



# ARBITRATION AWARD

Commissioner: **Janine Carelse**

Case No: **PSHS435-18/19**

Date of award: **6 June 2019**

In the matter between:

**PSA obo ABDURAGMAAN ERNSTZEN**

**APPLICANT**

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

**RESPONDENT**

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The Arbitration hearing was set down for arbitration on 16 August 2018, 16 October 2018, 16 and 17 January 2019, 4 March 2019, 23 April 2019 and was finalised on 23 May 2019. The matter was postponed on two occasions, one postponement request was made at the respondent's instance and the other at the applicant's instance. The arbitration hearing took place at The Western Cape Nursing College in Cape Town in terms of Section 191(5)(a)(i) of the Labour Relations Act 66 of 1995, as amended, ("the LRA"). The proceedings were digitally and manually recorded.
2. The applicant, Mr. A Ernstzen, was present and represented by Mr. D Johnson. The respondent, Department of Health- Western Cape, was represented by Mr. F Rodrigues.

3. Both parties handed in a bundle of documents which they relied on as documentary evidence. The applicant's bundle of documents was marked bundle "A" and the applicant's bundles were marked bundles "R1" and "R2".
4. The proceedings were manually and digitally recorded and the matter proceeded in English.
5. Both parties handed in their comprehensive written closing arguments on 30 June 2019.

### **ISSUES TO BE DECIDED**

6. I have to decide whether the applicant's dismissal was substantively fair. If I find that the applicant's dismissal was substantively unfair, I must decide what the appropriate remedy will be for such unfair dismissal.

### **BACKGROUND TO THE DISPUTE**

7. The applicant was employed by the respondent as an Assistant Director in the HR unit. The applicant was charged and dismissed for about 14 charges of misconduct. Mr Rodrigues conceded that there was a duplication and splitting of charges and stated that there are essentially two charges that the applicant was dismissed for. The first charge relates to the alleged disclosure of confidential information to the Weekend Argus, without authority, and thereby bringing the respondent's good name into disrepute. The second charge relates to the alleged manipulation of the benchmark in order to favour a specific candidate, namely, Van Rooy. The applicant denied both charges and challenges the substantive fairness of his dismissal. The applicant wishes to be reinstated with retrospective effect.

## **SUMMARY OF EVIDENCE AND ARGUMENT**

### **THE RESPONDENT'S REPRESENTATIVES EVIDENCE AND ARGUMENT**

8. Sheile Margaret McCloen (McCloen) testified for the respondent under oath and stated that she is employed at Khayelitsha sub office and employed as the Deputy Director for comprehensive health programs. She knows the applicant and she was required to investigate the misconduct against the applicant. She averred that she investigated the newspaper article charge and she tried to establish who the members were who reported it to the media. The article dealt with leave pay outs that was denied by the respondent. She read out the first paragraph of the newspaper article and stated that the journalist was clearly referring to the applicant and one of his colleagues. She stated further that the rule in the workplace is that leave must be taken within the respective financial year and if it is not taken then it can be taken up until the next year on 30 June and if it is not taken then the leave is forfeited. In order to qualify for a leave pay out, the request must be done in writing and thereafter it must be approved by the CEO or Director. She read out paragraph 7 of the said article as follows: "His staff members claim they were unable to use their holiday leave, citing operational requirements – the very same reasons Kharwa wrote on his leave payment request forms." She contended that based on this, it is clear that the journalist was referring to the applicant and his colleague, as they had applied to be paid out their leave and they were paid out without the approval of the CEO. She cannot confirm whether the applicant had verbal approval from the CEO to pay out their leave payments. She was referred to the arbitration award that was issued subsequent to a dispute that the applicant referred to the CCMA and stated that the applicant had challenged the sanction that was imposed after leave pay outs were made to him and his colleague. They were not happy with the sanctions that were imposed.
  
9. She was further referred to a grievance document wherein the applicant and Mr Sheppard Pye indicated that their grievance was about Dr. Anwar Kharwa (Kharwa) receiving unauthorised leave payments without any consequence or responsibility. She contended that this was the core issue that was addressed in the newspaper article. She stated further that when she reads paragraph 3 of the newspaper article,

the author refers to two staff members as the aggrieved members because they approached the CCMA for their dispute. With reference to the guerrilla emails, she checked the applicant's and Pye's computers and she requested a forensic investigation due to the seriousness of the allegations. She was referred to the forensic report after the investigation from the forensics department and she also referred to a personal document with the leave pay outs of Kharwa and the document was found in Pye's deleted files. This consisted of a break-down of leave pay outs to Kharwa, which amounted to more than R200 000,00. She stated that the newspaper article clearly related to the applicant and Pye. She is not sure why the applicant did not hand over his laptop on the day that he was suspended. The applicant only handed over his laptop on 23 August 2017.

10. Insofar as the other charge is concerned, it started when they received a grievance from a person who applied for a post and the matter went to the CCMA to be heard because he felt that it was an unfair labour practise, as he was not appointed. After they investigated that matter, it transpired that the process was not done properly. On 20 September 2016, the first interview was held for the post and there was a lady who could not make it on the day and they scheduled another date for her on 3 October 2016. On that day Pye was not on duty and the applicant took up the role of chairperson. This had to be approved by Kharwa on the relevant form (RS6), but was not done. According to the rank order suitability for the post, Hungana was the suitable person. The panel must agree on the benchmark and in this case the benchmark was 70% and then part of the investigation revealed that there was another benchmark. She was referred to a motivation letter that was drafted by the applicant wherein he motivated for Van Rooy to be appointed into the position. In this motivation the applicant indicated that the benchmark was 80%, as opposed to 70% as indicated on the rank of suitability document. She stated that there are no separate benchmarks for in equity and out of equity candidates and one cannot have two motivations for one post. She stated that there was no other RS12 document. She read out the email that Pye sent to Hungana stating that he did not meet the benchmark and that that was the reason for his non-appointment. She stated that the respondent had to settle Hungana's matter and pay out a settlement amount of R90 000,00 because the processes were not properly followed. She referred to an email that was found on

Pye's laptop where complaints are lodged against Kharwa. She stated that the applicant is also responsible for the guerrilla emails that was sent around. She denied that she had spoken to the chairperson about postponements alone. The applicant delayed the matter and requested postponements all of the time and the delay was caused by the applicant. She further stated that the applicant was in possession of the relevant documents and had ample time to prepare his case. The applicant was granted every opportunity to object and ask for breaks and they had full time to do whatever process they wanted to do.

11. Under cross-examination she stated that she has been the facility manager for many years since 2006 and HR processes are part of facility management. She averred that she cannot say that the applicant and Pye leaked information to the journalist, Norman Cloete. She was referred to the forensic report and read out paragraph 3,1 which stated that the investigation showed no positive results for the searches performed on the applicant's laptop. She however stated that when she reads the newspaper article then it refers to the word "pair". The newspaper article further refers to Karwa's staff members. The applicant's laptop was with him after he was suspended. She was referred to another part of the newspaper article which states that the searches did not reveal any digital evidence that the applicant's computer stored any traces of the information purportedly leaked to the media or any traces linking the machine to the guerrillamail.com domain. She cannot say that the applicant created the guerrilla emails, however, Pye brought a bundle of documents that implicated the applicant. She conceded that somebody else could have had access to the information relating to Kharwa's leave pay out, however, Pye and the applicant were the only people who could be privy to that information. The article was published on 9 or 10 June 2017 and the arbitration of Pye and the applicant was on 22 March 2017. She averred that HR would have received the arbitration award and therefore the information about what had happened at the arbitration. Furthermore, a grievance was lodged thereafter. She contended that paragraph 9 of the article was not in the award. She averred that the article referred to the applicant when the journalist specifically stated that "the two approached the CCMA". It appears that the journalist did not want to reveal the names of the people. She stated that according to the forensic report the applicant is not exonerated from any wrongdoing. She contended that the applicant did not hand in his

laptop when he was dismissed and therefore he could have tampered with it. She stated that the applicant conceded to deleting all of the guerrilla emails on his laptop and this is suspicious conduct on his part. The appointment of Van Rooy was irregular. She stated that she is only aware of the RS 12 that is in the bundle of documents. The applicant signed two motivations, one for Van Rooy and one for Hungana. Van Rooy's motivation was completely signed off, whilst Hungana's motivation was partially signed off. The substructure only received Van Rooy's motivation and that is how it ended up with Horak and Horak was part of the selection process, except for the interviews on 3 October 2017. Horak was present when they interviewed Hungana and Van Rooy and he was aware of the benchmark of 70%. The RS 12 is clear that all of the panel members state that they agreed to a 70% bench mark.

12. Dr Anwar Karwa (Karwa) testified for the respondent under oath and stated that he is appointed as the CEO at Khayelitsha hospital. The applicant was employed as the Assistant Director in HR at Khayelitsha and as the HR and IR manager at the hospital. He was referred to the newspaper article in question and averred that the CEO's documents are managed by the Eastern Sub-structure in Khayelitsha and his file is there and the HR transactions and related processes is managed by that office. He averred that the policy is clear - although there is unused leave due, due to operational requirements, you must apply to the regional director via the deputy director resource management for a request for pay out for unused leave. It is guided by policy and procedure and there is a process and he has to apply for pay out and his senior would be Dr Philips as the director of Khayelitsha eastern. There can be no pay out with verbal approval. When a person applies for leave then they look at the leave form and if it is due to operational requirements they will continue working and their leave credits will be paid out. He gives that approval. There were no other people who received verbal approval and leave pay outs. He contended that the newspaper article refers to the applicant and Pye. The newspaper article tainted his credibility and integrity. He was referred to a document that was extracted from the persal system pertaining to his leave pay outs and stated that doctors do not have access to those documents and only the HR personnel. He contended that doctors could not have given the information to the journalist who wrote the article.

13. He contended further that he is familiar with the HR process of recruitment and his understanding is that there is a need identified to fill a post and the advert is prepared with the current financial constraints and they confirm if there is funding available and they sign the RS1 and it is sent to the chief director's office within the department and if the post is approved, it is advertised. Only one post was advertised. He has been involved in conducting interviews and the benchmark is discussed at the beginning of the process and on the day of the interview, the panel convenes and prepares questions and they agree to a benchmark. They cannot motivate for two posts when they only have the funds for one post. He has seen the documents and he cannot think for Pye and the applicant, but the document speaks volumes because the benchmark was changed and they kicked out the in equity candidate. This had a prejudicial effect on the respondent, as Hungana followed up and queried and there was a settlement paid to him due to the irregularity of the process. The applicant was responsible for the recruitment process and he recognises the doc because the PSC met with him and Pye and it was an introductory section and spoke them through the investigation and through sub structure office and they handed over the documents to comply with the investigation. When he attended the disciplinary hearings, it came to his attention that many emails were passed on to NEHAWU and they concluded their investigation and what came out was that the hospital was placed under administration for recruitment and selection and it was escalated to the chief directorate. It is still in effect and it was recognised that they will have to revitalise all new HR aspects in the hospitals and his understanding is that that is an ongoing process. The signing of approvals is at the level of the office of the chief directorate and the applicant was the custodian of that process. No payment will be accepted for appointments and that stems from an incident that stems from hospital HR component. He averred that there was a wilful changing of a benchmark to exclude the candidate from a post and they did that by lifting the benchmark. Francious Brandt is the deputy director for people management and he is higher in rank than the applicant and Pye. He stated that the motivation for Hungana did not reach his office and it is protocol to have reached his office to be signed off. He stated that he signed the motivation for Van Rooy's appointment. He signed the document based on trust and he did not scrutinise the motivation. He cannot see himself working with the applicant again based on the article and the sharing of confidential information. It is astounding how NEHAWU and the sharing of



personal confidential information which resides within the realm of HR management. There is a complete break in the trust relationship. The whole revitalisation of the HR team is disappointing. He does not have delegations with regard to suspension and he was made aware later that the applicant was still in possession of his laptop and the department made a formal request for him to return his laptop.

14. Under cross-examination he stated that he sent an email to the HR team and the substructure HR manager was involved where he stated that they do not do leave pay outs on verbal approval and the email was clear. He averred that the HR management team are aware of the processes involved. He maintained that they were officially communicated to and they knew the processes and that they do not authorise verbal approvals. All HR processes are confidential and if it is disclosed then it is in the context of disciplinary action. He cannot confirm that other people leaked the information to the newspaper and “the pair” refers to Pye and the applicant. At paragraph 8 of the article, it states that the “pair maintained” and no other people were paid out and there is a process in terms of capturing and one would expect that the HR clerk and an officer who is responsible for processing would have been privy to the information contained in the newspaper. He does not do payments for himself and it is dealt with by HR. They never pay on verbal approvals and they follow due process with regard to leave which he sacrifices because he wants to ensure that the hospital is running. He stated further that the sole purpose of the article was to create injury to himself and the article states that the pair returned to work. The sole purpose is to discredit him and the department. The journalist refers to the pair who is the applicant and Pye.

15. Furthermore, paragraph 11 of the newspaper article refers to a disciplinary hearing that was held and the only disciplinary hearing that was conducted at the time was the applicant and Pye’s disciplinary hearing and they were given final written warnings. He contended that the applicant spread the emails about him, although he may not have been the author. The applicant was complicit in it. He was complicit in damaging the reputation of the department and him to the extent that the community wanted to come and protest and remove management. He averred that the applicant and Pye did not inform him of the damaging emails against him and he was informed by community



members and by the department that there is strange and damning allegations against him and one would expect people who are sitting in a management meeting to bring it to the fore. The two officials had their laptops on for a while.

16. The context in which he signed off the post for Van Rooy is that they were about to lose thirty posts and the bundle was signed off based on trust and they had to ensure that it was at the chief director's office. Pye and the applicant were dealing with thirty posts and he signed it off on the basis of trust. He stated that the applicant did not hand in his laptop immediately and while he was suspended they became aware of the full extent that he and Pye had their laptops at home. The applicant should have informed them that he has a laptop that is state property. The applicant further elected to hand over the laptop to another office even though he was requested to hand it over at his office.
17. Under re-examination he referred to an email sent by the applicant to the PSA and Pye and stated that the applicant distributed the guerrilla emails to officials at the PSA and Pye. He contended that they do not give verbal approval of payments for unused leave and the applicant and Pye were informed that their leave was denied and they are well aware of process for payment of that leave.
18. Francious Garret Brandt (Brandt) testified for the respondent under oath and stated that he is the deputy director for people management at Khayelitsha hospital and he is based at the substructure office. This office is classified as the mini district office and they are responsible for the three district hospitals – Khayelitsha, Eerste River and Helderberg and nine clinics. He is familiar with the selection and recruitment process and they are responsible for that process. He averred that normally once an advert has closed there should be a number of applications that they received and they catch it on a long list. The long list is provided to the panel and the supervisor of the post must decide who the panel members must be and they will identify a date and the short listing. They will look at the criteria and the applications and do the shortlisting. Once this is done and the interview date is set, they will draw up a questionnaire and each candidate will evaluate the responses and then they recommend a, b, c or d. The panel will look at the questionnaire, equity profile and the equity targets and the overall

fit. It depends on the job at hand. The suitability is identified and a recommendation is made. He was referred to the RS 12 document and stated that according to that document, Hungana is the first appointable candidate and the second candidate is Van Rooy because he is out of equity. He averred that the benchmark takes place before the interview process on the morning as to whether the questions are easy or difficult. The panel must do it on the morning before the interviews. He was referred to the motivations drafted by the applicant where he motivates for both Hungana and Van Rooy to be appointed into the post. The applicant was the author of both documents. He stated that Hungana was not appointed into the post and the department received the submission for Van Rooy only. He stated that insofar as Van Rooy's motivation, it appears that the benchmark was changed to 80%. He contended that it is unfair if the scoring is changed and Pye was also dismissed for the same transgression.

19. He does not agree that there can be two motivations, one for an "inequity" candidate and one for an "out of equity" candidate. There can only be one submission. There cannot be two motivations for the same post. If a person is out of equity then you must explain why he is appointed. The sub-structure office only signs off the out of equity appointments and Karwa signs off the inequity appointments, as part of the quality checking process and then the director has the final sign off. The director has the only delegated authority to approve the appointment. He did not receive two submissions and if there is two then it is irregular because it is not protocol. He averred that it was indicated that there was a second set of interviews and that person was not appointed as per the correct process and the applicant was the acting chairperson. In terms of the respondent's processes, the same panel must be used for the same interviews in terms of RS 6. He stated further that the panel members are also required to sign because there is a declaration of confidentiality. It is further not procedure for a panel member to be replaced. He averred that once a process has started then the same panel must conclude the entire process. The applicant could not have chaired the interviews. He stated that Cupido was transferred to Helderberg due to an issue that there was conflict in the section and not because of leave pay outs. In Lumphondo's case, there was a disciplinary hearing and she referred the matter to arbitration where after she was reinstated at Eerste River Hospital. He contended that the newspaper

article was directed at the applicant, as the applicant and Pye were the only two cases that they had. He stated that only HR staff has access to the Persal system.

20. Under cross-examination he stated that he was not part of the panel that set the benchmark that set the benchmark and he was not aware or informed of how they got to the benchmark. He stated further that it is clear that it was a pre-determined benchmark which means it happened before the start of the process. He averred that at the time they were only presented with one motivation for Van Rooy. He stated that there is a RS 12 for Van Rooy but it is not in the bundle. Horak did not say that Van Rooy is not the candidate who was recommended. At the time of the interviews they were not aware that Pye was not available and they became aware that Pye was absent and that the applicant chaired. They realised when somebody came to complain about the appointments. They work according to strict policy guidelines and they should not have continued with the interviews. The panel should not have allowed the applicant to continue with the interview. He contended that the respondent is busy with disciplinary hearings with the rest of the panel.

21. Under re-examination he stated that they had to pay Hungana a monetary settlement because it was found that the respondent had made too many mistakes in the appointment process.

## **THE APPLICANT'S EVIDENCE AND ARGUMENT**

22. The applicant gave evidence under oath and stated that he was the Assistant Manager in the HR unit and his responsibilities included the management of HR, labour relations, recruitment and selection. He did not leak any confidential information relating to Karwa. He does not know where Karwa gets the information that he leaked information. He was not in contact with the journalist and he also did not collude with other parties to not let Hungana get the post. He averred that according to the policies, if there is any dispute, query or grievance raised by an applicant that was interviewed, the chairperson must be given a chance to give input regarding the process and how it was done and that never happened. In early October there was a need to get appointments done due to budget constraints and there was a due date for posts to be filled before the budget restricted the post from being used and the

submissions had to be in by 10 October 2017. When they were trying to finalise the process and one more person had to come for an interview on 3 October. It would be unfair for her not to be interviewed and they had to make provision to interview her and the submissions had to be in urgently. He averred that the substructure favoured in equity candidates but that the benchmark was 80 and they just submitted both motivations to see whether they would approve both posts. He made the second submission and if substructure decided to go with Hungana then the documentation is ready. He averred that all of the documents are not in the bundle. Neither the RS 6 nor RS 12 is attached. They did not conceal any document and they made it clear that that was the process that they will follow. The documents were in the batch. Once all of those things are done then they hand it over to the signatories and it goes to the CEO and if it is a person out of equity then it goes to the substructure. If the director allows the out of equity person to be appointed then he would sign it. Mr Hungana was in equity and Van Rooy was out of equity and Van Rooy went to substructure and he signed the document. He contended that they would have changed the benchmark to favour the inequity candidate but there was no such instruction. There was no indication that they needed to change anything.

23. On the day that he was issued with the suspension letter, he was very upset and he phoned the PSA and he was not sure what to do and he was dumbfounded and he called PSA and they said that he must take the letter and hand over his key and he left. He was distressed and he was angry. He took the letter and left and packed his things and he gave the key to the information officer and he did not even think about a laptop and he gave in the keys and he left. He worked at the desktop at work and he had a laptop when he works offsite. He did not want to be associated with the guerilla emails at all and there was a discussion held with substructure and Karwa received anonymous emails and he did not want to be linked to the emails considering what was happening at Khayelitsha and he received those emails and some people received it and he sent it to his gmail account and to his union and he kept a record of it in case he had to refer to it. He reported this to Pye and some of the things that he is not a party to and Pye could have escalated it. Some of the things that were mentioned in the emails were sensitive issues and his name was mentioned and when you try to respond to the emails then it bounces back. He does not know who created

the guerilla emails. He stated that he followed the line of delegation and he reported the matter to his supervisor. He had no problem working with Karwa and he did what he was asked to do.

24. Under cross-examination he stated that he recalls Karwa's testimony that the article came out during the fasting period and he was leading the conference during the fasting period and he acknowledges that the fasting period is very important to Muslims. He does not know whether Karwa was extremely emotional. If he did smirk then he does not know what it was for. He averred that he is loyal towards the respondent. He stated that at the time that he was suspended he did not have the laptop with him and he conceded that he handed it a few days later. He heard that there was confidential information found on Pye's laptop that relates to paid leave. He does not believe that the forensic report states that the guerrilla emails was found on his laptop. He did receive it on his government email. He conceded that the amount in respect of leave payments made to Karwa that was found on Pye's computer is the same as the amount indicated in the newspaper article. He denied that he had a motive and that he and Pye approached the newspaper. He averred that the RS 12 in the bundle which indicates that Hungana was the most suitable would never have gone through with the submission. The reason why Hungana is not appointable is because he scored below the benchmark of 80%. Hungana wrote an email to Pye and Pye said that he did not make it because he scored below the benchmark. He does not recall seeing the email that Hungana sent. He averred that he cannot trust the forensic report because they were not interviewed. He conceded that he was the chairperson of the second sitting of the interviews. He is the custodian of the selection and recruitment and Pye was not available because he had to collect his wife that morning. He took his advice from Horak who he is the adviser of the substructure. The benchmark was initially 80%. He stated further that he informed the panel that Hungana scored very close to the benchmark and that if he is favoured then they will lower the benchmark. Pye was supposed to send the submissions to Karwa and he was under the impression that Brandt received it. The benchmark was set at 80%. He averred that a benchmark can be changed if they favour an in equity candidate. It is the decision of the substructure.

25. Under re-examination he stated that the 80% benchmark was set at the shortlisting stage. Two submissions were created and he told them that he would do it. None of the panel members had any questions about the two submissions that he submitted. Horak was part of the panel that did the shortlisting and the interviews. Horak was aware of both submissions. He does not know how they reached the conclusion that the process was flawed. The process was clear and it was explained to the candidates. He contended that if there was no RS12 for Van Rooy then they would not have signed the submission for Van Rooy, as about three or four people would go through the documents to check if it is complaint. He has never touched Pye's computer.
26. Mr Brandon Hendricks (Hendricks) testified for the respondent under oath and stated that he is an assistant director in the employment policies and practises unit. All HR policies are kept by his department. He was formally appointed as the investigating officer when the grievance was lodged by the complainant. When there is a grievance then it is received by the designated employee and they will appoint someone to investigate the grievance and he was appointed by his office. The matter was first with Pye and then was escalated to his office and it would have been his HR manager from his office or the labour relations office. Nobody was interviewed and there was an attempt to resolve the matter and there is communication from the chairperson to the complainant stating the reasons why Hungana did not get the post. There is communication that Hungana did not meet the benchmark. There was communication where Pye stated that he did not meet the benchmark and therefore he did not have to interview Pye. He can only speak to the report which he did and he wrote the report based on the information available to him and whatever happened thereafter he does not know. When the investigation was concluded, he studied the available documents and he reported after having viewed the buff of documents. The rank order suitability is RS 12. RS 13 is the motivation. The person with the highest score is not always the successful candidate. He stated that there is no relationship between RS 12 and RS 13. When you place a name on a RS 13 then the panel has nominated a person to be appointed.
27. Under cross-examination he stated that Pye told Hungana that he did not meet the benchmark at the interviews which was 80%. He went to the recruitment documents

and all of the RS numbers are found in the file, including the RS 12. There should only be one RS 12 document. The person can see from that document what has transpired during the interview process. The employee's score and whether the applicant is in equity are factors. They do not usually have two benchmarks and only one benchmark that is used before they start the process. There is only one RS 13. There would only be one submission for the successful candidate. It is irregular to want to appoint two people. He averred that in this case, there were different benchmarks for different people. There were two motivations with different benchmarks to appoint two different candidates. He conceded that there was a manipulation of benchmarks. The enquiry person was the applicant. Pye was part of people management. Both Pye and the applicant were chairpersons in that process. Pye was the Head of HR and the applicant was the assistant director. He stated that the officials involved in the process must be disciplined. He was referred to the motivation of Mr Hungana and stated that he could have been appointed because he had already held that post. Final approval would stop at the CEO and Brandt would have looked at the reasons why an out of equity was appointed. Van Rooy was appointed because he was the only employee who reached the benchmark and he was recommended as the most suitable candidate. The true benchmark was 70% and not 80%. Under re-examination he stated that there was only one RS 12 in the file which showed a benchmark of 70%.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

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

### **Substantive fairness**

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



### **Charge relating to the newspaper article**

30. I agree with Mr Rodrigues that although there is no direct evidence that the applicant had shared confidential HR information with the journalist, Norman Cloete, the wording and the content of the article itself suggests that he did. With reference to the content of the article – it is not in dispute that the applicant and Pye were disciplined and issued with final written warnings for unauthorised leave payments that were made to them. It is further not in dispute that they had challenged this in arbitration. Reference was made in the article to specific amounts claimed by Kharwa and the applicant and Pye for leave payments. There is further specific detail about an email that Kharwa had sent stating that there would be no leave payments. It is therefore clear that the article contains very specific detail about the applicant and Pye’s grievance and in the light hereof, I find that it is highly unlikely that a third party would have been privy to such information. The applicant’s case is that their arbitration award would have been received by the HR department and therefore other people would have had sight thereof and approached the media therewith. I beg to differ. The article is not a replica of the arbitration award and contains information that is not contained in the arbitration award. Moreover, according to the forensic report presented by the respondent, Pye had deleted files or folders pertaining to the amounts that Kharwa was paid out for leave. This suggests that he had taken this information to the media, as the journalist stated that the Weekend Argus was in possession of those documents. The evidence further revealed that there were no other staff who were aggrieved about this issue as much as the applicant and Pye had been. I find that the contents of the article shows a clear nexus between the applicant and Pye’s grievance about Kharwa’s leave payouts.

31. According to the article, the journalist used language as follows: “They claim...”; “His staff members claim that they were unable to use their holiday leave...”; “The pair maintain that they had verbal approval from Kharwa.....”; “The staff members claimed.....”. The language used by the journalist in no uncertain terms suggests that he was approached by Pye and the applicant. The most plausible and reasonable deduction that can be made from the language used in the article and the content of the article itself is that Pye and the applicant had approached the Weekend Argus. I am not persuaded by the applicant’s version that it may have been somebody else.

There were no other people who had this particular gripe against Kharwa. The applicant and Pye clearly had a motive to approach the Weekend Argus with the information contained in the article. I agree with Mr Rodrigues that this has defamed the respondent and Kharwa, as there is no evidence that it was truth and in the public interest. In view hereof, it undoubtedly brings the respondent's good name into disrepute. It goes without saying that in the circumstances the trust relationship between the applicant and the respondent has broken down. The nature of the transgression is of such a nature that it breaks the relationship of trust between the parties which is an integral part of the employment relationship and what is more, the evidence is clear that the trust relationship between the parties have broken down irretrievably. Kharwa testified about how the newspaper article had adversely affected his integrity and credibility. This not only attacked Kharwa's credibility, but the credibility of the institution as a whole. I find that the respondent has succeeded in proving, on a balance of probabilities, that the applicant is guilty of this charge.

### **Charge relating to the alleged manipulation of the benchmark**

32. With reference to this charge, the applicant's case is that he prepared documents for Hungana's appointment, in the event that the sub-structure office wished to appoint an in equity candidate. This version was not put to any of the respondent's witnesses. The applicant did however always maintain that he did not change the benchmark so that Van Rooy could be appointed. The respondent's case is that the initial benchmark was set at 70% and that the applicant changed it to 80% so that Van Rooy could be appointed into the position. The evidence that the respondent adduced in support of this contention is the RS 12 document showing that Hungana is the most suitable candidate. This RS 12 indicated that the benchmark was set at 70% and in view hereof, the respondent wants me to draw an inference, in the absence of an RS 12 showing that the benchmark is 80%, that the benchmark was set at 70% and changed to 80% to favour Van Rooy. Brandt testified for the respondent and he stated that there was a RS 12 for Van Rooy, but that it was not part of the bundle of evidence. According to an email that Pye sent to Hungana, it was stated that he was not appointed because he did not meet the benchmark of 80%. This email and the evidence of Brandt supports the applicant's version that the benchmark was set at 80%. The RS 13 for Hungana

did not go further than the applicant and Pye's office. The applicant further stated that the submission to appoint Van Rooy had to go through a number of offices and signatures and that it is unlikely for there not to be an RS 12 that accompanies an RS 13. I find the applicant's version to be plausible in the circumstances. Surely one of the offices would have noticed that Van Rooy is not the most suitable if the RS 12 for Hungana is attached to the RS 13 of Van Rooy.

33. What is more, the applicant would have in all likelihood concealed the documents that supports the appointment of Hungana, if it did not want Hungana to be appointed and this includes the RS 12 and RS 13 documents and he did not do this. I find it unlikely that he would have drafted two submissions, as there is a likelihood that it could surface at any time. The applicant was correct that he should have been consulted about this at the time that Hungana referred a dispute and it would have shed light on the dispute. What is clear is that the respondent merely took the documents and inferred therefrom that the applicant had manipulated the benchmark. Albeit that I find that the applicant had not manipulated the benchmark to favour Van Rooy, it is clear that he had made an attempt to do so when he drafted a submission and an RS 12 for Hungana. All of the respondent's witnesses stated that it is unusual to change a benchmark after it is set at the commencement of a recruitment and selection process. On the applicant's own version he would have changed the benchmark and I find this to be irregular and tantamount to dishonesty. In the light of the above mentioned evidence, I find that the respondent failed to prove, on a balance of probabilities, that the applicant manipulated the benchmark to favour Van Rooy.

34. I find that the applicant's dismissal is the appropriate sanction in the circumstances for the following reasons:

34.1 The applicant occupied a critical position in the institution and one which required a substantial degree of trust. He worked with private and confidential information and when he approached the Weekend Argus and divulged private and confidential information, he unquestionably broke that trust. Albeit that the applicant may not have been the main perpetrator in divulging the specific figures involved, as this information was found to have been deleted on Pye's computer,

he was certainly an accomplice with Pye in the disclosure of confidential information of Kharwa. The applicant clearly breached his duty of trust towards the respondent in this instance.

34.2 The applicant showed absolutely no remorse when he maintained that he did not approach the Weekend Argus in relation to the newspaper article in question. He had done so in the face of overwhelming evidence against him in respect of this charge. This exacerbates the situation and shows that progressive discipline is not the appropriate sanction.

34.3 I consider the charge in relation to the newspaper article as serious. The newspaper article places the respondent's good name into disrepute and has caused a public outcry. The public outcry alone had the potential of causing so much harm, a situation that could have been avoided, had the applicant decided to deal with the matter in a different more civilised manner. The respondent cannot be expected to tolerate such unruly behaviour from its staff.

34.4 I have taken into account the applicant's length of service and clean disciplinary record.

34.5 Given the totality of factors mentioned above, I find that dismissal is the appropriate sanction.

35. The respondent has succeeded in proving that the applicant's dismissal is substantively fair, on a balance of probabilities.

**AWARD**

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

37. The applicant's application for arbitration is dismissed.

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**Janine Carelse**