PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **Minette van der Merwe**

Case No: **PSHS 473-18/19**

Date of award: **03 May 2019**

In the matter between:

NEHAWU obo Keatlegile Moses Ramatong (Union/ Applicant)

and

Department of Health-Free State (Respondent)

DETAILS OF HEARING AND REPRESENTATION:

[1] This matter was scheduled for arbitration on 12 November 2018, 15 & 16 January 2019, 21 & 22 February 2019 and 24 & 25 April 2019. The arbitration did not continue on 21 & 22 February 2019 due to the illness of the Respondent's representative.

[2] Parties were at all times present, and represented as per the cover page of this award.

[3] Proceedings were mechanically recorded and copious handwritten notes were kept. Interpretation was done by Mr. Themba Tshabalala, Bargaining Council appointed Interpreter, as and when required.

BACKGROUND TO THE DISPUTE:

[4] The matter was scheduled for arbitration in terms of section 191 (5) (a) in respect of a claim for unfair dismissal related to misconduct.

[5] The Applicant was employed as a Data Capturer (Level 3) with a salary of R 147 000.00 per annum. He commenced employment with the Respondent on 11 June 2011 and was dismissed on 09 July 2018 when his appeal was dismissed.

[6] The Applicant was charged with misconduct as follows (page 14 & 15 of "A"):

"***Charge 1***

That you are allegedly guilty of misconduct in terms of the Disciplinary Code and Procedure PSCBC Resolution 1 of 2003, in that, on or around 07 January 2016, unauthorized state property [46 containers for ***state use only*** *Atroiza – Antiretroviral medication] was found in your possession at your house with address; 13819 Jerusalema Park, Thabong, which were concealed in your washing machine, which action constitute serious misconduct.*

Alternative to charge 1

That you are allegedly guilty of misconduct in terms of the Disciplinary Code and Procedure PSCBC Resolution 1 of 2003 in that, on or around 07 January 2016 you were not authorized to have in your possession [46 containers of ***state use only*** *Atroiza medication] in your home at Thabong with address 13819 Jarusalema Park, which amounts to misconduct.*

Charge 2

That you are allegedly guilty of misconduct in terms of the Disciplinary Code and Procedure PSCBC Resolution 1 of 2003 in that, you gave false statement(s) as to why you had state property in your possession at your home with address 13819 Jarusalema Park, Thabong, which action constitute misconduct.

***Alternative to Charge** 2*

That you are allegedly guilty of misconduct in terms of the Disciplinary Code and Procedure PSCBC Resolution 1 of 2003 in that, you on the 07 January 2016 you were dishonest and unreliable for not disclosing that a member of the public gave state property to you, which is a scarce resource being Antiretroviral medication and for state use only, which action constitute serious misconduct.

Charge 3

That you are allegedly guilty of misconduct in terms of the Disciplinary Code and Procedure PSCBC Resolution 1 of 2003 in that, the Department of Health has suffered prejudice due to your actions as contained in the charges brought against you above, resulting in shortage of Antiretroviral medication, seriously denting the image of the Department of Health and the Department suffered financial loss, which action is viewed as serious misconduct. "

ISSUE TO BE DECIDED:

[7] I was called upon the determine the fairness of the dismissal on the following grounds:

Procedural fairness:

i. Whether the Respondent was in breach of PSCBC Resolution 1 of 2003 by failing to communicate the outcome of the disciplinary hearing within 5 (five) working days, and further failing to finalize the Applicant's appeal within the prescribed 30 (thirty) days

ii. Breach of Schedule 8 in that no consultation was held with the union prior to taking disciplinary action against the Applicant by virtue of the fact that the Applicant was a Shop Steward

Substantive fairness:

iii. Whether the charges were proven and subsequently whether the Applicant committed misconduct as charged

iv. Incorrect evidentiary weight attached to certain evidence, by the Chairperson

v. Whether the sanction of dismissal was appropriate in the circumstances

[8] The following facts were common cause:

i. The Applicant was employed by the Respondent, with employment details as per paragraph 5 of this award

ii. The Applicant was aware of the rule in the workplace

iii. The rule was reasonable

iv. The rule was consistently applied

v. The Applicant lodged an internal appeal, which was unsuccessful

vi. The Applicant was found guilty on all three charges levelled against him

vii. The Applicant pled not guilty to all three charges

viii. The Applicant attended and participated in his disciplinary hearing

ix. The Applicant was a Shop Steward at the time of the incident and the hearing

RULING ON THE ADMISSION OF HEARSAY EVIDENCE:

[9] Mr Nhlapo wished for me to consider a statement by one of the Police Officers that found the Antiretroviral medicine in the house of the Applicant. I provisionally allowed the hearsay evidence, with the understanding that the author of the statement would testify on its content during the arbitration.

[10] In civil and criminal proceedings hearsay evidence is regulated by **Section 3 of the Law of Evidence Amendment Act 45 of 1998** (the "LEAA") which stipulates that hearsay evidence would not be allowed unless if the parties consent, the person upon whose credibility it depends testifies later or if it is in the interest of justice to allow it. The last category might be problematic and any court must consider the nature of the proceedings, the nature of the evidence, the purpose of the evidence, the reason why the actual witness does not testify and any prejudice.

[11[Subject to the provisions of any other law, hearsay evidence may not be admitted as evidence at criminal or civil proceedings, unless:

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, him or herself testifies at such proceedings; or

(c) the court, having regard to:

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

[12] The rules of arbitration proceedings are, in general, less formalistic than criminal and civil courts. Arbitrators will therefore more readily be inclined to accept hearsay evidence. I have considered our case law regarding this issue and there are various decided matters. The following are of paramount importance:

In ***Swiss SA (Pty) Ltd v Louw NO*** *(2006) 4 BLLR 373 (LC*) it was held that hearsay evidence introduced outside the parameters of the Law of Evidence Amendment Act should not be allowed. An e-mail complaint was not allowed as the complainant could have testified at the inquiry.

In ***FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River*** *[2010] 9 BLLR 903 (LC)* witness statements were allowed were witnesses feared their lives**.** In ***POPCRU obo Maseko v Department of Correctional Services & others*** *[2011] 2 BLLR 188 (LC)* statements from prisoners were allowed against a prison warder and it was held that the admission was proper even though the warden was unable to cross-examine.

The court must also take into account any prejudice a party may suffer if the hearsay evidence is admitted. It is well established that the LEAA applies to CCMA arbitrations. In ***Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union & another (****2000) 21 ILJ 1315 (LAC)* the Labour Appeal Court held that, in the context of the LEAA, the test whether or not hearsay evidence should be admitted would be whether or not in a particular case the court thought it would be in the interest of justice that the hearsay evidence should be admitted.

In ***Sisonke Partnership t/a International Healthcare Distributors v National Bargaining Council for Chemical Industry and others*** *(JA 51/10) [2013] ZALAC 16 (handed down on 19 July 2013)* the Court with approval referred to the matter of Southern Sun Hotels and that of Swiss South Africa and confirmed the principle that hearsay evidence is allowed if it is in the interest of justice and that it was not irregular for the arbitrator to have relied on such hearsay evidence as the evidence was confirmed by other evidence.

The constitutionality of hearsay evidence was challenged in ***S v Ndhlovu*** *(2002) SACR 325 (SCA*) and it was held that Chairpersons should not passively accept hearsay in the absence of an objection, that the general rule should be explained to parties and that unrepresented individuals should be protected from ill-advisedly agreeing to allow hearsay. It is however not against constitutional principles to allow hearsay evidence.

It appears that any Commissioner should therefore consider and invite parties to comment on its usefulness even if there was no objection to it being admitted. It should, in general, not be allowed if it is tendered to prove a material issue and there is no other relevant direct evidence in support. When hearsay evidence is allowed, the question still remains what weight should be attached to such evidence.

[13] With aforementioned in mind and after considering the arguments as presented by the two representatives, I decided to deny the admission of the statement as hearsay-evidence. My brief reasons were as follows:

a) The Respondent representative, Mr Nhlapo, took no steps to secure the witness at arbitration, even after an instruction by myself to subpoena the witness
b) The witness also did not testify at the disciplinary hearing
c) The witness did not testify at the arbitration, despite Mr Nhlapo indicating at the commencement of the arbitration that he would testify
d) There was no other direct evidence led by the Respondent to support the statement
e) There was no agreement by parties as to the admission of the statement, and the Applicant's representative objected to its admission as well as the reliability of the content thereof
f) There was no reason advanced why the witness could not testify, e.g fear for his life, and why the statement should ultimately be admitted
g) The admission of the statement as hearsay evidence would have severely prejudiced the Applicant

SURVEY OF EVICENCE AND ARGUMENTS:

Documentary Evidence:

[14] Bundles “A, D & E” was submitted into evidence on behalf of the Applicant, whereas bundles “B & C” was submitted by the Respondent.

Oral Evidence:

Respondent’s evidence:

[15] The Respondent called one witness to testify, namely, Mr. **Luthandu Eric Yawa,** being the Chairperson of the Applicant’s disciplinary hearing.

[16] The testimony led is fully captured on the record of proceedings. I therefore do not deem it necessary to repeat it in this award.

[17] In essence, he testified that the hearing was postponed on 15 February 2016 so that the Respondent could consult with the union on the disciplinary action taken against the Applicant as required by the LRA, as the Respondent has failed to do so prior to levelling charges against him. Such consultation then took place during April 2016. The disciplinary hearing was procedurally fair. The charges against the Applicant were proven by documentary evidence and the Applicant’s testimony, as well as the inspection *in loco,* and further the Respondent’s evidence as a whole was not challenged by the Applicant. The Applicant’s representative at the disciplinary hearing Mr Rens (“Rens”) failed to submit mitigating factors for his consideration. Dismissal of the Applicant was appropriate as a sanction due to the severity of the misconduct. He communicated the verdict to the Applicant (“C”) and further his report as well.

[18] Under cross-examination he maintained that the procedure was fair, despite conceding that timeframes were not adhered to in terms of Resolution 1 of 2003 par 7.3 (o) and 8.8, however, blaming such on Rens’s tardiness. There was no objection to the Respondent’s request to use the Applicant as its only witness in the disciplinary hearing to prove the allegations against him (the Applicant), and there was nothing untoward about him having allowed it. No witness testified on the disciplinary hearing on the documentary evidence submitted by the Respondent in its case, but the documentary evidence was considered by him in his decision. He conceded that the Applicant’s dismissal was on the basis of his disciplinary report, which contained multiple admitted errors (e.g. page 23 & 26 of “B”). The e-mails contained in “C” were follow up

correspondence, and the outcome of the hearing was communicated within the timeframes of Resolution 1 of 2003, however then conceded he did not adhere to timeframes. He could not explain why the recipients of his e-mails ("C") did not reflect in full. When asked about the evidence led on the breakdown of the trust relationship, he stated that the Respondent proved such with the evidence on the charges against the Applicant when the Applicant was called as its witness by the Respondent. The Applicant had an obligation to prove his innocence during the disciplinary hearing. He did not respond when it was put to him that there was no evidence that the Antiretroviral medication found in the Applicant's house were concealed. The Applicant never disputed the fact that Antiretroviral medication was found in his house. He did not probe further into the Applicant's concession to the fact, in order to establish an explanation or the Applicant's version. He allowed the Applicant to testify both for the Respondent and for his own case. He could not recall whether there was any evidence led to rebut the Applicant's version at the disciplinary hearing.

[19] The Applicant was found guilty on charge 2 because of the statement he made, which was false. During the inspection *in loco* the Applicant's house was pointed out to him, but they did not enter the house. The purpose of the inspection *in loco* was not clear to him, but he granted it in any event. He testified that the Applicant's version was probable, albeit unusual. As for charge 3, the prejudice suffered by the Respondent due to the damage to its image and reputation could be inferred by him as the SAPS and the community was involved in the matter. He denied the assertion that he violated Resolution 1 of 2003 and the LRA.

Applicant's evidence:

[20] The Applicant testified in his own case and called an additional witness, Mr Rens. The testimony led by the Applicant and his witness is fully captured on the record of proceedings and therefore I do not deem it necessary to repeat it in this award.

[21] The Applicant, **Keatlegile Moses Ramatong**, testified under oath and his evidence was, in essence, that the union was not consulted prior to disciplinary charges being levelled against him, which led to the postponement of the disciplinary hearing on 15 February 2016. A consultation ultimately took place on 20 April 2016. On 15 June 2016 the hearing continued and he was called by the Respondent to testify as its only witness, to which Mr Rens objected, but the objection was overruled. The inspection *in loco* was granted by the Chairperson, but his house was never entered as part of it, neither was the SAPS office where the medicine was held. The outcome of his disciplinary hearing was not communicated to him within five days, and he was not afforded an opportunity to submit factors in mitigation, and he was further not furnished with the outcome report of the Chairperson until the first day of arbitration. His case felt like a set-up and predetermined, as he received the medication at 21h00 on 06 January 2016, was arrested at 03h00 on 07 January 2016, yet the same morning he received the letter of precautionary suspension. The outcome report by the Chairperson was not an accurate reflection of what transpired in the hearing. "C" did not reflect either his or Rens's e-mail addresses. The entire procedure was flawed.

[22] He never denied that the Antiretroviral medication was found in his possession, and has always maintained that a member of the public, who was not known to him, had brought it to his house at 21h00 on 06 January 2016, claiming that he picked it up in a veld. He had put it on top of his washing machine, intending to take it into the clinic where he worked the following day. At 03h00 on 07 January 2016 the SAPS stormed his house and arrested him at gunpoint. The medicine was not concealed at any point, and he did not give a false statement of the events.

[23] Under cross-examination he testified that, upon receipt of the Antiretrovirals from the member of the public, he tried to contact his Supervisor, Mr Keto, to alert him to what had transpired, but his phone went to voicemail. He could not foresee that he would be arrested, as he did not commit any crime or misconduct. It was explained to him

that he was always seen in the neighbourhood in the uniform of the Respondent, hence the medication was taken to him after it was picked up in the veld. Although nothing expressly prohibited the Respondent from asking him to testify in its case during the disciplinary hearing, it was irregular and unfair. He received the outcome of the hearing on 10 October 2016 by hand.

[24] During re-examination he demonstrated that the container with the Antiretroviral medicine was approximately 1.2 meters, which could not have fitted into his washing machine, and that would have been demonstrated if the inspection *in loco* was properly done.

[25] **Mr. Sizakele Charles Rens**, testified under oath and his evidence was, in essence, corroborative of the Applicant's evidence on the postponement on 15 February 2016 and the reason therefore, as well as the conducting of the inspection *in loco,* as well as the general disciplinary hearing process and its unfairness. The Chairperson made an audio recording of the hearing, which was never availed. The hearing report of the Chairperson was an inaccurate reflection of what had transpired. The Chairperson has not communicated the outcome with him, and he was not afforded an opportunity to submitted factors in mitigation. "C" reflected the Chairperson's e-mails to unknown recipients, as his e-mail address was not used. An accused can never be used by the Employer to prove the Employer's case, and the allowance thereof was highly irregular.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[26] Written closing arguments were submitted by parties on 30 April 2019. Same were duly considered, but will not be repeated herein.

[27] Mr. Yawa proved to be a highly inconsistent and unreliable witness. He contradicted himself on a number of aspects, and were evasive and easily agitated. The Applicant created a good impression and was unwavering under cross-examination, and led consistent and credible evidence. Mr Rens, although having corroborated the Applicant's evidence, appeared to be confused and unsure of himself during the arbitration, but same did not necessarily adversely affect his credibility as a witness.

Procedural fairness:

[28] Consultation with the union:

[28.1] It was common cause that the Chairperson postponed the disciplinary hearing on 15 February 2016 in order for parties to comply with the Code of Good Practice: Dismissal item 4(2). It was further common cause that parties had a consultation on 20 April 2016 in order to comply with item 4(2). It was further common cause that the Applicant was a trade union representative (shop steward) at the time.

[28.2] The Code of Good Practice: Dismissal states in item 4(2) that "*Discipline against a trade union representative or an employee who is an office-bearer of official of a trade union should not be instituted without first informing and consulting the trade union*".

[28.3] Much evidence was led on an "agreement" that was not reached during the consultation. There is no requirement to reach any agreement, but merely a duty to consult and inform the union.

[28.4] It was held in ***BIFAWU and another v Mutual and Federal Insurance Company Ltd*** *[2006] 2 BLLR 118 (LAC)* that the failure to consult with the union prior to taking disciplinary action against a shop steward did not automatically render the procedure unfair as long as there is no prejudice suffered by the employee.

[28.5] I had no evidence that any prejudice was suffered by the Applicant by the initial failure to consult the union. Further, the Respondent attempted to remedy the oversight in the consultation held between parties on 20 April 2016. As such, it cannot be held that this affected the procedural fairness of the Applicant's dismissal adversely.

[29] Compliance to paragraph 7.3 of PSCBC Resolution 1 of 2003:

[29.1] It was held in ***Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*** *(2006) 27 ILJ 1644 (LC); [2006] 9 BLLR 833 (LC)* that if Unions and Employers have agreed to a disciplinary model replicating the criminal justice model in the form of Policies or Collective Agreements, Employers are bound to apply the standards to which they have agreed. If they fail to do so, the procedure would be unfair.

[29.2] Par 7.3 states as follows:

"*7.3* ***Conducting the disciplinary hearing***

c. The employer and the employee charged with misconduct may agree that the disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council appointed by the council. The decision of the arbitrator will be final and binding and only open to review in terms of the Labour Relations Act, 1995. All the provisions applicable to disciplinary hearings in terms of this Code will apply for purposes of these hearings. The employer will be responsible to pay the costs of the arbitrator.

d. If the employee wishes, she or he may be represented in the hearing by a fellow employee or a representative of a recognised trade union.

e. If necessary, an interpreter may attend the hearing.

f. In a disciplinary hearing, neither the employer nor the employee may be represented by a legal practitioner, unless –

(i) 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

(ii) the disciplinary hearing is conducted in terms of paragraph 7.3.c.

For the purposes of this agreement, a legal practitioner is defined as a person who is admitted to practice as an advocate or an attorney in South Africa.

g. If the employee fails to attend the hearing and the chair concludes that the employee did not have a valid reason, the hearing may continue in the employee's absence.

h. The chair must keep a record of the notice of the disciplinary hearing and the proceedings of the meeting.

i. The chair will read the notice for the record and start the hearing.

j. The representative of the employer will lead evidence on the conduct giving rise to the hearing. The employee or the employee's representative may question any witness introduced by the representative of the employer.

k. The employee will be given an opportunity to lead evidence. The representative of the employer may question the witnesses.

l. The chair may ask any witness questions for clarification.

m. If the chair decides the employee has committed misconduct, the chair must inform the employee of the finding and the reasons for it.

n. Before deciding on a sanction, the chair must give the employee an opportunity to present relevant circumstances in mitigation. The representative of the employer may also present aggravating circumstances.

o. The chair must communicate the final outcome of the hearing to the employee within five working days after the conclusion of the disciplinary enquiry, and the outcome must be recorded on the employee's personal file. "

[29.3] From the evidence led, there was non-compliance to Resolution 1 of 2003 by the Respondent. In terms of paragraph 7.3(j) the Respondent had failed to lead evidence on what had given rise to the hearing. The Respondent had requested an inspection *in loco,* which yielded no results and provided no evidence on the charges against the Applicant as the Applicant's house, where the medicine was found, was never entered and inspected. The photographs used as documentary evidence by the Respondent (pages 25 – 30 of "A") established no evidence against the Applicant as the photographs were not demonstrative of the location where the medication was found, and further the Applicant had always maintained that Antiretroviral medication was in his possession and found in his house. The Respondent had failed to call any witnesses to proof the conduct of the Applicant which gave rise to the hearing. An Accused can never be used as the sole witness to prove allegations levelled against him/her. One may not be made to say something that incriminates oneself. This is the natural consequence or corollary of the presumption of innocence, and it applies both to criminal and to civil cases. Section 203 of the Criminal Procedure Act gives guidance on privilege against self-incrimination to the Accused in criminal cases. In civil proceedings, the witness has a wider protection by virtue of privilege than in criminal cases.

[29.4] There was further non-compliance in terms of paragraph 7.3 (m), (n) and (o) in that there was no evidence, on a balance or probabilities, that the Chairperson had informed

the Applicant of the findings and the reasons for it. There was further no evidence, on a balance of probabilities, that the Applicant was afforded an opportunity to submit factors in mitigation for the consideration of the Chairperson. Finally, there was no evidence, on a balance of probabilities, that the final outcome was communicated to the Applicant within five working days after the conclusion of the hearing. There was further non-compliance to paragraph 8.8 as the appeal was not finalized within 30 days, but rather only after approximately two years.

[30] It then follows that the dismissal of the Applicant was procedurally unfair.

Substantive fairness:

[31] Charge 1 and its alternative (par 6):

[31.1] It was common cause that the Applicant was in possession of unauthorized Antiretroviral medicine and that it was found in his house by the SAPS. There was, however, no evidence that the items were concealed or found to have been concealed. The Applicant testified that the items were not concealed, which evidence was corroborated by the Chairperson who conceded that no evidence was led on concealment. Mr. Nhlapo's failure to secure witnesses from the SAPS had the consequence that charge 1 and its alternative was not proven. The element of the unauthorized possession was given a plausible explanation by the Applicant. There was not need for him to have the member of the public, who gave him the medication, testify as the Respondent had failed to demonstrate a version other than that of the Applicant. Although the Applicant's version of events sounds curious, it is not improbable.

[32] Charge 2 and its alternative (par 6):

[32.1] There was no evidence led that the Applicant gave a false statement of events. His version had remained unchanged from the onset, and was reflected in his statement (page 24 of "A") in response to the intention to precautionary suspend him. There was further no evidence that the Applicant was dishonest in failing to disclose a member of the public had given the Antiretroviral medication to him as, again, it has been his version from the onset, in his statement as early as 11 January 2016.

[33] Charge 3 (par 6):

[33.1] No evidence was led that the Respondent suffered prejudice as a result of the incident, and further no evidence was led on a financial loss suffered by the Respondent as a result of the incident.

[34] In light of the fact that the Respondent was not able to prove the charges against the Applicant, it could not be held that he was guilty, and as such dismissal was not an appropriate sanction. Further, no evidence was led on how the trust relationship between parties had been affected.

[35] The Chairperson failed to demonstrate an understanding of the disciplinary hearing as a whole, as well as Law of Evidence and the evidentiary burden. He clearly has no understanding of an inspection *in loco* (even further demonstrated by him calling referring to it as an inspection *in logo*). Literally no evidence was led by the Respondent at the disciplinary hearing to prove the allegations, however, the Chairperson reached a finding of guilty on all three charges. This either demonstrates a lack of skill, or a predetermined decision on guilt. His hearing outcome further demonstrates that he took facts into consideration that was never in evidence, and that he does not understand the evidentiary value that must be attached to certain evidence.

[36] It then follows that the dismissal of the Applicant was substantively unfair.

[37] The Applicant prayed for retrospective reinstatement as well as compensation. The Applicant is only entitled to one remedy as they are mutually exclusive, as section 193 of the LRA states:

"(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that the dismissal is unfair, the Court or the arbitration may –

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee (limit of 12 (twelve months in terms of section 194 (1) of the LRA)

(2) The Labour Curt of the arbitrator must require the employer to reinstate of re-employ the employee unless –

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

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

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

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

[38] In light of the above, the appropriate order is for the Respondent to reinstate the Applicant.

[39] I further find it appropriate to make a cost order against the Respondent in this matter, for defending this claim where it did not have any evidence to prove its case, and for the costs incurred by the Applicant, NEHAWU and the Bargaining Council in this case.

AWARD:

[40] The dismissal of the Applicant, **Keatlegile Moses Ramatong,** by the Respondent, **Department of Health- Free State**, was both substantively and procedurally unfair.

[41] The Respondent is ordered to reinstate the Applicant, with retrospective effect, into the same position he held prior to his dismissal, and without any loss of benefits.

[42] As a result of the retrospectivity of the reinstatement, the Respondent is further ordered to pay the Applicant backdated salary to the amount of **R121 000.49** (one hundred and twenty-one thousand rand, forty-nine cents) and calculated as:

- R 147 000.00 / 12 = R 12 250.00 (monthly salary)
- R 12 250.00/4.33/5 = R 565.81 (per day)

- 10 July 2018 – 31 July 2018: R 565.81 x 16 days = R 9 052.96

- August 2018 – 30 April 2019: R 12 250.00 x 9 = R 110 250.00

- 01 – 03 May 2019: R 565.81 x 3 days = R 1 697.53

[43] The Applicant must report for normal duty on **01 June 2019**.

[44] A cost order is made against the Respondent as follows:

[44.1] Travelling cost of Mr Mofokeng between Kroonstad and Welkom

- R 3.61 per/km x 73.4km x 2 (per day) = R 537.16
- R 537.16 x 6 days' travelling = **R 3 222.96**

[44.2] Cost of the Bargaining Council:

- R 2 500.00 (per day) x 7 = **R 17 500.00**

  PLUS
- Travelling: 350km/3.61 x 4 = **R 5 054.00**

[45] The amounts mentioned above must be paid by the respondent by no later than **01 June 2019**.

Signature: 

Minette van der Merwe