



ARBITRATION AWARD

Commissioner: **Lindiwe Makhanya**

Case No: **PSHS375-19/20**

Date of award: **29 January 2021**

In the matter between:

PSA OBO THAVABASHNI ANAMALLAY

(Applicant)

and

DEPARTMENT OF SOCIAL DEVELOPMENT- KWAZULU NATAL (Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was scheduled for arbitration before me on 27 August 2020, 29 & 30 September 2020, 23 November 2020 until 20 January 2021 when it was finalised at the Respondent's premises, in Richards bay. It was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council ("the council") PHSDSBC in terms of section 191(5) (a) of the Labour Relations Act No.66 of 1995, as amended ("the Act").
2. The Applicant, Ms. Thavabashni Anamallay, was represented by Mr. M.C. Ngubane, Provincial Manager from PSA, and the Respondent, Department of Social Development -KwaZulu Natal, was represented by Ms. H.N. Jili, it's Assistant Director-Labour Relations. The proceedings were digitally recorded.

PRELIMINARY ISSUES, JURISDICTION, AND ISSUES TO BE DECIDED

3. No jurisdictional issues were raised.
4. I have to decide whether or not the Respondent committed unfair labour practice by suspending the Applicant for two months without pay.
5. The Applicant sought for the setting aside of the sanction of suspension and be reimbursed for the two month's salary.

BACKGROUND TO THE DISPUTE

6. The Respondent is the Department of Social Development located in Richards bay, KwaZulu Natal. The Applicant commenced her employment with the Respondent on 1 September 1995 and was employed as a Service Office Manager in Richards bay office. She was subjected to a disciplinary enquiry and subsequently sanctioned to two months suspension without pay, at the time of her suspension she was earning a salary of R56,260.75. This matter involves the case of a child who was a minor at the time of the incident, the child's name is therefore withheld. I will refer to the child as "child X"

SURVEY OF EVIDENCE AND ARGUMENT

7. Both parties presented a bundle of documents. Both parties submitted their closing arguments on 26 January 2021.
8. The Applicant was found guilty on charge 1 and 2 as per ("Bundle A", page 1 and 2):
 - (a) On or about 5 July 2017 at or near Richards bay area in the District of King Cetshwayo you were negligent and contravened the provisions of Section 110(5) read with the provision of section 150(1) and section 152(1) of the Children's Act, No 38 of 2005 in that; You failed to ensure the removal of the child that was in need of immediate/ emergency protection into a temporary safe environment

in order to secure the child's safety therefore your action jeopardized the safety and wellbeing of the child.

- (b) During the period 6 to 11 July 2017 at or near Richards bay area in the District of King Cetshwayo you were negligent and contravened the provisions of section 9 read with the provisions of section 7(l) (i) of the Children's Act, No 38 of 2005 in that;

You failed in your duties to act in the best interest of the child as of paramount importance when you did not follow up a lawful and reasonable instruction issued by yourself in your capacity as Richards bay Service Office Manager to the Social Worker; Ms. D.N. Mthiyane stationed under your jurisdiction to implement a safe removal of the child that was exposed to multiple sexual abuse. Your actions dented the image of the Department of Social Development into the public domain.

THE APPLICANT'S CASE

9. The Applicant Ms. Thavabashni Anamallay testified that she has been employed by the Respondent since 1995 occupying the position of a Service Manager in Richards bay office. She had a clean disciplinary record prior to this incident.
10. On 5 July 2017 after 1 pm, she was informed by Mrs. Afrikander who was working at the reception area that the Community caregiver (CCG), Ms. Nokuthula Mbuyazi "Mbuyazi" was looking for her as the Social Worker assigned to Ward 16 was not available and that it was about a case of a child who had been sexually abused. She immediately got hold of Ms. Mthiyane, the social worker "Mthiyane", who attended to the matter. Mthiyane contacted Mbuyazi and later reported to her that she had contacted the police as well. She referred to Mthiyane's daily diary to support her argument that Mthiyane had attended to the matter on 5 and 6 July 2017 which is found in Pages 4 to 13, "Bundle A".
11. There was no transport for Mthiyane to go and visit child X's home on 5 July 2017, but Mthiyane had established through the Police Officer, Mr. Magwaza that

they were aware of the case and that the perpetrator had been arrested. Also, Mthiyane had contacted Ms. Mathenjwa, the mother of child X who had refused to have child X removed to a temporary place of safety.

12. Mthiyane gave her feedback at about 4:00 pm because her supervisor was not available. She arranged for the car to be booked for the following day for Mthiyane to visit child X's home. On 6 July 2017, a trip authority sheet was signed by the Applicant and Mthiyane's supervisor, Ms. Mchunu to authorise Mthiyane to visit t child X's home.
13. She denied contravening s150 and s152 of the Children's Act because the act states that a designated social worker or a police official may remove a child and place a child in temporary safe care, however in this instance, Mthiyane was a designated social worker not her. She was subjected to unfair labour practice as the charges levelled against her did not fall within her duties. She communicated directly with Mthiyane because her supervisor was not available, and the department has a chain of command whereby Mthiyane reports to Mchunu.
14. On 11 July 2017, she was not at work but had received a call from Ms. Mchunu that they had decided to have child X removed from her mother's house to a place of safety and that there had been reports on the radio, Ukhozi FM that child X had not been removed from her home after the multiple sexual cases of abuse.
15. She was precautionary suspended prior to being charged for 2 years and was subsequently charged and for two months she was not paid. She had a good reputation and prides herself as a social worker, but she now feels that other people look at her as being incompetent.
16. Under cross-examination, she maintained that it was not her duty to remove child X from her home to the temporary place of safety, but the duty of the social worker.
17. Mthiyane had given her feedback that she had phoned Mbuyazi and the police who had advised that the perpetrator had been arrested and that child X was in the safe care of her mother. The media had broadened the story which they did not know on 6 July 2017 when the Mthiyane visited the child X's home.

18. During the re-examination, she reiterated that it was not her duty to remove child X; she had done her part and believed the social worker had performed her duties properly as reported to her.
19. Ms. Dumisile Mthiyane is employed as a Social Worker in the Richards bay office since July 2011. One of her main duties is to take care of children, elderly people, people who are ill, and those infected with HIV. She was the social worker responsible for Ward 16 at Empangeni. She referred to page 4, Bundle A, where there is a daily diary which she completed every time she performed her duties. On page 7 there is an activity at 1:45 pm where it is written that she was informed by the Applicant to attend to an urgent case that was reported via telephone by Mbuyazi.
20. On 5 July 2017, she did not visit the home of child X as there was no car available however, she had contacted the Policer Officer, Mr. Sangweni from the South African Police Services at KwaMbonambi area at 2:30 pm who informed her that they were aware of the child abuse case and that when they tried to remove child X from her home to a temporary place of safety the mother had refused because child X was no longer in danger since the perpetrator had been arrested.
21. It was not the duty of the Applicant to remove child X from her home to the temporary place of safety. She referred to section 152(1) of the Children's Act where it is stated that a designated Social Worker or a police official may remove a child and place the child in temporary safe care if there are reasonable grounds. She was the designated Social Worker, not the Applicant.
22. Child X did not require care and emergency protection as she had contacted Mbuyazi as well on 5 July 2017, and it was established that the child was safe.
23. On 6 July 2017 as seen on her diary report page 8, "Bundle A", she had visited the home of child X and was informed by the mother that the perpetrator, who is the father of child X had been arrested. She offered to counsel child X and the mother. According to her assessment on 6 July 2017, child X was safe and was not at risk. When she returned from child X's home, she gave her supervisor feedback as she did not report to the Applicant.

24. On 11 July 2017, she was tasked by her supervisor to go and remove the child to a place of safety because Mr. Mchunu, the District Manager had called and had given that instruction.
25. Under cross-examination, she insisted that the police were aware of the case and had assured her that the perpetrator had been arrested. She maintained that it was not the Applicant's responsibility to ensure that child X was safe and protected, but her duty.
26. When asked why she had taken instruction from the Applicant as she did not report to her, she stated that her supervisor was not present during that time but when she returned from child X's home on 6 July 2017, she gave feedback to her supervisor.
27. During the re-examination, she reiterated that the child was safe and the reason for her removal on 11 July 2017 was due to media pressure.

THE RESPONDENT'S CASE

28. Ms. Nikeziwe Pretty Mhlongo testified that she is employed as a Social Worker Manager at Cetshwayo District, her duties involve supporting and guiding in the social work service.
29. She further testified that the Applicant was found guilty of charges 1 and 2 because the actions of Richards bay office under the management of the Applicant did not comply with section 152(1) of the Children's Act after the report was received about the child that was sexually abused. The Applicant was supposed to ensure that the child was removed from her home to a temporary place of safety. The assessment was not done to establish that child X needed to be removed from her mother's house.
30. She referred to "Bundle B", page 7 section 110(5) citing that it relates to the duties of the Applicant as it identifies several people who can assist the child who is in need of care and protection. According to her, this section is linked to the position

of the Applicant as well because it refers to the department not specifically to the Social Worker.

31. The case had already been referred to the social worker on numerous occasions and was eventually reported to the Applicant for her intervention. The Applicant had a responsibility to monitor Mthiyane's actions and request a written report and thereafter hand over the case to her supervisor.
32. Under cross-examination, she maintained that s110(5) of the children's act is linked to the Applicant's position because she was a delegated employee of the Respondent and was accountable for the Office of Richards bay. The Applicant failed to ensure the removal of child X who was in need of emergency protection and the daily diary of Mthiyane was not giving any assurance that there was any assessment done.
33. She maintained that the matter had been reported to the Richards bay office numerous times before but had no file or report for it.
34. She conceded that she was not appointed as an investigator of the case. She disputed that child X was removed from her home due to media pressure.
35. During re-examination, she maintained that the Applicant was supposed to make a follow up as she was entrusted with the responsibility for her office.
36. Ms. Nokukhanya Mbuyazi testified that she was employed by the Respondent as a Community Care Giver (CGG) responsible for Ward 4, 5, and 16 at Empangeni. On 5 July 2017, she phoned Richards bay office and reported the sexual abuse of child X in Ward 16 at Nzalabantu. Later that day she received a call from Mthiyane who asked her about the police case number. She received another call from the Police Officer who wanted her to explain about the child abuse at Ward 16. The Police Officer said he wanted to contact the Mthiyane to explain to her that he would not take child X from her mother.
37. On 6 July 2017, Mthiyane came to Ward 16 to visit the home of child X. When Mthiyane had finished consulting with the mother and child X, she told her that the matter was beyond her competency and that she would report it to the office. On 7 July 2017, the mother reported to her that child X had been come home

smelling condoms. After she did not receive any assistance from the Richards bay office, she decided to report the matter to Ukhozi radio station on 10 July 2017.

38. Under cross-examination, she conceded that she did not communicate with the Applicant, therefore she had nothing to say about the Applicant. According to her, Mthiyane was responsible for removing child X from her home, not the Applicant.
39. When she called the office, she was told that the message would be passed to the manager. She believed that the manager had done her part.
40. She insisted that two perpetrators had raped child X, but only one perpetrator was arrested.
41. During the re-examination, she emphasized that Mthiyane had said the matter was beyond her competency.
42. Mr. Ntokozo Derick Mchunu testified that he is currently employed as a District Manager based in Ngwelezane. His responsibilities involve overall management at a district level. The Applicant was one of his subordinates.
43. He referred to page 48, "Bundle A" in bulletin 4 where development social welfare services duties are listed, including childcare and protection services which are the functions of the Applicant.
44. On 11 July 2017, he received a call from the office of the MEC regarding the story that had been broadcasted at Ukhozi Radio station about child X who was being sexually abused. Mbuyazi who had reported the matter to the media said she did not get any joy when she reported the matter to the Richards bay office. Mrs. Mchunu, the supervisor of Mthiyane was contacted and asked to present a report about this matter to his office.
45. It was reported that child X continued to be sexually abused even after the matter had been reported to the Respondent. If the matter had been attended to

immediately, it would not have gone to the media, and child X would have been removed from her home immediately to a temporary place of safety.

46. He did not believe that there was pressure from the media to have child X removed from her home because Social Workers are professionals who are skilled and have the experience to do their jobs. When he called Mrs. Mchunu he did not put any pressure on her but, child X was removed from her home to a place of safety.

47. The responsibility of the Applicant was to oversee the overall management of the office. She had assigned the social worker to attend to the matter, it remained her duty to do a follow up to the case.

48. Under cross-examination, he admitted that he did not enquire from Mbuyazi as to who had not been assisting her at the office but had decided to refer the matter to the supervisor of Mthiyane to investigate it.

49. He conceded that it was not the responsibility of the Applicant to remove child X from her home but that of the Social Worker.

50. There was no re-examination.

ANALYSIS OF EVIDENCE AND ARGUMENT

51. I have taken note of section 186(2) (b) of the LRA, which states that an “unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee. I read this section together with section 185 (b) of the LRA which states as follows; “Every employee has the right not to be: (b) subjected to unfair labour practice.

52. The applicant bears the onus to prove that her suspension was unfair. The Applicant contends that the sanction of two months suspension without pay was unfair. The Respondent contends that the office of Richards bay failed to protect

the child by not removing her from her home to a place of safety, as a manager, the Applicant ought to have made a follow up with Mthiyane, so the Respondent imposed a fair sanction.

53. It was common cause that the Applicant had asked Mthiyane to attend to the matter of a child that had been sexually abused at Ward 16 Nzalabantu. It was also a common cause that Mthiyane reported to Mrs. Mchunu who was her supervisor.

54. The testimony of all four witnesses confirmed that it was not the responsibility of the Applicant to remove child X from her home to a temporary place of safety, except Mhlongo who was adamant that the Applicant ought to have made a follow up from Mthiyane to ensure that child X was removed. Section 110(5) of the Children's Act which Mhlongo relied on, in terms of listing several people who can assist the child who is in need of care and protection does not make any mention of the service manager who is the Applicant. Also, section 152(1) of the Children's Act states that a designated social worker or a police official may remove a child and place the child in temporary safe care. In this instant, Mthiyane was a designated Social Worker for Ward 16 at Nzalabantu, she recommended that child X was not at risk.

55. The Applicant claimed that Mthiyane gave her feedback on 5 July 2017 because Mrs. Mchunu was not available. Mthiyane had reported that child X was safe with her mother and that the perpetrator had been arrested. The Respondent argued that the assessment had not been done which resulted in Mthiyane failing to have child X removed from her home. The daily diary of Mthiyane indicates that all affected parties had been contacted which enabled her to conclude that the child was not at risk. The feedback given to the Applicant suggests that Mthiyane had done her work including assessment. Although Mhlongo argued that the assessment was supposed to be in a form of a written report, it is my view that it would still show the same content as it would have been compiled by Mthiyane.

56. It must be noted that both parties gave different versions concerning what transpired on 5 and 6 July 2017. The Applicant and Mthiyane stated that child X was safe as the perpetrator had been arrested whereas, Mbuyazi claimed that

child X was not safe as she was again sexually abused after 6 July 2017. I agree with the Respondent that misconduct was committed and this tarnished its reputation to the public, but the evidence of Mbuyazi revealed that she got frustrated and desperate when she did not get any joy from Richards bay office, she decided to report the matter to the radio. During Mbuyazi's testimony, there was no mention of the Applicant as she believed that the Applicant had done her part since she had received a call from Mthiyane on 5 July 2017.

57. Mchunu and Mhlongo testified that the Applicant had a responsibility to oversee the overall management of the office therefore, it remained her duty to do a follow-up to the case. Mthiyane argued that the feedback had been given to her supervisor on 6 July 2017 after she came back to the office. It remains unclear as to why the Applicant was charged when she was not the direct supervisor of the Applicant. Also, Mthiyane was not a junior social worker, she had so many years of experience, this is confirmed by the fact that her supervisor did not question her when she returned with a report on 6 July 2017 recommending that child X was safe.

58. I accept that the issue of sexual abuse is extremely sensitive which was the reason there was an uproar in the media and the community at large after the broadcast of this case. The office of the MEC also got involved as it wanted answers from the District Manager. Whether Mthiyane had done her job properly or not that did not involve the Applicant. The Applicant was satisfied with the feedback that child X was safe on 5 July 2017 and Mthiyane did not indicate any challenges regarding the handling of the case. Also, Mrs. Mchunu was at work on 6 July 2017, she received feedback from Mthiyane and was satisfied that child X was not at risk at her home.

59. The Applicant in her closing arguments claimed that she was charged by the Respondent to please the media and the community. I agree with this statement in that even the District Manager, Mr. Mchunu during cross-examination conceded that it was not the duty of the Applicant to remove child X. The Respondent had to blame someone senior in Richards bay office to be seen as having taken some corrective measures.

60. The Applicant testified that her colleagues see her as an incompetent person after receiving the sanction. She had a clean disciplinary record for 24 years yet she was subjected to unfair labour practice and had suffered a financial loss of two months' salary because of the suspension when she did not commit any misconduct. Our courts have emphasized that employers should refrain from hastily resorting to suspending employees when there are no valid reasons to do so. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security, and fulfillment. It is, therefore, necessary, that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee.

61. The evidence before me evinced that the Applicant did not commit any misconduct. Therefore, it was grossly unfair to issue the Applicant with a sanction of suspending her without pay for two months.

62. It follows that the Applicant discharged the onus to prove that the Respondent unfairly suspended her, and therefore the Respondent committed an unfair labour practice as contemplated in section 186 (2) (b) of the LRA.

63. In *SAPO v Jansen Van Vuuren NO and others* (2008) 29 ILJ 2793 (LC) it was held that Commissioners may set aside suspensions imposed as a disciplinary penalty if they find, on the merits, the Employee was not guilty of the conduct for which he or she was suspended.

64. I note that the sanction issued to the Applicant has expired as it was issued on 26 February 2019. The Respondent's guilty finding, as well as the sanction of suspension for two months without pay, are hereby set aside.

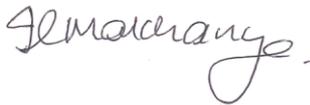
65. The Applicant is therefore entitled to be paid two months' salary for suspension without pay which is a total amount of R112 521.50 (R56 260.75 x 2 months).

AWARD

66. The Respondent, the Department of Social Development KwaZulu Natal, committed an unfair labour practice by suspending the Applicant, Ms. Thavabashni Anamally for two months without pay.

67. The sanction of suspension without pay is therefore set aside and should be expunged from Ms. Thavabashni Anamally's disciplinary record with immediate effect.

68. The Respondent is ordered to pay the Applicant the amount of R112 521.50, less applicable statutory deductions, by no later than 15 February 2021.



LINDIWE MAKHANYA