was issued with a Final Written Warning that would be placed in his file and remain valid for six months. In terms of the same Code he was further suspended from duty without pay for a period of three months. The Applicant was further informed of his right to appeal to the Chief Executive Officer of Nkonjeni Hospital within five (5) working days of the receipt of the sanction letter. The Applicant did appeal and was not successful hence the matter has come before this forum.
24. On the one hand the Applicant denies the charge levelled against him. On the day in question he maintains that he was not the cashier. Although he did work as a cashier from

time to time all that he did on the day was to retrieve patient cards. Ms Mathebula, the Applicant's witness, confirmed this view. In the same vein it should be borne in mind that Ms Mathebula faced the same charge and was also found guilty. She was issued with a Final Written Warning.

25. On the other hand, the complainant, Ms Mbatha, identified the Applicant as one who received payment of R20-00 and did not issue a receipt for the same. Interestingly, Ms Mathebula and one Ms Gumede were also identified and confirmed in the presence of Ms Zungu, a Security Guard. I have noted that the latter after receiving the initial complaint, did a random search and discovered that six (6) patients without receipts and others with old receipts.

26. In my own mind it may well be that the Applicant was not a cashier of the day, but that does not explain why Ms Gumede faced the same charge for the same day, if only Ms Mathebula was the cashier. Other than to try and exonerate the Applicant, Ms Mathebula made no attempt to explain Ms Gumede who was also found guilty. On the other hand Ms Mbatha, the complainant, identified the Applicant, in the presence of Ms Zungu, the security guard. There was not even a slightest indication that the Applicant declared his innocence at that crucial moment. I can only come to one conclusion that Ms Mathebula's evidence cannot be credible and must be rejected.

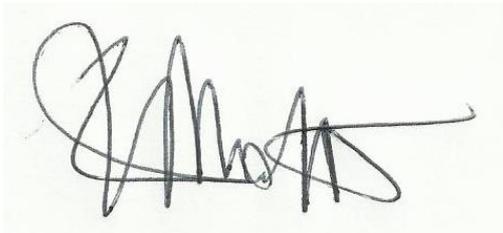
27. The context that the Respondent's witness, Ms Thabethe, gave painted a gloomy picture in terms of the level of fraud / theft that had been taking place resulting in low takings primarily because the hospital fee manual practice was either unknown or deliberately not followed. Fortunately measures that have since been taken have brought the situation under control.

28. In conclusion in my honest view the Applicant should deemed himself as being fortunate that he still has a job especially that this was not first time he has been found guilty for a similar misconduct. In any event he has already served the sanction in full and would be well advised to steer clear from such malpractices.

29. Finally, taking the facts of the case presented before this forum into consideration, I am unable to find the conduct the Respondent constituted an unfair labour practice in terms of the sanction imposed on the Applicant.

### **AWARD**

30. I find that the Respondent's conduct in terms of section 186(2) (b) of LRA did not constitute an unfair labour practice against the Applicant, Mr S B Ndebele, in terms of the sanction it imposed on him.

A handwritten signature in black ink on a light green background. The signature is stylized and appears to read 'Lungile Matshaka'.

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Lungile Matshaka

**PHSDSBC Panellist**