ARBITRATION AWARD

Panellist/s: **Mokgere Masipa**
Case No.: **PSHS285-11/12**
Date of Award: **26-Jan-2012**

In the ARBITRATION between:

In the arbitration between:

PSA OBO N MLANDU

(Union / Applicant)

and

DEPARTMENT OF HEALTH – KWAZULU-NATAL
(Respondent)

Union / Applicant's representative: S HLONGWANE

Union/applicant's address: P.O.Box 4011
Durban
4000
Telephone : 031 310 3600
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Respondent's representative: T NDWANDWE

Respondent's address : C/O Head of Department
Natalia Building
Langalibalele / Long Market Street
Pietermaritzburg
3200
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1.

DETAILS OF THE HEARING AND REPRESENTATIONS

The Arbitration hearing was scheduled for the 24th October 2011 and the 13th and 14th December 2011 at 10h00 at EMRS: Port Shepstone, The Boardroom. The Applicant was represented by Mr. S Hlongwane, a Union Official and the Respondent was represented by Mr. T Ndwandwe an Attorney.

2.

ISSUES TO BE DECIDED:

The issues to be decided are:

2.1 Whether the dismissal of the Applicant was procedurally and substantively fair.

2.2 Whether the sanction of dismissal is fair.

3.

PRELIMINARY ISSUES

Hlongwane submitted that he was objecting to legal representation on the basis that Ndwandwe is an admitted Attorney while he was a Union official. He submitted that when looking at their comparative ability the two they were not on an equal footing. Also, that there were no questions of law to be argued. He submitted that it would be unfair for Ndwandwe to represent the Respondent. Ndwandwe states that the Collective Agreement Constitution dealt with persons who may represent at Arbitration. It allowed union officials and fellow employee of legal person to represent either party. The employer was not barred from being represented by an attorney. The constitution was signed by PSA, NEHAWU, NUPSAW and the Department agreeing to be bound by it. When the disciplinary hearing was conducted, both parties were legally represented. There was agreement between the Applicant and Respondent to be legally represented. The Respondent believed that they were bound by that agreement. Looking at the Constitution and the agreement, he submitted that the point in *limine* was of no basis. He argued that the Constitution allowed legal representation irrespective of the nature of the dispute.

4.

Hlongwane stated that it is not wrong for parties to be represented. He said parts of the constitution dealt with representatives at conciliation and arbitration. It states that despite sub-rule 1 at conciliation legal representation may be allowed to represent and argue points of jurisdiction. He said the status of the parties i.e. the employee and the employer were unequal at the disciplinary hearing. The Respondent chose legal representation and the Applicant's hands were forced. He said that the rules do not make express provisions and should be read and considered in line with the Labour Relations Act. The Labour Relations Act excludes legal representation in conduct or capacity arbitrations. The must either be consent or a decision in the form of a ruling. He submitted that he was a mere Shop Stewart when Ndwandwe is an Attorney. There was no authority from Labour Court to say there was automatic legal representation. He submitted further that Ndwandwe was a possible witness.

5.

Ndwandwe submitted that he would not be called as a witness. Further that the Applicant had not objected to legal representation during the disciplinary hearing. She was represented by an Attorney and assisted by PSA. He further submitted that we were dealing with collective bargaining and that the Constitution sets out who may represent. The rules emanated from the Constitution.

6.

RULING:

6.1 Item 21 of constitution of Public Health and Social Development Sectoral Bargaining Council signed in 2007 provides as follows: 'Disputes must be resolved in terms of the provision of the Dispute Resolution Procedure contained in schedule 2 of the Constitution and the Rules of Conduct of the proceedings before the Council contained in Resolution 3/2006.

6.2 Schedule 2 to the Constitution Headed Dispute procedure for the PHSDSBC and more specifically item 5.9 read as follows: 'In any arbitration proceedings, a party to the dispute may appear in person or be represented only by a legal practitioner, a member, office bearer or official of that party's trade union or an employee of a National Department or Provincial Administration.'

6.3 Rules of conduct of Proceedings before council contained in Resolution 3/2006 and more specifically item 22.4 reads as follows: 'In any con-arb or arbitration proceedings, a party to the dispute may appear in or be represented only by a legal practitioner, a co-employee, member and an office bearer or official of that party's trade union or an employee of a national department or provincial administration.'

6.4 On a reading of schedule 2 and the Rules, it is clear that the parties' intentions are to allow legal representation. I therefore rule in favour of allowing legal representation.

7.

OPENING STATEMENTS

Respondent's Opening Statement

Ndwandwe stated the Applicant was employed by the Respondent and was stationed at its Ugu District Office. A complaint was received by fax saying that she was also employed as a professional nurse at Margate Netcare on a full time basis. Secondly that while on full time employment with the Respondent and on duty, she abandoned her duty to conduct training at Ugu District Municipality for Jenatho Trading which was paid R19 500 for the training. In both instances, she did not request permission and in doing so breached the Human Resources Management circular 169/2009 prohibiting public service employees from conducting remunerative services outside public service. The circular came into operation from January 2010. The Applicant performed duties at Margate from January 2010 to January 2011 and was paid between R800 to R1200 per hour and worked 12 hours 4 days a week at the hospital. There

was a meeting held during February 2010 where employees were advised that they were not allowed to perform remunerative work. The Applicant signed a register to confirm her attendance.

8.

Applicant's Opening Statement

Hlongwane stated that the dismissal was procedurally and substantively unfair as the Respondent breached the Collective Agreement Resolution 1/2003 as the Respondent was represented by a legal practitioner when the Collective Agreement disallowed this. There was no discretion. The serving of the notice was also breached in breach of Resolution 1/2003. Before the Human Resources circular 161, employees of the Respondent were allowed to perform remunerative work. The Circular provided that all employees affected by it would be notified in writing. The Applicant was not advised to cease performing remunerative work. There was a Circular allowing employees to perform remunerative work and with it the Respondent provided for employees to apply and if no response was received by a certain period, to assume that permission was granted. He stated that the relief sought by the Applicant was reinstatement and payment of area salary.

9.

SURVER OF EVIDENCE AND ARGUMENTS

Respondent's Case

Victor Luthando Tobo testified that he was employed by the Respondent at Ugu Health District. He had been in the Respondent's employment since 1988 and was he was promoted and transferred to Ugu since the 1st September 2007. He was a Deputy Director and his duties included Human Resources Management, planning in the district, co-ordinating Human Resources functions and ensuring compliance and implementing relevant legislation within the Department. He knew the Applicant Respondent when she was employed in district as operations manager training. The Provincial department issues circulars to institutions based on Directives from National Department or their own policy guideline. The expectation is that they be disseminated to all institutions. Institutional Human Resources is to disseminate them to all staff over and above posting them on the intranet. Most employees with computers have access to the intranet.

10.

Depending on the circular, it would be pasted on notice board and there would be discussions with unit component Managers for them to disseminate to their staff. In some cases there would be general meetings to discuss them to emphasise. A circular was issued on the 7th March 2009 dealing with guidelines on remunerative work outside the Public Services. It was pasted on the intranet. At the time of issue, there was no Office Manager and Tobo acted as Human Resources Manager for the district. The circular was pasted on the notice board. Thereafter there were discussions by the senior management team and it was agreed that due to the implication it be discussed at a general meeting. The circular read as follows

'Human Resources Management Circular 161 of 2009.

Remunerative Work Outside the Public Service (RWOPS)

1. Kindly be advised that Remunerative work outside the Public Service has been withdrawn with effect from 1 January 2010 whilst the Department reviews controls and processes.

2. If applications for RWOPS have already been approved, the end date for those authorities will be December 2009.
3. Those employees affected in paragraph 2 must be advised in writing accordingly.
4. The policy on Remunerative Work Outside the Public Service under cover of Human Resources Management Circular No. 9 of 2009 is hereby withdrawn with effect from 01/01/2010.
5. Please bring the contents of this circular to the attention of all staff concerned.'

11.

He complied with paragraph 5. The circular was posted on intranet and pasted on two notice boards and a staff meeting called and staff advised of the circular. He could not recall when the meeting was held but recalled that the Applicant was present. There were several issues discussed including the circular. It was read to all staff present at the meeting and staff was informed that non-conformance would lead to dismissal. The Applicant raised concerns about people who already had prior authority. The circular clearly stated that any such authority would end on the 31st December 2009. The Applicant was advised of this. He could not recall what she said but said that the policy stood. The Applicant signed an attendance register for staff who attended the meeting. It was said at the meeting that as of the 1st January 2010 all RWOPS would be null and void until further notice. It was also said that staff were to obtain authority for work performed outside working hours.

12.

After the circular 161/2009, there were no applications for RWOPS. He received a fax on the 27th September 2010 addressed to him from V Z Hlongwa. It related to a previous report of activities by the Applicant and Nosipho who were said to have been awarded contracts by the Municipality and no steps were taken against them. It also stated that the Applicant had for over 5 years worked night shift at Netcare while earning a salary from the Respondent. It stated there was no leadership within the Respondent. The matter was referred to the Office Manager Mr Nzuza for further investigation. After the investigation charges were preferred against the Applicant and the case set for hearing.

13.

After the meeting of the 3rd February 2010, most affected staff were unhappy. The previous circular gave instructions on how to conduct work out of the Respondent. Employees would submit applications through their supervisors for approval and then to Human Resources and from Human Resources to the Head of the Institution for approval. The Head of the Institution is the District Manager. Approval would be valid from January to December of each year (1 year). The application would be submitted in December for approval for the following year. If no approval from the Head of the Institution it would be communicated to the employee concerned in writing. He could not recall Human Resources receiving such applications in December 2009 for the year 2010. In 2009 he did not receive an application from the Applicant. If an employee continues without consent it would be transgression of policy on RWOPS and therefore disciplinary action would be taken. In most cases employees would be applying to work for the private sector or running their own businesses. Approval did not limit the hours of work but the information would have been filled on the form approved by the supervisor. The district complied with item 3 of circular 161/2009 i.e. advising affected employees in writing.

14.

Under cross examination he said that the previously the application was to be directed to the supervisor. If the Head refused the application such would be communicated to the employee. If there was no response from the Head, Human Resources to follow up for a response in December. He denied that it was policy or accepted practice that if no response was received in 30 days then it was assumed that authority was granted. As a Human Resources planner, he dealt with resolution 1/2008. He did not know if the code allowed for the procurement of Attorneys at disciplinary hearings. He said he was familiar with Clause 7.3 (f) which prohibited legal representation at disciplinary hearing unless the employee is a legal practitioner or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged or where consent has been obtained for the disciplinary hearing to be conducted by an arbitrator. The Applicant's was case not chaired by an Arbitrator. He said that in terms of the clause, procuring legal representatives would be a breach of the Collective Agreement. The Collective Agreement did not provide that legal representation may be allowed by the Provincial Office.

15.

At the meeting, it was said that the authority to be obtained was special authority granted by the Head of Department. At the time of the meeting, his understanding was that further operation would be kept in abeyance. Nothing in the document referred to special authority. The minutes were conflicting what was provided for in the circular. He said minutes were talking to issues discussed. The purpose of the meeting in so far as RWOPS was concerned was to sensitise staff on serious consequences which could arise. He was only realising at arbitration that the minutes contradicted the circular. He conceded that according to the minutes of the meeting, staff still had an option to apply for authority. He said that subsequently, special authority was granted by the MEC. Initially while authority was not there, the minutes gave an impression that staff could seek authority. In terms of the Human Resources register, they only replied to employees who were already granted RWOPS authority. The fact that the Applicant's application was not with Human Resources did not mean it was sent. The Applicant would not know if the supervisor had sent her application of not. It was put to him that in terms of policy, the Applicant knew that if no response was received within 30 days, it would be deemed granted. He said authority should be communicated in writing.

16.

As at the 3rd February 2010, no approvals had been issued. The circular issued on the 7th December 2009 was communicated by intranet and was pasted on the notice board. Due to the importance of the circular, it was also communicated at a meeting. The circular did not indicate the implications but contravention was to result in disciplinary action which would result in harsh sanction. At the stage of disseminating the circular, it was stated that disciplinary action may lead to dismissal. He said that he knew very little on the Applicant's charge relating to Jenatho Business Trading. When he received the letter on the 27th September 2010, it was not the first time he became aware that the Applicant was performing RWOPS. There had been allegation of the Applicant rendering services at Umziwabantu. He could not say how long he had known of that prior to receiving the letter. He only became aware of the Netcare issue when he received the letter. When he first became aware of the Umziwabantu issue, there was an investigation. The Applicant was spoken to and the results of the investigation were issued. When the chairperson was to be appointed by the District, it was escalated to Province. At the time, province was dealing with several cases. When the letter was sent to him, Nzuza was the Office Manager. Tobo referred the letter to him.

17.

Circular 9/2009 provided for a deeming provision of 30 days. He was aware that the Applicant had reported corruption in terms of supply chain and that she was called as a witness in a case. As regards the performance of RWOPS, he said that even if an employee was granted authority, all authority lapsed on the 31st December 2009. There were no ambiguities to be explained to the employees. In most instances, Human Resources would be told by staff that there were new circulars. It was put to him that the Applicant's evidence would be that she was not allocated a computer. He said that may be correct but said the Applicant worked with someone who had a computer. He did not know if the Applicant had a user ID or password. He conceded that Human Resources had a duty to disseminate the circular. If the Head of Department had knowledge that all employees had intranet, she would not have said Human Resources should disseminate the circular. He said that in compliance with the instruction from the Head of Department, Human resources posted the circular on the notice board immediately.

18.

There were submissions by Dr LL Nkonzo-Mthembu, the Principal at the College of Nurses seeking permission for them to perform RWOPS. Dr Zungu, the Head of Department approved this on the 25th May 2010. There was no circular withdrawing circular 161/2009. There was no provision to deviate from the circular. The submission stated the reason for the deviation. He agreed that the deviation was a breach of the circular by senior person within the institution. He did not personally check the accuracy of the allegations against the Applicant as they were elevated to Province. He would not know if the Applicant worked at the places where she was seen. He thought the tender issue was reported during May 2010. After receiving the allegations on the Netcare issue, an Investigating Officer was appointed and an investigation was conducted. He did not know when the allegations had come to the Respondent's attention. The Investigating Officer was instructed by the District Manager. The resolution provides for employees to be charged promptly. He said that employees were not charged on allegations. As soon as the fax went to him, he referred it to Nzuza. He did not call the Applicant or her supervisor to ask. When the letter came, he was no longer responsible for Human resources matters at the District Office.

19.

When the complaint was initially received, the Investigating Officer interviewed the supervisor. The initial complaint received related to Umziwabantu and did not relate to RWOPS. It was about the Applicant and her co-worker deviating on their route and diverting to Umziwabantu against instruction. It was put to him that the Applicant's evidence was that she did not. He said that he was the one to advise employees about the outcome of the RWOPS application. He did not mention the deeming provision and did not mention what circular applied before circular 161. He was unaware of applications made a month prior to the year for which approval was sought. He was not sure which year the September 2009 application for approval related to. The Applicant indicated that she gave her application to Mzobe. He canvassed the issue of the written communication which was to be sent to affected employees when he said that the circular was placed on the notice board and the intranet. The Applicant was affected There was no evidence that she was advised in writing. He was not aware that the 2010 RWOPS applications were to be received in 2009. He agreed that some employees' applications were received and they would have been granted hence the wording in clause 3 page of the Circular for affected employees to be advised in writing.

20.

It was put to him that the Applicant attended the workshop and was only asked to make a speech and he could not deny this. It was also put to him that the Applicant did not receive remuneration and just gave a speech on HIV. He said he had no comment. He would not deny that the Applicant was skilled on issues of HIV but said by virtue of her being a trainer or Co-ordinate in HIV it meant she had skills. The district Office had approximately 400 employees and he said he wrote to approximately 10 employees about the Circular. He did not know how many employees were granted permission for RWOPS in December 2009 for January to December 2010. All those who had applied were advised in writing of the circular. He agreed that the Applicant's application had to be submitted to her supervisor. He denied that the Applicant would have assumed as having been granted approval if she had no response. He said it was wrong of her to assume that. He disagreed that Circular 9/2009 provided that for the deeming provision.

21.

He agreed that the policy on granting permission was an administrative action. He was familiar with Circular 9/2009. He was not aware of the particular clauses. He confirmed that Circular 161/2009 provided on item 3 that employees affected were to be advised. He said there was a process for submitting applications. If an application was given to the supervisor and no response was received, then it could be deemed that authority was granted. His duties in Human Resources included implementing policy which included monitoring part of the clause relating to applications received. There was no onus on employees to check with Human Resources on what became of their application. There are several sections in the district. Human Resources' audit is at their level as the District Manager only responds to applications received through Human Resources.

22.

Clause 6.5 of Circular 9/2009 stated that failure by Managers and Supervisors to discharge their responsibilities could be regarded as non-performance under the performance management and development system and may also render them liable to a charge of inefficiency or misconduct in terms of the Code of Conduct. Human Resources looked at their records. The component Manager was responsible to check compliance by Managers. He agreed that Human Resources was the chain between the employer and employee. There were no control measures to ensure that every Manager or supervisor complied with clause 6.5. He conceded that all employees could claim that there was submission to the supervisor. He agreed that Human Resources was the custodian of policy. Further that as there was no control measures, there was nothing to disprove the Application's allegation that she submitted her application. He did not know that the Applicant was called by her supervisor or not to discuss allegation relating to Jenatho Business Trading. He said it would be wrong for the supervisor to call one employee and not call the other. Nosipho was charged within a short space of time and sanctioned after committing the same offence as the Applicant. Nosipho was given 3 months suspension without pay.

23.

On re-examination he said that he could not remember when Nosipho was charged. They did not receive application for RWOPS from the Applicant if they did it would be in the register. Human Resources would determine applications received from the register. If there was no recording it would be deemed that there is no application submitted to the supervisor. The circumstances of the application by Doctor Nkonzo-Mthembu were that the University of KwaZulu-Natal

through nursing the college had agreement with the Respondent to train staff on priority health care. The agreement stated that persons would be staff of the Department. There was no way the Department could pull out of the agreement and deviation was sought from the Head of Department. It was in the interest of the employer. Looking at the circumstances, the Respondent's inconsistent application of Circular 161/2009 was for justifiable reasons. He testified at the disciplinary hearing. The Applicant was represented by a lawyer or two. He knew there was a computer in the office and that the Applicant used it. He was not sure if she had password but thought that she had an email address. He said when questioned per Investigating Officer's report the supervisor said she did not give the Applicant and Madlala permission. There were two supervisors Mzobe and Doctor Oku. Mzobe was not present at the time when permission was being sought.

24.

The second witness Bongani Mkhize testified that he was the chairperson of the disciplinary hearing. He is practising Attorney with an LLB Degree and had been in practice since 2005. He worked with the Department of Transport for 2 years, the Department of Health and the Department of Housing chairing disciplinary hearings. He had been with the Department of Health since August 2010 and with the Department of Housing it was not a contract but he had chaired a hearing which ran for 5 months. At the Applicant's hearing, she was represented by Linda A Dlamini from Muzi Dlamini Attorneys in Port Shepstone. Dlamini is an Attorney. The issue of him chairing the hearing and the Respondent being legally represented was raised and dealt with. There had been a letter requesting for an adjournment for Dlamini to be present. The other issue was that Dlamini was available as an Attorney to represent the Applicant. The Respondent would have instructed Mkhize and Ndwandwe. He said that in as much as the Collective Agreement provides that legal representation was not allowed it was discussed and agreed with the parties.

25.

The Applicant was charged for gross misconduct alternatively misconduct in that during 1 January 2010 to December 2010 she performed remunerative work outside the public service by, inter alia, working as a Professional Nurse at Netcare Margate Hospital; On or about the 6 May 2010 she performed remunerative work outside the public service by, inter alia, conducting a training /workshop for women empowerment at Umziwabantu Municipality, Harding Town Hall, on behalf of Jenatho Business Trading and lastly that she contravened the provisions of Chapter 2 C.4.5 of the Public Service Regulations, by engaging in transactions or actions that is in conflict with or infringes on the execution of her official duties. The notice advised the Applicant of her rights to representation and allowed a recognised union or attorney. The Applicant chose Muzi Dlamini Attorneys to represent her. He issued a written ruling which was read to both representatives. He found the Applicant guilty of all three charges against her.

26.

The Applicant pleaded not guilty on all counts. Then before evidence was led, she made an admission on count 1 and a partial admission on count 2. On count 3, she pleaded not guilty but evidence depended on count 1 and 2 to which she had made admissions. The allegations against her were that she was working at the Netcare hospital from the 1st January 2010 to December 2010 in contravention of the circular issued by the employer preventing employees to work for remuneration without approval of the Respondent. The Applicant in her admissions admitted to working in the Private Hospital – Netcare Margate during the said period. She admitted being paid for that. In the essence, she admitted to the

allegations in count 1. She indicated how much she was paid which was from R800.00 to R1200.00 a day. She earned R8 846.00 from the Respondent. During the hearing, the Applicant confirmed that she was aware of circular 161 and that she attended a staff meeting of the 3rd February 2010 and confirmed the minutes specifically on RWOPS. This proved all elements of the crime and she was found guilty through the admissions which were made in writing, signed by Applicant or her representative and entered as exhibits.

27.

On count 2 relating to performing remunerative work on the 6th May 2010 at Umziwabantu Municipality obo Jenatho Business Trading, the Applicant admitted attending the workshop and speaking as invited but denied receiving remuneration for her services. There was a purchase order from Ugu District Municipality to Jenatho Business trading to supply items as per quotation. It was for Attention Mandisa Jean Luzipho to provide workshop for women empowerment at Umziwabantu. Mkhize recorded that the Applicant addressed the audience meaning she gave a speech to people who attended the workshop or training. Rose Madlala was the Applicant's colleague who attended the workshop or training with her and from the evidence, the motor vehicle used to attend the workshop belonged to Madlala. Mkhize knew Madlala to have been disciplined by the Respondent and had pleaded guilty. She was suspended without pay. The only documentary evidence presented to him relating to the Applicant's application for RWOPS related to the period 2009. There was no evidence in relation to count 1. The admissions from the Applicant were only 4 lines and there was also oral evidence relating to count 1. The Applicant testified that she felt she was being treated unfairly in that her application for RWOPS was not approved by her supervisor Mzobe. The unfair treatment she compared with the approved RWOPS for Prince Mshiyeni approved by Head of Department. She submitted an application in September 2009 which went to Mzobe and she supported it.

28.

The Applicant did not submit anything or give evidence in support of her case after the issue of Circular 161 which indicated that the existing RWOPS applications or people performing RWOPS from January 2010 were withdrawn. She couldn't state what happened after 3 February 2010 when they were informed at a workshop that all RWOPS had been withdrawn by the Head of Department. She compared her situation with Prince Mshiyeni which was different. His findings were in terms of her admission on count 1. He found her guilty on count 2 her evidence was that she did not receive remuneration which was an issue to be determined. He concluded that there was in no way that she was not paid for her services considering that she left her employment without supervisor's knowledge, she risked being disciplined by Respondent for attending other businesses unrelated to her employment, she and Madlala used own transport to go to the training/workshop at their own expense, and they had no association with the company given the tender by Ugu which was paid R19 500.00. He found that one would not offer those services without expecting any payment. He concluded that the Applicant was remunerated for her services and found her guilty on count 2. The conduct of the Applicant in count 1 and 2 made him conclude that she had breached the provisions of Ch2 C.4.5 of Public Service Regulation. He recommended that the employer consider dismissal as an appropriate sanction. The parties submitted factors to consider however in light of the Applicant's persistent denial of the allegations, Mkhize noted that she was not remorseful and was likely to commit the same offence. She was aware of circular 161 but continued performing remunerative work. He concluded that the relationship of trust between her and the Respondent had broken down.

29.

Under cross examination he said that S Mnyango from the Respondent's Labour Relations gave him an appointment letter to chair the disciplinary hearing. He was not in the Respondent's employment. He knew the resolution and was familiar with certain provisions. It is the only code regulating discipline in the workplace. Procedure to be followed in chairing the hearing is to be guided by the resolution among other things. Clause 7(3) b provided that chairing of the hearing was to be done by an employee on higher grade that the representative of the employer. He said he was not an employee. He said the clause offered discretion if you read the collective agreement in terms of clause 2.8 read to record. He said it was the Respondent's decision to engage him and that the circumstances for that would not be within his knowledge. At the hearing of the matter, that issue was not raised. It was put to him that the Collective Agreement was peremptory and any deviation was to be ancillary to the agreement. He said it may be correct. He accepted that the deviation should have been in the written policy. He was not sure if that deviation should have been communicated to the Applicant. He said if it was raised he would have dealt with it. He agreed that a preliminary point was raised encompassing 7.3f which dealt with his presence and that of Ndwandwe. He said he referred Dlamini to the Collective Agreement and decide cases on representation. Moreover, the notice to the disciplinary hearing had indicated that the Applicant had a right to be represented by an attorney. She took it upon herself to indicate to the Respondent that she would be represented by Muzi Dlamini Attorneys and Mr Dlamini represented her.

30.

He could not confirm that Ndwandwe served the notice of the disciplinary hearing on the Applicant. He believed his appointment was premised on the basis of the Applicant being represented by an Attorney. He was given a letter of appointment and at the hearing submissions were made but there was no objection to him chairing the hearing. As a chairperson, he was not representing the employer. It was put to him that the reason for agreement in terms of clause 7.3(b) was assented to was for the chairperson to be in a better position to understand the policy or prescript regulating the public service. He said he was not part of the discussions and could not deny or agree with the statement. He took into consideration relevant factors being the letter and the representations. He denied that the provision of an attorney as a representative was *ultra vires*. He said clause 2 of the Main Agreement allowed that. The employer appointed him as they have the prerogative to appoint him. Had the issue of the presiding officer been raised before him he would have dealt with it. He said he did not bring the policy with him but said that if the issue had arisen he would have dealt with it.

31.

The Applicant had an attorney, knew her rights to representation, had opportunity to address him and her representative had opportunity to cross examine the Respondent's witnesses. The issue which was raised was about Ndwandwe representing the Respondent and not about him chairing the process. It was put to him that the that Applicant's version was that Attorneys were not allowed and he said that the Applicant had an Attorney. It was put to him that the notice served on the Applicant had an *ultra vires* clause and was served by Ndwandwe, an Attorney. He said he gave decided cases to the parties and Dlamini agreed that they may proceed. The recording did not reflect that. In terms of item 3.2 (d)

of the minutes to the hearing he recorded that the employee representative conceded that representation laid in Resolution 1 of 2003 was not pre-emptive to exclude attorneys from outside the Employer's employment to represent the employer and the employee charged. The issues or the complexity of the case would be taken into consideration. He gave the representatives cases on resolution 1 of 2003. He had two attorneys before him. A preliminary issue was raised which did not related to him chairing the process. He found no reasons to examine his standing as he had a letter of appointment from the Respondent.

32.

He said the charge spoke for themselves and that in terms of count 1, there was no need for an admission by the Applicant that by so doing she committed a misconduct. He conceded that the admission did not in itself constitute misconduct. The Applicant pleaded not guilty. Evidence was led that she performed the work within the stipulated period. He said after the charge, he did not pre-empt the evidence. One of evidence led was that she breached Circular 161 /2009. Tobo testified that the Circular was placed on the notice board and the intranet. A meeting was held on the 3rd February 2010 for employees to be familiarised with it. After the meeting, the Applicant continued to work privately and said it was unfair as she compared herself to employees at Prince Mshiyeni. He could not say if Tobo said the Applicant had seen Circular on intranet.

33.

He was not privy to Circular 9/2009 as it was not brought to his attention. He did not have the circulars in his possession. He conceded that before reaching his decision, he should have had regard to the documents mentioned on the applicant's charge sheet being the Code of Conduct for the Public Service; PSCBC Resolution 1 of 2003; Human Resources Management Circular No. 9 0f 2009 and Human Resources Management Circular No 161 of 2009. From the evidence he had before him, Circular 9/2009 was not necessary. Circular 161/2009 was relevant and gave directions as to how RWOPS would be dealt with. He had never had sight of Circular 9/2009 but read on Circular 161/2009 that Circular 9/2009 was withdrawn. There was no need for him to worry about a Circular which was withdrawn. The Applicant's documents in terms of that Circular had not been approved.

34.

He did not make a decision on the admissibility of the Applicant's RWOPS application documents. The Application was withdrawn even if it was granted employees were to be advised in writing. He accepted that policy provided that employee's application was to be deemed approved if no response was received within 30 days. Evidence was that the Applicant submitted her application through Mzobe, her supervisor. Only Mzobe could tell what became of it. He agreed the application was in line with Circular 9/2009. He agreed that he neglected to read that Circular but said had he read it his findings would be the same even in the absence of evidence by Mzobe because Circular 161 provided that all RWOPS applications or approvals were withdrawn. Also, the Applicant said she approached Mzobe and asked if she needed to apply and she said she was still to enquire on that.

35.

The Applicant as the affected person was not advised in writing but communication was through notice boards, the intranet and the meeting. He said it depended on the mode of communication. The directive of the Head of Department was directory. The Applicant made her application in September 2009 and became aware of the withdrawal Circular in

January/February 2010. Reading Circular 9/2009, it would not have made any material difference to his decision. He did not pre-empt that it was irrelevant. He said the document was relevant in considering the matter. The evidence and admissions were sufficient to warrant a finding of guilt. The Applicant compared herself to RWOPS for Prince Mshiyeni. She said she was treated unfairly. Her evidence was that nothing came of her application. He excluded her evidence that she gave Mzobe her application for RWOPS. He read clause 2.7 of Resolution 1 of 2003 which provided that disciplinary proceedings did not replace or seek to imitate court proceedings.

36.

No employee from Jenatho trading was called to testify. His decision that the Application was paid was based on the fact that they used their own transport, used working time and did not have authority. The Applicant's evidence that she had advised Mzobe that she was invited to talk at the workshop was excluded as hearsay. The employer had not proven that the Applicant received money but on a balance of probabilities from the evidence it was found that she received money. He arrived at a finding of gross insubordination as the Applicant was told not to perform work outside Circular 161/2009. During the hearing, the employer submitted that the employee was charged and found guilty of serious misconduct which included gross insubordination, gross dishonesty, and wilful defiance of the lawful instructions of the employer. It was not in accordance with his findings.

37.

There was no evidence on the sanction. There was no evidence led that the employment relationship was broken. He took into account the fact that the Applicant still insisted she did nothing wrong. The Respondent submitted that they no longer trusted the Applicant. He was not aware that the breakdown in the employment relationship was to be substantiated through facts. He could not remember if the Applicant was on suspension during the hearing but could not dispute that she was. He presided over Madlala's case. She confirmed that they attended the meeting and used her motor vehicle. Madlala's case was before the Applicant's case. When Madlala's case came before him, she pleaded guilty, he established why she was pleading guilty and she gave a written statement. He was aware before presiding on the Applicant's case that she was implicated by Madlala. He did not find it improper as the Applicant had not pleaded at the time.

38.

It was put to him that he was mandated to dismiss the Applicant. He said on count 3, the employee was found guilty and issued a final written warning and 3 months suspension. Clause 7.4 of the resolution says you cannot combine any sanction with dismissal. He said it was a recommendation he made to the Respondent. He mentioned in his ruling that the employees had been informed at the meeting that contravention of Circular 161/2009 would be dismissible. The policy was signed on the 7th December 2009 and staff were to be advised by the 31st December 2009. The policy was to apply with effect from the 1st January 2011. He did not agree that it took 3 months for employees to be advised. The minutes of the meeting held on the 3rd February 2011 stated that staff was to obtain authority for working outside working hours of public service if attending to personal business. It further stated that employees required authority to work outside the Respondent. He considered the minutes as part of the evidence. Circular 161/2009 said no RWOPS were to be granted. Minutes of the meeting were said employees should obtain permission or authority. He said with effect of the 1st January 2010, all RWOPS became null and void. He was not at the meeting and could not answer to the contents of

the minutes. He confirmed that the minutes of the meeting were before him. He denied that in line with the contents suggesting authority to be sought, he did not apply his mind. He said that the Applicant had no authority.

39.

It was put to him that the Applicant made it clear at the disciplinary hearing that she had authority in terms of Circular 9/2009. He said she submitted her application. He disputed that his decision was not proper and said there was no authority. Circular 161 stated that there were no approvals for RWOPS. The minutes gave an impression that authority may be obtained which created a discrepancy. It was put to him that in light of the fact that the Applicant informed him of her application read with resolution 9/2009 and that she had authority. He accepted that Tobo said there was no register for receiving applications. He would not know why the provision for 30 days was put and could not deny when it was put to him that it was to allow employees to operate in the absence of a response. The Applicant's evidence was that she approached Mzobe who said she would write to the Head of Department.

40.

On re examination he said that Circular 161/2009 withdrew RWOPS under Circular 9/2009 from the 1st January 2010. This nullified any authority obtained by the Applicant. He disputed that he had a mandate to dismiss the Applicant. As regards Madlala's case, she indicated that she attended the workshop. He could not remember if details of her case were presented to him and said there may have been a settlement agreement. The circular from the Head of Department had more value than the minutes and in considering the Applicant's case he looked at the Circular concerned.

41.

The third witness, Viren Chetty testified that he was employed by the Respondent since 1981. He had since 2003 held the position of District Health Manager, Port Shepstone. The Applicant was one of their Program Managers. He is responsible to develop the district health system and develop a responsive health service that is effective, efficient and economical. He had various delegations which included approval of remuneration of work outside public service after considering it on merit. The delegation was in terms of Circular 9/2009. The procedure was that an employee intending to do RWOPS was to apply to the supervisor who would make recommendations and the application would go to him for approval prior to 2010. He did not receive the Applicant's RWOPS application in 2009. He therefore would not have approved it. Circular 161/2009 was issued to them during 2010 taking away the delegation. It effectively meant that any application submitted in 2010 would have been forwarded to the Head of Department for consideration and approval. All RWOPS were renewable every year and expired on the 31st December. As regards applications received in 2009 for 2010 and approved, the Respondent had to inform the affected parties that such had been withdrawn.

42.

Circular 161 informed and instructed all Head of institutions that RWOPS was to be withdrawn effective 2 January 2010. Applications approved and to be approved came to an end by the 31st December 2009. Affected employees were to be informed in writing. Any RWOPS under Circular 9/2009 was withdrawn. The contents of Circular 161/2009 were to be circulated to all staff concerned. In 2010, no RWOPS application was received from the Applicant. There was no complaint from the Applicant on the operation of that Circular. When it was revoked there were trainers at the University of KwaZulu-Natal wanting to know if it affected them. They had authority from the Head of Department and wanted to know if the Circular prevented them from continuing with the partnership which the Department had with the university.

They escalated it to the Head of Department and the response was that they were not affected. The submission was dated the 25th May 2010 and talked about partnership the Head of Nursing had with the Department. The submission was for Head of Department to approve the continuation of the partnership.

43.

On the 8th February 2010, he received an email asking whether Circular 161/2009 would affect them. It was a request coming from the Program Manager. Ramasir, head of the program discussed that with him. The PHC Training addresses a legal and compliant requirement to ensure that nurses are trained in PHC. Termination would have had legal implications to the Department and affect the training of Nurses. The Respondent was the beneficiary of the program. Individual nurses facilitating the program were being paid so they would also be beneficiaries. The query was raised with the Head of Department and a recommendation was that identified persons be allowed to continue facilitating the program. This was approved on the 25th May 2010.

44.

The Applicant's immediate supervisor was Ms Mzobe. He was familiar with incident of the 6th May 2010. Two of their officials went to Umziwabantu to perform some work at the Municipality. They were scheduled to do some work. He became aware of this through a complaint received that the Applicant and Madlala were performing work at Umziwabantu. He was out of the office on that day. The complaint was not received on the same day. The officials did not have permission from him. All requests went to him and he did not recall receiving a request from the Municipality for training or workshops. He allocates the requests through various Senior Managers. The Municipality would be have been requesting for a representative to give a talk on health issues or for ambulance service. The request could be oral or in writing and he would normally ask for a written email request. He did not allocate the Applicant and Madlala to do a presentation at Umziwabantu. If the Applicant obtained permission from Mzobe, it would be irregular as there was no written request. Also, Mzobe would have raised it through her supervisor then to him and in this instance; it was not brought to his attention.

45.

Under cross examination he said that the complaint about the workshop at Umziwabantu was made through a call to him which he referred back to Ramisir to investigate as he was the supervisor. He could not recall when it was received but said it was after the 6th May 2010. He could not recall receiving a written complaint. It was possible that he received it and passed it to Tobo. He had seen the complaint received on the 29th September 2010. 5 months after the 6th May 2010. There was an investigation but not much came from that. They were investigating employees about diverting from authority. He asked Ramisir if he gave them authority and he said no. Ramisir was not the Applicant's direct supervisor. He was still to get a statement from Mzobe on whether authority was granted. There was a preliminary investigation and then other investigations. Ramisir would not be able to say whether the employees obtain authority or not. Nothing prevented them from establishing from Mzobe by obtaining her statement if the employees obtained authority. If it was granted, it should have been in writing. There is nothing saying authority should be in writing. He accepted it was wrong for him to allege that she did not have authority.

46.

Before the 29th September 2010, he asked Human Resources office to attend to preliminary investigations. The investigation was not concluded before the receipt of the complaint. He sanctioned the investigation and there were timeframes. The timeframes were not complied with and there were delays. It was overtaken by other issues and went to the Department as they lacked capacity. In terms of Circular 9/2009 RWOPS applications would lapse on the 31st December 2010. Circular 161 was issued with a backdrop of Circular 9/2009. Applications for RWOPS were to be made at the beginning of the year but people would do it in December. Before Circular 161 was issued, he had not received the applications. RWOPS applied to Doctors as well but not dealt with in his office. Circular 9/2009 said if no response was received then it shall be deemed to be approved. He said if the application was in writing, then the withdrawal would be writing.

47.

In 2009, some employees were not applying but renewing for 2010. Applications went to the supervisors to submit to Human Resources. The register was at the level of Human Resources and not supervisor. He conceded that it was possible that an application be lost by a supervisor. He said that the Applicant could have submitted her application in 2010. He was not aware of any written letter from him or the Applicant's supervisor. If you take the 30 days period into account then she should have received it. He agreed the buck stopped with him to have ensured that systems were in place regulating applications. The Circular made no provision for a meeting. The meeting provided clarity and the Applicant should have raised the issue and sought clarity. There was a group of affected employees who did that.

48.

The Head of Department considered the provisions of Circular 9/2009. The Applicant should have been aware in light of the meeting, the notice boards and intranet as measures to communicate the Circular. He said if the supervisor did not give it to her in writing, it was possible she did not violate that. He was not aware of other employees doing RWOPS in the office other than the PHC issue. Before The Applicant was charged, he was not aware that she was working at Margate. He said he was the Head of the office and unaware that the Applicant had RWOPS. The letters withdrawing RWOPS would have been from his office and Human Resources. He said it was an omission in that Human Resources had not sent her the withdrawal letter. It would be unfair to dismiss her for breaching the Circular if a withdrawal was not given. Circular 161 said any one affected must be given a letter meaning there was no discretion. He said the minutes of the meeting of the 3rd February 2010 looked like a fair reflection of what was discussed. It stated that staff was to obtain authority for work outside hours of public service. It meant since Circular 161 withdrew authority, employees needed to re-apply. He said it was reinforcement. It meant any application would be sent to the Head of Department. He conceded that the Circular or minutes did not say that but that was what they would do.

49.

There were meetings within the Department saying until further notice which meant that people could still put up their applications. It was clearly stated that all RWOPS came to an end in December 2009 and were not renewable. There were discussions from the Head Office that the Head of Department was considering reviewing her decision. If there was

any confusion it would have been clarify. The minutes of the meeting said employees working outside public service had to obtain authority. RWOPS was not only during office hours. There was the leave issue as well. The meeting was a general staff meeting to sensitise staff about RWOPS. The meeting was to emphasize the stance of the Respondent being that all RWOPS were withdrawn and there would be no applications. It was a temporary measure. Submissions were made to the Head Office on the 25th May 2010 for Nursing College. No permission was sought in the interim. The program did not stop and Trainers were not given letters in terms of Circular 161. They were told verbally by the Head office that the program would be continuing while the matter was being attended to. The policy included everyone even programs benefiting the Respondent and the public. They knew the strategic position with the University of KwaZulu-Natal and believed the decision would be positive. There May have been an oversight on the side of the Head of Department.

50.

The Applicant had an email address and he sent her emails. He was not sure if Applicant had a computer allocated to her. He passes the notice board daily and checked it. The notice board was not the only means of communication. They also held Heads of Component meetings. At the beginning of the year, they had the RWOPS meeting on the 3rd February 2010 to sensitise employees on RWOPS which was already in operation. He agreed that the Circular created confusion on the employees. There were employees making enquiries as they did not understand intricacies of policy. There was a Human Resources department.

51.

On re examination he said that the letter indicated that the issue was reported before the letter of the 29th September 2010. He had no knowledge of the Applicant giving Mzobe her application. He received RWOPS applications from Human Resources. Heads of components could sensitise him of the application. To inform employees of the RWOPS withdrawal Circular it was put on the notice board, intranet, sensitise through Heads of Component and then a meeting was called. He did not have knowledge of the Applicant's application and therefore could not write to her about the withdrawal. He had no knowledge of anyone submitting the application to the supervisor. After the meeting of the 3rd February 2010, only staff from PHC raised concerns. They were represented by their Component Manager. The Applicant never approached him to say she was affected.

52.

Applicant's Case

The Applicant testified that she was employed as a District PHC Training Co-ordinator. Her functions were to co-ordinate training in the district, organise venues and training materials. She was served with the notice of the disciplinary hearing on the 25th January 2011. Ashe confirmed that she worked at Netcare Hospital from the 1st January 2010 to the 31st December 2010. She had authority to work there. She also worked there in 2009. Her 2009 application was submitted in 2008 and she did not receive any written approval. There was a circular with a deeming provision of 30 days which set out that if no response was received in 30 days then authority was deemed to have been granted. Tobo was aware that she worked at Netcare outside her employment with the Respondent, so did Mrs Mzobe, her supervisor. She submitted her 2009 RWOPS application vie Mzobe. Tobo saw her working at the hospital on weekends.

53.

She submitted her RWOPS application for 2010 to Mzobe during September 2009. There was no register recording that Mzobe had received applications. After submitting her application, she expected a letter allowing her to carry on with RWOPS which she never received. She became aware of circular 161 /2009 during mid January 2010 when she saw it on the notice board. She went to Mzobe and asked what would happen to her and others in similar situations. Mzobe said there was still a bit of confusion with the circular. And that it would be clarified at a meeting. At the meeting, what was said was that a person should get authority to perform RWOPS. She and others from PHC asked what the position at PHC was as they were concerned about training at PHC. She had already signed a contract with Netcare She did not receive a letter dealing with circular 161 and did not ask for it as it was said at the meeting that Managers were to write to the Head of Department to seek permission.

54.

She testified that if she had received a letter withdrawing RWOPS she would have taken it to Netcare and advised that she could no longer render services for them. She was not the only employee performing RWOPS and did not know what became of other similar employees. She was a whistle blower in a case involving Mzobe and Mzobe was allowed to resign. In the Applicant's view, she had authority to perform RWOPS. In relation to count 2, Nosipho Madlala asked her to attend a workshop at Umziwabantu. The Applicant informed Mzobe about Madlala's request and permission was granted. Madlala provided her car to travel to the venue. The Applicant was not remunerated for the speech she gave and she did not ask for payment. It was something they did when asked by the community. According to her knowledge, Madlala did not receive any payment but said she would not know. Jenatho business Trading was still trading and its managers available and accessible for the Respondent to confirm payments. No one was called at her disciplinary hearing to deal with payment. It was incorrect for Mkhize to assert that she used her own transport as they used Madlala's vehicle. Madlala was still in the Respondent's employment and could have been called to testify on whether she received payment of not. Disciplinary action against Madlala was taken three (3) days after the workshop. She was not disciplined for leaving without authority.

55.

At the Applicant's disciplinary hearing, the initiator did not show her his appointment letter. She was unhappy with them as they were attorneys. The charge sheet was delivered to her by Ndwandwe who was also at the hearing. She was represented by Julian Harsen from PSA. She raise the issue of prohibition of attorneys and the chairperson said that he was also an attorney. She told him that she was unhappy with that as it was a breach of the Collective Agreement and he said the hearing would proceed as he was already there. If the chairperson had recused himself, then Harsen would have represented her. She denied that Mkhize was appointed after the Respondent received a letter from her attorneys and said it was because she had not seen his appointment letter. She referred Mkhize to circular 9/2009 with the deeming provision. Mkhize did not want to look at the documents she was presenting. At the time of her hearing, Mzobe was no longer employed by the Respondent. She testified that she did not disregard the provisions of the circular. She sought reinstatement with backpay. She said that even in the first hearing, she told them to arrange for Mzobe's attendance and included this in her appeal.

56.

Under cross examination she confirmed working at Netcare. She was paid between R800.00 to R1200.00 a day. She worked a 12 hour shift. She sometimes worked at night depending on when they called her. She sometimes worked during the week from 7pm to 7am. She would thereafter go to work without sleeping and would perform her duties as if she had slept. She said at night they gave patients medication and finish by 10pm. They would then sit until 4am. She denied that she performed part time work for the municipality. She was employed by South Port Clinic under the municipality from August to September 2011. At the time of the arbitration she was working part time at Netcare as a professional Nurse. Her employment with Netcare was via Karisma, and agent. From the period January 2010, the agency paid her salary despite her contract being signed at Netcare. The hospital called her when required. She did not receive a salary advise and said that she was paid through her bank. She worked 5/6 days a week during January/December 2010.

57.

She qualified as a professional Nurse during 1996 and moved to the district office in 2007. There was no contract of employment. She went for an interview and received a letter of employment setting out that she was in full time employment and setting out her salary. She received a salary advise. There was nothing saying she could go work elsewhere. She was paid to work full time and received her salary with benefits. In her appointment letter, there was nothing setting out terms and conditions of her employment. The letter just congratulated her on her appointment, when to start work and the salary she would earn. No one told her of her working hours until she asked and was told it was from 7.30am to 4pm. She confirmed that employees were to dedicate their working time to the employer. She did not want to answer when it was put to her that she was not supposed to serve another employer.

58.

On the 7th May 2007, when she started in her new position, she was already working at Netcare. She did not report this to Chetty or seek his permission. There was no written authority for her to work at Netcare. She gave Mzobe her application during September 2009 which was a renewal as she had applied in 2008. There was no written authority given to her in 2008 and she was never provided with a written authority. It was put to her that she could not renew something which was not granted; she said she could renew it. She did not know if Chetty signed her authority and said she had given her application to Mzobe, her supervisor. When she did not receive a response from Mzobe, she used circular 9/2009.

59.

She understood circular 161/2009 to say that RWOPs approved would end on the 31st December 2009 and that the policy on RWOPs under circular 9/2009 was withdrawn from the 1st January 2010. She did not agree that it cancelled RWOPs already granted. She did not want to accept that the fact that circular 9/2009 was withdrawn meant her application was terminated on the 31st December 2009. She accepted that it meant that all approved applications would end on the 31st December 2009. She however did not want to accept that it meant that she did not have authority and said she was waiting for compliance of the circular by her supervisor in the form of a letter being sent to her. The circular provided for affected employees to be sent letters of cancellation informing them of the cancellation. It did not say it was reviving authority that had been cancelled. She said there was no authority cancelled. To her understanding, paragraph 3 of the circular reinstated her authority. She formed part of those employees affected by the cancellation of the

authority. Despite this, she continued to work at Netcare for her own benefit and had not stopped working there. She stopped working when she was charged in January 2011 and returned in July 2011.

60.

She could not remember the date when she had seen the circular on the notice board but said it was during January 2010. She did not have a computer and could not see the intranet. She said there was never any meeting by their Head. She continued working at Netcare despite seeing the notice. She attended the meeting of the 3rd February 2010 where the issue of RWOPS was discussed. Staff was told that non compliance would lead to discipline and dismissal. Despite being told this, she continued to work. She was still drawing a salary from both institutions. She raised a question pertaining to the implications of the circular and did not know why they were not recorded. She also did not know why that version was not put to Chetty. Chetty was not telling the truth when he said that he mandated his staff on every issue.

61.

The presentation did not go through Chetty's office and she did not know if he knew about the woman's workshop. Madlala had requested her to attend it and it was on a working day. She reported for duty on the said day. She and Madlala were assigned to go to Nyaveni to perform departmental functions. She was not there when Madlala received a call. She denied that the Respondent's vehicle was issued for them to go to Nyaveni and said it was a flagship programme and they were to join other employees of the Department. They did not go to Nyaveni but went to Umziwabantu using Madlala's vehicle. It was an official trip for the benefit of the Department but was not assigned by Chetty. She did a presentation on the day, so did Madlala. She addressed women on HIV and prevention on mother to child transmission which was part of the tender scope given to Jenatho Business Trading. On the same day she did her presentation, Jenatho issued an invoice to the Municipality which paid R19 500.00 as invoiced. The invoice was for facilitation and for domestic violence, Human rights and Rural Women Counselling. It was the first time the Respondent received such an invitation from Jenatho.

62.

The invitation from Jenatho was received by Madlala who was not her supervisor. They usually used the Respondent's vehicles to travel to events and to perform their duties. In that instance, Madlala said it was already late and the process to request the vehicle took long. After the presentation she returned to work for an hour. Madlala had two sessions in the morning and one in the afternoon. As she was a passenger in Madlala's vehicle, she had to wait for herself. Madlala finished her afternoon presentation at 14h15 and they travelled to work and arrived at 15h15 having left work in the morning at 8h45. They spent the entire day at Umziwabantu and did not take leave. She did not tell Chetty what she did on the day and was paid by the Respondent. After their presentation Jenatho invoiced the municipality. She did not know why. She said she didn't know if that was in terms of the tender document. The presentations were not only by her and Madlala, there were other departments. Only Madlala would have heard her reporting to Mzobe. Chetty would not know if she was at work or not as she did not report to him. This version was not put to Chetty as the Applicant did not know she had to.

63.

She consulted Muzi Dlamini 30 minutes before the enquiry. The then wrote to the Respondent seeking a postponement. Dlamini appeared for her at a subsequent hearing. Harsen was present and she engaged Dlamini as she saw details of the people who were to be present on the charge sheet. The charge sheet gave her the option for an attorney or the union. She used both as she was exercising her constitutional right to be represented. She did not ask for the chairman's appointment letter as it was her first time in a hearing. She did not instruct the union or her attorney to ask for it. Madlala was called by Dr O and told that Chetty wanted a statement on why she went to the workshop. It did not ring a bell to her that the attendance was not sanctioned. She did not know why the Respondent was taking disciplinary action if it was sanctioned. It was put to her that she was not a whistle blower and was part of a syndicate. She said she was a whistle blower on fraud and corruption cases. Madlala was sanctioned to 3 months suspension without pay. Although she was not aware of her plea, she said she pleaded not guilty. The Applicant said she was not guilty as she did not perform any remunerative work.

64.

She confirmed that she was found guilty of gross misconduct and that this had an impact on the employment relationship. She said non compliance with the instruction was tantamount to challenging authority of the Respondent. She denied that working at Netcare despite authority was tantamount to challenging the Respondent's authority. If she was reinstated, she would not work at the hospital. She continued work in 2010 as she understood that the Respondent was to give her a letter to stop or to be called by her supervisor to be warned. She was part of the PHC and did not know why Mzobe excluded her name. She also did facilitation at UKZN when required. Her work at Netcare was for her benefit.

65.

CLOSING STATEMENTS

By agreement the parties' representatives submitted written closing arguments on the 10th January 2012 which have been taken into account in considering the matter and issuing this arbitration award.

66.

ANALYSIS OF EVIDENCE AND ARGUMENT:

In terms of Schedule 8 to the Labour Relations Act 66 of 1995, 'the LRA' Code of Good Practice: Guidelines for Dismissal item 4, prior to dismissing an employee, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

67.

The Respondent's case was that the dismissal was procedurally fair as they had complied with the provisions of the Disciplinary Procedure Collective Agreement, Resolution 1 of 2003. The relevant clauses of the

resolution are clause 7.1.c.iii which affords employees the right to be represented by a fellow employee or a representative of a recognized trade union; clause 7.3.b which provides for the chairperson of a disciplinary hearing to be appointed by the employer and be an employee on a higher grade than the representative of the employer and clause 7.3.f which prohibits representation by a legal practitioner by any of the parties unless the employee is a legal practitioner or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged with misconduct or where the disciplinary hearing is by agreement between the parties chaired by an arbitrator in accordance with clause 7.3.c.

68.

The Respondent's case was that the Applicant was afforded an opportunity to be represented by an Attorney of her choice and that she had exercised that right as she was represented by Muzi Dlamini & Asscociates. Mkhize testified that the issue of representation by attorneys was raised before him and he considered it taking into account relevant case law which he handed to Dlamini. Dlamini then accepted that legal representation be allowed and the matter proceeded. As regards Mkhize's appointment, he was of the view that it was the Respondent's prerogative to appoint him. He also suggested that the Respondent appointed him after the Applicant sough to postpone the matter on the basis that Dlamini, her attorney was not available.

69.

The Applicant's case was that his dismissal was procedurally unfair as she had objected to Attorneys being present at the hearing. Her evidence was that this included Mkhize. She had secured Dlamini's presence as the Respondent had advised her that there would be legal representation. Further, because she had been served her notice of the hearing by Ndwandwe, an attorney of the Respondent.

70.

On a reading of the Collective Agreement, it is clear that the Respondent breached the relevant provisions of clause 7 raised by Hlongwane. The question is whether the breach/deviation results in the disciplinary process being procedurally unfair. In **Majola v MEC, Department Of Public Works, Northern Province & Others** (2004) 25 ILJ 131 (LC), while the court upheld the Chairperson's decision to allow legal representation, the court mentioned that whether there is a binding collective agreement on the issue of legal representation is a vital consideration. One of the pillars on which the LRA 1995 is constructed is the primacy of collective agreements. If a collective agreement prohibits or restricts the granting of legal representation, an adjudicator may allow such representation provided just cause exists not to apply the terms of the collective agreement. In such a situation the adjudicator has to balance the tension between the constitutional right of access to a court or tribunal, the primacy of collective agreements and the freedom to contract and between collective and individual rights. Adjudicators must be aware that particular factors which the parties to collective agreements consider important to the sector or industry underpin the collective agreement. Such factors may not be immediately apparent to the adjudicators. As a result, they should be slow to disregard or deviate from

applying the collective agreement. It follows that the discretion exercised by a chairperson of a disciplinary enquiry in which the right to legal representation is regulated by a collective agreement would be more restricted than where there is no collective agreement.

71.

In the case of **MEC: Department Of Finance, Economic Affairs & Tourism, Northern Province V Mahumani** (2004) 25 ILJ 2311 (SCA), the court agreed with the finding in the unreported Labour Court judgment in Mosena & others v The Premier: Northern Province & others that clause 2.8 of the code, which provided that the code and procedures are 'guidelines and may be departed from in appropriate circumstances', is an injunction as to the general approach that should be followed. It also agreed that clause 7.3(e) is a fundamentally important provision of the collective agreement and should not lightly be departed from. However, there may be circumstances in which it would be unfair not to allow legal representation. The court found that the parties who had agreed to the code were intent on devising a fair procedure and that it was reasonable to assume that they also knew that there could be circumstances in which it would be unfair not to allow legal representation. In these circumstances it was likely that they would have intended the presiding officer to have discretion to allow legal representation in circumstances in which it would be unfair not to do so. The court found that it followed that, if on a conspectus of all the circumstances, it would be unfair not to allow legal representation, the provisions of clause 7.3(e) could in terms of clause 2.8 be departed from. The presiding officer had erred in holding that he had no discretion to allow such a departure, and the matter had, accordingly, to be referred back to him for consideration.

72.

While the Labour Court has held that the chairperson can exercise a discretion to allow legal representation, the court also stated that there must be just cause balancing the collective agreement and individual rights. The court stated that presiding officers should be slow to disregard or deviate from applying the collective agreement. In the present case, the fact that the right to be represented by an attorney was contained in the notice of the disciplinary hearing, suggests that the Respondent decided before the hearing that legal representation would be allowed. Another factor which was not disputed which may be interpreted to support this was the fact that the notice of disciplinary hearing was served by Ndwandwe, the Respondent's attorneys. If it was not the Respondent's intention to use an attorney, then why was Ndwandwe delivering the notice? It was therefore understandable that the Applicant sought to have an attorney present to represent her. The **Mahumani** decision impresses that there may be deviation from the collective agreement taking into account the consideration of fairness. In order to determine the existence of fairness, there must be evidence to

support the deviation from the intentions of the parties to the Collective Agreement which was concluded, as the court stated, to ensure procedural fairness.

73.

Taking this into account, it may be seen as though Mkhize's actions giving Dlamini cases on allowing legal representation was to justify a decision already taken by the Respondent to have legal representation. He did not testify as to the factors he took into account in deciding whether to deviate from the collective agreement. He sought to justify his deviation by providing case law. In the absence of evidence stating the cases he had relied on, I am unable to find just cause in the deviation which amounts to fairness. It is therefore clear that the Respondent breached the provisions of clause 7.3.f. Having said this, I find however that the fact that the Applicant was legally represented mitigates against the breach.

74.

The decision of **Khula Enterprise Finance Ltd v Madinane & Others** (2004) 25 ILJ 535 (LC) relied on by Ndwandwe is clearly distinguishable to this one. In that case, an external chairperson was appointed as all senior staff of the employer were involved in the case. In the present case, there was no evidence led to suggest involvement by persons which the Respondent ought to have appointed to chair the hearing. In fact, other that Mkhize's evidence that the Respondent had discretion to appoint him, there was no other evidence led explaining a deviation from the Collective Agreement. It is unclear where the discretion mentioned by Mkhize emanates from as this is not in accordance with the Collective Agreement. Mkhize's evidence was that the issue relating to legal representation was not raised specifically relating to him. It related to the Respondent's legal representative and he dealt with this following from which he issued a ruling. While the Applicant sought to suggest otherwise, there was no evidence led to suggest this. The Applicant was legally represented, her attorneys should have specifically pursued the issue of an external chairperson and allowed Mkhize opportunity to deliberate and rule on the matter. Their failure to do so may be interpreted as having given consent.

75.

While I find that the Respondent breached the provisions of the Collective Agreement, I find that there is evidence mitigating against such deviation/breach and find that the Applicant's dismissal was procedurally fair.

76.

In terms of Section 192(2) of the LRA, the Respondent bears the onus to prove that the dismissal was fair. I deal firstly with the allegations raised in count 2 of the charges i.e. performing remunerative work by conducting a workshop at Umziwabantu. It is common cause that the Applicant attended a workshop at Umziwabantu and made a presentation. It is also common cause that she and Madlala had been scheduled to perform other functions for the Respondent on the

6th May 2010. The charge against the Applicant in this regard was misconduct or gross misconduct for performing remunerative work on behalf of Jenatho Trading. Evidence presented proved that Jenatho trading invoiced the Municipality for services provided and that the Municipality paid them. Evidence was also led that the Applicant was not a member/owner of Jenatho Business Trading. There was no evidence led to suggest that the Applicant was remunerated for having made the presentation.

77.

Mkhize's explanation that he found the Applicant guilty as she had used the Respondent's time, used Madlala's vehicle and took a risk in attending the workshop is insufficient to suggest that she was therefore paid. The Respondent could have called Madlala who had more information as she was the one contacted by Jenatho or could have called owners of Jenatho to testify whether the Applicant had been paid. Much time was wasted leading evidence on whether the Applicant had permission/authority to attend the workshop. She was not charged for this and I will not deliberate on this issue. I find that there was no evidence to prove that the Applicant performed remunerative work in relation to Jenatho Business Trading. The fact that Madlala was charged and sanctioned immediately of receiving the complaint and the Applicant was not begs the question especially when taking into account the issue of the Applicant having been a whistle blower. It appears that the Respondent only took a decision to pursue her following from the whistle blowing. While Ndwandwe sought to suggest that she was not a whistle blower and had been implicated in the fraud and corruption related to the alleged whistle Blowing, Tobo conceded during his cross examination that the Applicant had been a whistle blower so did Chetty. They also conceded that following from her whistle blowing, Mzobe who was one of the implicated employees was allowed to resign.

78.

As regards the Applicant performing remunerative work from the 1st January 2010 to December 2010 working as a Professional Nurse at Netcare Margate Hospital, it is common cause that the Applicant worked at the hospital during the relevant period. The issue is whether she had relevant authority to do so. The Respondent's case was that Circular 161/2009 took away any authority for employees to perform remunerative work. The language of the circular is clear that authority for employees to perform remunerative work shall cease to exist from the 1st February 2010. The Respondent relied on this and led evidence to prove that the Applicant was aware of the circular. While the Applicant led evidence to refute this, she conceded that she had seen it on the notice board. The circular directed Managers/representatives of the Respondent to write to employees who had obtained such authority and advise them of the withdrawal of their authority.

79.

In determining the issue and as submitted by Hlongwane, regard must be had to the provisions of Circular 9/2009 which granted employees authority to perform remunerative work. The Circular provided that if no response was received to an employees' Application within 30 days, then the application shall be deemed granted. The Applicant's evidence which is the only evidence before me was that she had submitted her application to Mzobe, her supervisor and that was in accordance with Circular 9/2009. The 30 day period had lapsed and she had not received a response which meant the deeming provision was applicable. The Applicant's evidence was that she had attempted to submit Circular 9/2009

during the disciplinary hearing and that Mkhize had refused to accept it. This meant that relevant evidence which could have assisted in the determination of the matter was excluded.

80.

A lot turns on the issue of whether the Applicant had made application in terms of Circular 9/2009. In the absence of evidence refuting her version that she submitted the Application and in the absence of proper record keeping by the Respondent to prove whether her application was received or not, I accept that she had submitted her application. If her application was submitted to her supervisor, she had no way of knowing whether it had been processed and reached Chetty for him to exercise his delegated authority to approve the application. She was therefore entitled to assume that the deeming provision was applicable and that she had been granted authority. Once it is accepted that she was granted authority, then the part of Circular 161/2009 which required that employees with authority had to be advised in writing of the withdrawal of authority kicks in. Her evidence was that she was waiting to receive the written notice which she never received.

81.

The situation was worsened further by the meeting of the 3rd February 2010. Evidence was led that the meeting was called to sensitise employees of Circular 161/2009 and its implications and that this was due to the seriousness of the implications. This presupposed that the Respondent had formed a view that the Circular was unclear to the employees and needed to be communicated and clarified at a meeting. However, the meeting confused employees further as it indicated that employees could apply for authority. The Applicant's evidence was that she asked if she had to re-apply and asked of the implications of the circular to her and other PHC workers and was told that clarity was still to be sought from head office. This was clearly confusing as employees were advised of a possible dismissal if they breached the provisions of the Circular but clarity could not be provided of the nature and extent of application of the circular. In addition to this, other PHC employees of the Respondent performing remunerated services at the University of KwaZulu-Natal were never issued letters advising them of the withdrawal of their authority.

82.

It was only in May 2010 that an application was made on their behalf for the application of the Circular to be waived. While evidence was led to the effect that such authority was granted, there was nothing presented to support this. The Respondent's evidence was that the situation of those employees differed from that of the Applicant as they were performing the services for the benefit of the Respondent and in compliance with a contract concluded with the University of KwaZulu-Natal. Ndwandwe's argument was that the Applicant performed services at the hospital for her own benefit. While the employees working at the University performed work in terms of the contract between the University and the Respondent, remuneration received from there went to them and not to the Respondent. In essence, they performed remunerative work for their own benefit as well. Consideration must be had also to the fact that Tobo and other senior employees of the Respondent were aware that the Applicant worked at the hospital. Despite this, they never saw it necessary to raise the issue with her. It was only after the Applicant raised the issue of fraud and corruption in the supply chain that the issue was raised as a complaint and then investigated.

83.

It is clear from the evidence that the Applicant breached the provisions of Circular 161/2009. The Respondent was however entirely responsible for her conduct as they failed to issue her with a written notice of withdrawal. This was due to a lack of proper procedures of receipting applications. Also, there was further confusion caused by the meeting of the 3rd February 2010 and employees were told that clarity would be sought from the Head Office. Thereafter, nothing was said to the Applicant. She was left with no option but to assume that she still had valid authority and to continue working. On the evidence before me, I find that the Respondent has failed to prove the fairness of the Applicant's dismissal and find that the Applicant's dismissal was substantively unfair.

84.

REMEDIES FOR UNFAIR DISMISSAL:

Section 193 of the LRA provides that reinstatement is a primary remedy, which must be ordered unless certain facts exist being:

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

85.

Hlongwane asked that the Applicant be reinstated and I find that reinstatement is appropriate. In making this decision, I took into account the evidence led, the fact that the Applicant's dismissal was substantively unfair as well as the provisions of Section 193 of the LRA.

86.

AWARD:

I make the following award:

86.1 The dismissal of the Applicant by the Respondent is declared to be substantively unfair;

86.2 The Respondent is directed to reinstate the Applicant retrospective to the 26th June 2011on terms no less favourable than those which existed at the time of his dismissal.

86.3 The Respondent is directed to pay to the Applicant arrear salary in the amount of R62 738.62 being from the 24th June 2011 to the 26th January 2012 (the date of dismissal to the date of the arbitration award).

86.4 The Applicant is directed to return to work on the 10th February 2012.

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Mokgere Masipa

Arbitrator/Panellist