ARBITRATION AWARD

Panellist/s: **Ananthan Sanjivi Dorasamy**
Case No.: **PSHS50-11/12**
Date of Award: **20-Nov-2011**

In the ARBITRATION between:

HAGGISON A T MJIYAKO

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative	:	MR A CHRISTISON (ADVOCATE)
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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 09H00 on the 27 October 2011, continued on the 28 October 2011,at the Natalia Building Pietermaritzburg. Mr A Christison an advocate instructed by attorney C O'Dwyer represented the applicant and Mr M Khumalo represented the Respondent (employer). The parties agreed to submit written closing arguments and the respondent submitted its closing arguments on the 18 November 2011.

APPLICANT'S OPENING STATEMENT

2 This application is brought to set aside the sanction of three (3) months suspension without emolument. The sanction was handed down on the 12 December 2010 following a disciplinary hearing held in the absence of the applicant on the 6 December 2010.

3. At the time the disciplinary hearing was held the applicant was present at the hospital premises. During the course of the disciplinary hearing he was performing an emergency procedure on a patient and was performing his medical duties as a doctor at the hospital.

4. The hospital at the time faced severe shortage of doctors. It was not possible for the applicant to relinquish his duties to attend the disciplinary hearing.

5. as appears from the report of the chairperson of the enquiry the decision to proceed was undertaken on the strength of the letter from the applicant dated 15 October 2010. In that letter the applicant expressed reservations with the procedure and indicated that unless provisions were made for him to have cover as a medical doctor he simply will not be in a position to attend the enquiry. The initial 19 October 2010 enquiry was postponed and on the day in question, Annexure 4 page 23(a) of the doctor's call register 2010, he was on call on the 19 October 2010.

6. The applicant did not receive a reply to his letter and no attempts were made to arrange for a medical doctor to replace him. At the time of the second enquiry there were no more than four (4) doctors and it would have been unfeasible to be released. The chairperson based his decision on the 19 October 2010, earlier enquiry and decided that the applicant indicated that he would not wish to attend.

7. The applicant was present at the hospital performing essential services in a position of staff constraints and no attempt was made to contact him and request that he attend the enquiry and whether he was willing to attend on that day. This is not withstanding that the chairperson in his report had been advised that the hospital had staff shortages and ought reasonably have considered the possibility that the applicant could not attend and if he attended it was not free without compromising his duties to the patients.

8. Further it must be noted that in the letter 15 October 2010 the chairperson relied on to proceed the applicant made certain representations concerning the different working conditions he faced (page 13).

The chairperson in evaluating the case had this information before him and made attempt to consider it in his report.

9. accordingly it is the applicant's contention that he was denied the opportunity of a fair hearing, was on the premises, not given a reasonable opportunity to attend and his written submissions were not considered.

10. On this basis the applicant contends that he was subjected to an Unfair Labour Practice in terms of section 186(2)(b) of the LA and that the sanction of suspension without pay for three months should be set aside.

RESPONDENT'S (EMPLOYER) OPENING STATEMENT

11. This application is that in short the applicant was subjected to an Unfair Labour Practice ,section 186(2)(b) in that he was not given a chance to attend an enquiry. He did not attend because he was busy doing work as a medical practitioner. He was found guilty and sanctioned with suspension without pay.

12. The applicant was given a fair chance to attend the enquiry in that on the first occasion he was furnished with a notice to appear and he replied that he would not attend an enquiry against him. The hearing was postponed and set down for the 6 December 2010. Several attempts were made to serve him with a notice and he frustrated all attempts by not allowing Ms Hlophe to serve him with a notice after several times of her attempts and after she indicated to him to receive the notice and sign for it. He advised her to come on another date and he was not inclined to receive it. She then wrote a report that he was not co-operating with her. In the report she stated that she waited until 18h40 to no avail.

13. Therefore his contention that he was not afforded a chance to attend is baseless. He was correctly found guilty and sanctioned.

14. He was a medical manager and could have arranged with his subordinates to advise the hearing that he was engaged in an emergency procedure and could not attend the enquiry.

15. The relief sought is unreasonable and baseless and should be dismissed.

ISSUE TO BE DECIDED

16. I am required to determine whether the Respondent (employer) had perpetrated an act of unfair labour practice against the applicant in respect of his disciplinary finding and sanction. Should I find in favour of the applicant, I am to determine what relief should be granted to him.

BACKGROUND TO THE ISSUE

17. The applicant, a medical manager was served with a notice to attend a disciplinary enquiry and after the first sitting was postponed, the reconvened hearing continued in his absence and he was found guilty and sanctioned to three months suspension without pay.

18. The applicant seeks the setting aside of the sanction whilst the employer prays for the sanction to be

upheld.

SURVEY OF EVIDENCE

APPLICANT'S CASE

HAGGISON ABEDINGO THEMBIKOSI MJIYAKO

The salient aspects of Dr Mjiyako's evidence are recorded below:

19. At the time he was the medical manager of the hospital. There was a severe shortage of doctors at the hospital and the doctors under his supervision needed constant supervision.
20. At the time of the second hearing, 6 December 2010 there were four doctors at the hospital and he living on the premises.
21. The hearing was scheduled for the 19 October 2010 and prior to that date he wrote a letter (15 October 2010) (page 13-14). He wrote the letter after receiving the notice and he wanted the employer to know that some of the issues brought forth were issues raised by him and he felt that due to the shortage it would have been difficult to work under those conditions. It was difficult to prepare and would be impossible to get support.
22. He wanted the presiding officer to consider the submission and wanted a response to his letter. If he received a reply and he was told that there was cover for him then he would have attended the enquiry.
23. He told Ms Hlophe that he wanted a response to his previous letter and the situation had gone worse in the hospital.
24. On the 6 December 2010 the day of the hearing he was in the hospital and was called to do an emergency procedure on a child that subsequently passed away.
25. During the day there was no attempt to call him to the enquiry.

Under cross examination he stated:

26. He was not informed that the first hearing was postponed.
27. He knew the investigating officer Mr Kheswa.
28. When he was suspended he picked up the documents and was asked to leave immediately. He is not at work currently.

RESPONDENT'S CASE

MBONGELENI THEMBILIHLE MGWABA

The salient aspects of Mr Mgwaba's evidence are recorded below:

29. He was the presiding officer in the matter. The first sitting did not take place because the applicant was not present and the employer was not ready.
30. On the 6 December 2010 he decided to proceed as the applicant was advised in the notice that the hearing would proceed in his absence. He was not contacted by the applicant that he would not attend.

31. the hearing concluded and he gave a sanction of three months suspension without emolument.

Under cross examination he stated:

32. He took all factors into account in arriving at his decision. The applicant was a senior employee and could have reached the presiding officer within minutes. He was not under obligation to find the applicant.
33. He read the applicant's letter and the issues raised were counter accusations against the management and he should have raised a separate grievance.

The parties agreed to submit written closing arguments the respondent submitted its written closing arguments on the 18 November 2011.

APPLICANT' CLOSING ARGUMENTS

34. The applicant's arguments are recorded below:

1.

This is an application to declare the Respondent's imposition of a sanction of suspension for three months without emoluments an unfair labour practice in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 ("the LRA"), for the setting aside of such sanction, and for compensation.

2.

The Applicant bears the onus of proving that the sanction constitutes an unfair labour practice.

3.

The parties agreed that the issues of procedural fairness and substantive should be separated, and that the question of procedural fairness should first be addressed.

<u>Background</u>

4.

It was common cause that:

4.1 The applicant was given notice to attend an enquiry on 19 October 2010.
4.2 The applicant sent a letter, dated 15 October 2010, in which he indicated he could not attend the enquiry and gave reasons therefor and made various submissions.
4.3 The enquiry was adjourned.
4.4 The respondent rescheduled the enquiry for 6 December 2010.
4.5 The applicant was shown notice of such enquiry on 25 November 2010, but had refused to accept and sign the notice.
4.6 The notice advised that the enquiry could proceed in his absence if he did not attend.
4.7 The applicant did not attend the disciplinary enquiry scheduled for 6 December 2010

4.8 The presiding officer decided that the applicant had no intention of attending any enquiry, and elected to proceed in the applicant's absence.

4.9 The presiding officer found the applicant guilty of all charges and decided on a sanction of three months suspension without pay.

Issues

5.

The applicant initially contended that the suspension was unfair on procedural grounds in that:

5.1 Given the nature of his work and working conditions, the presiding officer should have made an attempt to ascertain why he was not in attendance but had not done so, and that the applicant had a valid excuse for not attending;

5.2 The presiding officer failed to take into account the submissions made in the applicant's letter of 15 October 2010, and thus deprived the applicant of even the bare minimum of a hearing.

6.

The applicant now also contends that it has emerged in evidence that:

6.1 The respondent failed to properly serve notice on the applicant; and

6.2 The presiding officer was not impartial in reaching his decision, in that prior to considering the merits of the enquiry he had come to the view that the applicant was "arrogant".

Witnesses

7.

Two witnesses were led. The applicant testified on his own behalf, while the respondent led Mr Mgwaba, the presiding officer at the disciplinary enquiries held on 19 October 2010 and 6 December 2010.

The applicant's evidence

8.

8.1 The applicant testified that he was not in a position to attend the enquiry because he was under severe work pressure – at the time of the enquiry, he was one of only five doctors on the permanent staff establishment of St Apollinaris hospital, including inexperienced and community service doctors, who needed supervision, whereas the proper staff establishment was in the region of fourteen doctors.

8.2 Moreover, he testified that he carried additional administrative responsibilities as medical manager.

8.3 The existence of a staff shortage at the time of the enquiry was corroborated by the report of the presiding officer in which he recorded that there were just two doctors at the time at St Apollinaris, whereas there used to be sixteen.

9.

9.1 The applicant further testified that the enquiry was held on a Monday, that Mondays are difficult days at the hospital, and that he was obliged to work that morning. He further testified that at the time of the enquiry, he was involved in a medical emergency, in that he was required to attempt resuscitating a

young child who had undergone a tracheostomy. When attempts to revive the child failed, he had to inform the child's relatives and counsel them.

9.2 The respondent led no evidence to contradict this testimony.

10.

10.1 The applicant also testified that he had pointed out to the respondent by means of his letter dated 15 October 2010, that he would find it difficult to attend any enquiry because of his work pressure, and that when presented with the notice to attend the enquiry, on 25 November 2010, by Ms Hlophe, he had rejected such notice on the basis that he would not be able to prepare and the concerns set out in his letter, including those relating to his availability had not been met.

10.2 The applicant's response to Hlophe was partially corroborated by Hlophe's report dated 26 November 2010 (put up by the respondent; exhibit B5-6), in which it was stated "He read the notice and made nasty comments saying I as labour something must find his witnesses.and that his concerns were not addressed."

10.3 The applicant also testified that Hlophe made no attempt to serve the notice on him after 25 November, which is corroborated by her report. The report indicates that the applicant had attempted to postpone receipt of the notice to 29 November, but that Hlophe felt it should be served on 25 November to give him time to prepare. It is apparent from the date of the report (26 November) that when she was unable to serve the notice on him on 25 November she decided not to make any further attempts.

10.4 It subsequently emerged that the letter dated 15 October 2010 on which the applicant relied as proof that he had indicated to the respondent that he could not attend due to work pressure (Exhibit A13-14) was not in fact the version of the letter signed and sent to the respondent. The version actually sent (Exhibit C) made no reference to work pressure and long hours.

10.5 When called on to explain this discrepancy, the applicant testified that the copy included in Exhibit A had been printed from his computer, that this was the letter he had intended to send and believed he had sent, but that he must in fact sent an earlier draft. The respondent did not challenge this explanation.

10.6 Accordingly, the applicant conceded that he could not rely on the letter as proof that he placed concerns regarding his availability for the enquiry before the respondent and that the respondent had not been informed of such concerns.

10.7 Nonetheless, it is submitted that as the respondent did not challenge the applicant's explanation, the genuineness of the applicant's belief that he had placed such concerns before the respondent is also unchallenged.

11.

11.1 The respondent put it to the applicant that as in the reasons attached to his notice of appeal (exhibit B30) he had stated "I had written a letter to the investigating officer stating the reasons why I would not attend the enquiry; I still feel the same about those reasons", this clearly showed that he had no intention of attending a disciplinary enquiry.

11.2 The applicant denied that this was what was meant.

11.3 Under re-examination, the applicant noted that in fact he also stated on the same page that his desired outcome included "2. Chance to provide you with what is beyond compelling evidence and explanations against the charges, since I know (corrected to "now") have more doctors." He pointed out that this clearly showed that he willing to participate in an enquiry provided he was free to do so.

12.

12.1 In relation to his appeal, the applicant also testified that he had requested a hearing, as is apparent from the notice of appeal (Exhibit "B29"), on the grounds that he wanted to and was in a position to present his case, that he had submitted papers, but that he had received no reply other than the sanction stood.

12.2 The respondent led no evidence on the appeal process, save to note that the person serving as the appeal authority was currently suspended.

Mr Mgwaba's testimony

13.

Mr Mgwaba testified that he was a Deputy Manager in the Department of Health, and to his qualifications, which were extensive – BCom PGDip (Personnel Management) MA (Development Studies).

14.

14.1 He testified that at the first hearing on 19 October 2010, they waited for the applicant and attempted to locate him, but could not.

14.2 He testified further that the enquiry was postponed because the respondent was not in a position to proceed and to give the applicant a second chance.

14.3 From the minute of the hearing introduced into evidence by the witness (Exhibit D), it is apparent that the postponement was requested by the investigating officer, on the basis that some of the respondent's witnesses were unavailable and because the respondent had not served documents that would be used in the hearing on the applicant.

15.

15.1 Mr Mgwaba testified that at the hearing on the 6 December 2010, they again waited for the applicant to appear. He asked whether the applicant had been seen but was informed that the applicant had made up his mind and would not be coming.

15.2 He then felt it was fair to proceed with the hearing, and indicated that he relied on the applicant's letter dated 15 October 2010, which indicated that the applicant would not attend the hearing.

15.3 When it was put to him that the letter was making specific reference in this regard to the hearing on 19 October 2010, he replied that he viewed it as one single hearing.

15.4 He also indicated, and confirmed under cross-examination, that he viewed the tone of the letter as arrogant.

16.

Mr Mgwaba testified that if he had been presented with a reason why the hearing should be postponed that was valid and credible, he would have considered postponing the hearing.

17.

17.1 When the respondent invited Mgwaba to comment on the applicant's contention that he was always on the premises, but that no attempt had been made to call him, Mgwaba stated that the applicant had been presented with a notice to appear and that he had had evidence placed before him that the applicant had received that, and that this was sufficient.

17.2 Mgwaba also testified that there was in his view there was no reason why the applicant could not himself have sent a message indicating that he was detained, as he (Mgwaba) was aware that the applicant was just a short distance away from where the hearing was held.

17.3 When cross-examined on how he knew the applicant was close by, he indicated that he was aware of the general layout of the hospital.

18.

Under cross-examination, Mgwaba confirmed that his report (Exhibit A15-22) reflected all the factors that he taken into consideration in reaching his findings.

19.

He confirmed under cross-examination that he had read Hlophe's report, but disputed that the applicant's comment that Hlophe should find him witnesses was capable of being interpreted as the applicant indicating he would not have adequate opportunity to prepare.

20.

He confirmed that no attempt had been made to contact the applicant prior to the decision to commence the enquiry.

21.

21.1 It was put to Mgwaba that notwithstanding that the applicant was not in attendance, the applicant had made certain submissions in the letter dated 15 October 2010 that had a bearing on the case, but which he had not considered in reaching his decision, namely:

21.1.1 Submissions which could have been considered in mitigation of sentence, relating to the applicant's general frustration with the working environment, the fact that grievances he had raised had not been dealt with, and further that he had not been given the opportunity to comment on the complaints prior to the bringing of charges in relation to such complaints against him, but clearly showed his willingness to deal with such complaints.

21.1.2 A legal submission (expressed in layman's terms) that some of the issues were old, and that the employer had indicated by its conduct that these were not important because it had not dealt with them timeously, i.e. in lawyer's terms, a submission that the right of the employer to bring charges relating to older incidents had been tacitly waived through inaction.

21.2 Mgwaba replied that he had been aware of these submissions but had dismissed them as mere counter-accusations.

21.3 Under re-examination, he took the somewhat paradoxical position that he viewed the letter of 15 October 2010 as evidence, but that he took the view that it had not been intended as evidence, hence his ignoring of the submissions.

Legal submissions

Failure to attend the enquiry

22.

The general principle applicable to employees' participation in disciplinary hearings has been set out in ***Old Mutual v Gumbi*** **[2007] 8 BLLR 699 (SCA) at para 8**:

> "The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal. Should the employee fail to take the opportunity offered, in a case where he or she ought to have, the employer's decision to dismiss cannot be challenged on the basis of procedural unfairness."

23.

However, there is no universal test as to when an employer is entitled to proceed in the absence of an employee. In paragraph 7 of ***Gumbi*** **supra**, the following was stated:

> 'Of importance is the fact that, by extending the requirement of the audi alteram partem principle to employment relationships, our law promotes justice and fairness at the workplace. In doing so, the law promotes the primary objects of the Labour Relations Act 66 of 1995, namely, giving effect to South

Africa's obligations as a member state of the ILO and promoting social justice at the workplace (section 2 of the LRA). In this context, fairness must benefit both the employee and the employer.

The process of determining the actual content of fairness, in matters such as this, involves the balancing of competing and, sometimes, conflicting interests of the employee, on the one hand, and the employer on the other. The facts of a particular case determine the weight to be attached to such interests on each side of the scale. Expressing the view of this Court on this topic in National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others 1996 (4) SA 577 (A), Smalberger JA said at 589C–D: "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances. . . And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair.'"

24.

In ***Bosch v T H U M B Trading (Pty) Ltd*** **1986 7 ILJ 341 (IC)**, the Industrial Court noted:

"In certain circumstances justice requires that the enquiry be held as quickly and as speedily as possible; in other circumstances it becomes highly desirable, if substantive justice is to be done to an employee, that he be afforded every latitude to prepare himself for the hearing. A disciplinary enquiry which is held in the absence of an employee and with undue haste, can and does in most cases amount to a travesty of justice and is the clearest denial of the audi alteram partem rule."

24.

Accordingly, when an employee fails to attend a disciplinary enquiry, the question of whether the employer is entitled to proceed in the employee's absence cannot be separated from the surrounding circumstances.

25.

This is illustrated by the approach that is required where employees are absent from work and the employer wishes to dismiss them on such charge – if the employer can communicate with the employee, then it is obliged to give effect to the audi alteram partem principle. This is so even if the employee has ignored previous warnings to return to work. ***South African Broadcasting Authority v CCMA*** **[2002] 8 BLLR 693 (LAC) at paragraphs 15, 16.**

26.

It is submitted that the evidence shows that:

26.1 The applicant had raised at least some indication that he was concerned about his ability to find witnesses.

26.2 The applicant believed that he had placed sufficient grounds before the Respondent why the enquiry should not go ahead.

26.3 In practical terms, due to pressure of work, the applicant had little or no opportunity to prepare for an enquiry. Nor, due to staff shortages and his supervisory function, could he afford to set time aside for attending an enquiry without the employer providing acceptable cover, which cover was not forthcoming.

26.4 Hlophe only attempted to serve notice of the enquiry on the applicant on 25 November 2010. She made no further attempts thereafter. The presiding officer was either aware thereof or ought reasonably to have been so aware, as he admitted he had read Hlophe's report which detailed this information.

26.5 The presiding officer was either aware or ought reasonably to have been aware at the start of the enquiry, that the applicant operated under considerable work pressure and could be involved at any stage in rendering emergency medical treatment. He certainly was aware of this prior to reaching a decision, given the reference to the shortage of doctors in his report.

26.6 The presiding officer knew that the applicant's whereabouts were readily ascertainable.

26.7 At the enquiry held on 15 October 2010, the presiding officer had attempted to establish the applicant's whereabouts. At the enquiry on 6 December 2010, no such attempt was made.

26.8 The enquiry held on 15 October 2010, was not postponed due to the applicant's absence, but on application by the respondent, due to the respondent's lack of preparation and the fact that hadn't delivered the relevant documentation to the applicant.

26.9 On 6 December 2010, the applicant was engaged in a medical emergency and dealing with the aftermath thereof, at the time the enquiry was held.

27.

Given the surrounding circumstances, it is submitted that the presiding officer of the enquiry was not entitled to assume that the applicant had no intention of ever attending an enquiry. Instead, it is submitted there were compelling grounds for the presiding officer to believe that the applicant:

27.1 Had not been afforded a proper opportunity to prepare;

27.2 Would have good grounds for not attending, namely the rendering of essential services in an environment where the number of employees capable of rendering such services was extremely limited, with or without supervision.

28.

Accordingly, it is submitted the presiding officer should reasonably have taken steps to ascertain the applicant's whereabouts. Indeed the presiding officer took this step at the previous enquiry, on 19 October

2011. Such an approach would not have been unduly burdensome for the respondent, as the presiding officer's testimony indicates he did not believe it would be difficult to locate the applicant.

29.

Moreover, it is submitted that the applicant could not reasonably have been expected to attend the enquiry, because at the time he was rendering emergency medical assistance. Nor, it is submitted, could the applicant in such circumstances reasonably be expected to send notice to the presiding officer of the enquiry that he was unable to attend. His attention was rightly confined to the emergency, and subsequently to counselling the bereaved relatives.

30.

In the premises, it is submitted that the respondent denied the applicant a fair hearing when presiding officer decided to proceed with the enquiry in the applicant's absence.

Failure to properly serve notice

31.

Section 7.1(b) of PSCBC Resolution 1 of 2003 ("the KZNPA disciplinary code") provides that if an employee refuses to sign receipt of a notice of an enquiry, the notice (and presumably any documentation attached) must be given to the employee in the presence of a fellow employee; the latter must then sign the notice.

32.

32.1 It is submitted that the evidence shows that while the applicant was shown the notice of the disciplinary enquiry, the respondent did not in fact give the notice to him.

32.2 There was no need for Hlophe to withhold the notice from the applicant until he had signed it. Her report (Annexure B5-6) indicates that the applicant was often in the presence of other employees, who could have signed in lieu of the applicant.

33.

Accordingly, it is submitted that the applicant did not receive notice in accordance with section 7.1 of the KZNPA disciplinary code, and therefore that this renders the disciplinary enquiry and consequent sanction procedurally unfair.

Failure to consider submissions

34.

It is submitted that the evidence shows that the presiding officer of the enquiry viewed the applicant's letter dated 15 October 2010 as "evidence" but declined to apply his mind to the applicant's submissions contained in such letter, dismissing them as mere counter-accusations.

35.

It is submitted that these submissions give insight into applicant's and his dedication to his work for the respondent and the deep level of frustration he felt, which ought to have been considered as mitigating factors. It must be borne in mind that most of the charges related to alleged outbursts by the applicant.

36.

Per section 7.3(n) of the KZNPA disciplinary code, the presiding officer ought to have applied his mind properly to the question of mitigation. In failing to consider the applicant's written submissions placed before him, the presiding officer failed to properly apply his mind to the question of mitigation. In the premises, he did not follow a fair procedure.

37.

37.1 Moreover, the applicant submitted (in layman's terms) that the employer had failed to bring certain of the charges in a reasonable time after the events to which they related and accordingly that the employer had conveyed to the employee that it did not regard him as having committed misconduct.

37.2 This is a recognised defence which at least merited consideration by the presiding officer. **See *Van Eyk v Minister of Correctional Services* (2005) 26 ILJ 1039 (E); Section 2.2 of the KZNPA disciplinary code.**

37.3 Accordingly, the presiding officer not only denied the applicant a hearing in person, but having decided to do so declined to consider the applicant's written legal submissions, thereby denying him even the bare minimum of a hearing in circumstances where he had made some form of representation that needed to be considered.

37.4 In the premises, it is submitted the respondent failed to follow a fair procedure.

<u>The presiding officer was not impartial</u>

38.

It is submitted that the evidence shows that the chairperson of the enquiry adopted the view that the applicant was arrogant on the basis of the letter dated 15 October 2010, prior to considering the merits of the charges.

39.

It is submitted that this indicates that prior to considering the merits of the charges brought against the applicant, the presiding officer no longer kept an open mind and accordingly was biased in reaching his final decision, or alternatively that a reasonable person in the applicant's position can no longer be satisfied that the presiding officer was unbiased. **See *Townsend v Roche Products (Pty) Ltd* (1994) 15 ILJ 886 (C) at 889A-D, 890A-B; *Slade v Pretoria Rent Board* 1943 TPD 246**

40.

It is trite that a presiding officer in a tribunal must refrain from showing bias or even the impression of bias until they have given their decision. If a presiding officer exhibits bias, the proceedings will be unfair even if the decision reached is factually and legally correct. **See Grogan. *Dismissal*. (2010). Juta: Cape Town, pages 240-241.**

41.

In the premises, it is submitted that the applicant has been subjected to procedural unfairness on the ground that the presiding officer was biased or has subsequently conveyed the impression that he was biased.

<u>The appeal</u>

42.

Procedural unfairness at a hearing can be cured by an appeal procedure which constitutes a complete rehearing.

43.

Section 8.1 of the KZNPA disciplinary code read with Annexure E thereto provides an employee can request the opportunity to lead further evidence not available at the time of the disciplinary procedure. Section 8.5 of the code provides that the appeal authority is empowered to require a hearing.

44.

It is submitted the evidence shows when the applicant noted an appeal, he requested the opportunity to be lead additional evidence and be heard in person, given that he had not been able to attend the disciplinary enquiry but had the opportunity to prepare for and appear at an appeal hearing. The applicant was not given the opportunity to be heard in person and there is no indication this request received due consideration from the appeal authority. The applicant's sanction was simply confirmed.

45.

It is submitted that as the appeal did not offer the applicant a complete rehearing of the matter, it did not cure the procedural unfairness of the original enquiry.

46.

46.1 Moreover, it is submitted that in circumstances where the original hearing was held in the appellant's absence and the appellant challenges the factual findings as well as sanction, then in order to give full effect to *audi alteram partem*, a complete rehearing (i.e. a "wide appeal") should be held where the disciplinary code permits a full rehearing, unless there are compelling circumstances why such an approach need not be followed.

46.2 It is submitted that the KZNPA disciplinary code provides for the possibility of a complete rehearing and accordingly that the applicant should have been afforded a complete rehearing unless there were compelling circumstances why such an approach need not be followed.

46.3 As the respondent has led no evidence to explain the approach taken by the appeal authority, it is submitted that the proper inference is that the appeal authority unfairly denied the applicant a complete rehearing. **See *Mekgoe v Standard Bank of SA* [1997] 4 BLLR 445 (CCMA) at 455.**

46.4 Accordingly, the appeal procedure followed by the respondent was also procedurally unfair.

Remedies

47.

47.1 A suspension is unfair and constitutes an unfair labour practice if the hearing held prior to the suspension being issued was unfair. ***SA Post Office v Janse van Vuuren NO* 2008 29 ILJ 2793 (LC)**.

47.2 Where an arbitrator finds that an unfair labour practice has been committed, s/he may determine the dispute on terms which s/he deems reasonable, which includes ordering reinstatement, re-employment or compensation. **Section 193(4) of the LRA.**

47.3 It is submitted that the applicant has shown that the hearing held prior to his suspension being issued was unfair.

47.4 In the premises, it is submitted that the applicant is entitled to a declarator that he has been subjected to an unfair labour practice.

47.5 It is further submitted that the suspension should be set aside retrospectively, on the grounds that the applicant was not given a fair hearing prior to suspension and the suspension was accordingly unlawful. ***Baloyi v Department of Communications* 2010 31 ILJ 1142 (LC); *Dince v Department of Education, North West Province* 2010 31 ILJ 1193 (LC).**

47.6 It is further submitted that the applicant should be compensated for the detrimental effect of the unfair suspension on his reputation, advancement, job security and fulfilment. ***SA Post Office* supra at paragraph 39**.

Conclusion

48.

In the premises, it is respectfully submitted that the applicant has made out a case that he was subjected to the disciplinary sanction of a suspension without pay in a procedurally unfair manner and accordingly that he has been subjected to an unfair labour practice and is entitled to the setting aside of the suspension with retrospective effect, and to compensation.

WHEREFORE the applicant prays for an award in terms of which:

a. The respondent is declared to have committed an unfair labour practice against the applicant; and

b. The sanction of suspension without emoluments for three months is set aside;

c. The applicant is paid three month's remuneration in compensation;

d. Costs of application.

35. RESPONDENT'S CLOSING ARGUMENTS

The respondent's arguments are recorded below.

01.

The issue to be decided is whether the respondent acted procedurally when it disciplined and suspended the applicant after the hearing was held in the applicant's access or not.

02.

The facts of the dispute will not be repeated to prevent prolixity. It is submitted that the record bears the details of the facts.

03.

On the day of the disciplinary hearing the applicant was in the premises of the respondent and he made no attempts to inform the presiding officer that he would not be able to attend a hearing as he was busy with the patients. the applicant advanced no reasons why he did not make any attempts to ensure that the presiding officer is aware that because of his nature of work he could not attend the hearing on the 06th of December 2010. The applicant admitted to have written a letter which spelt it out clearly that he will not the hearing as the people who were dealing with the hearing were not clinically informed and or educated.

04.

It is submitted that the applicant waived his right of having the hearing heard in presence. The applicant was blatantly very overbearing in his attitude towards the hearing itself. He elected not to attend a hearing and he made no attempts to have it postponed. It is worth mentioning that the hearing was initially set down to proceed on the 19th of October 2010 and it was postponed to the 06th of December 2010 to give the applicant to reconsider his decision not to attend which the presiding was made aware of on the 19th of October 2010.

05.

The applicant was served with a notice to appear in misconduct hearing on the 06th of December 2010 and he refused to sign for it. The applicant admitted that he was aware that he was required to attend the hearing on the 06th of December 2010 though he did not sign for it. This means therefore that the applicant was hell bent to make a mockery of the hearing tribunal which was properly constituted.

06.

The applicant submitted that he could not attend the hearing because he had to attend to the patients. He further submitted that he had not taken vacation leave in eighteen months because if he left patient care would be grossly compromised. This submission is absurd, in that the applicant was suspended for three months

without pay which means that he was not at work for three consecutive months, and service delivery particularly patient care. The applicant's submission that he could not attend the hearing because he was busy does not hold water.

07.

Resolution 1 of 2003 does not make any mention of the need to call the applicant after a notice has been properly issued and served on the applicant.

The applicant's representative's argument that the applicant ought to have been called on the day of the hearing is absurd. It is shocking to learn that the representative quotes cases which are dealing with dismissal cases not unfair suspension. It is my submission that the applicant was not dealt with unfairly by conducting his hearing in his absence.

08.

The presiding officer had no burden to go an extra mile of calling the applicant after he had made clear that he was not going to attend a hearing for the reasons cited in a letter dated the 15 October 2010. The letter also lists a litany of grievances against the Hospital CEO. It is submitted that the applicant wanted to use grievances he had against the CEO to halt the disciplinary action. Unfortunately that did not work for him. Grievances are dealt with in terms of the grievance procedure PSCBC Resolution 14 of 2002 and discipline is dealt with in terms of disciplinary code and procedure PSCBC Resolution 1 of 2003.

09.

It is therefore submitted that the applicant's case was correctly dealt with and there were no procedural flaws. Wherefore the respondent prays that the applicant's case be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENTS

36. This matter was cited as an unfair labour practice dispute in terms of Section 186 (2)(b) of the LRA. The issues to be decided was whether the respondent (employer) perpetrated an act of unfair labour practice against the applicant in respect of the findings and sanction meted out to the applicant and if my finding be in the affirmative what would the appropriate relief be to him.

37. I have taken cognizance of the decision in Sweeney/ Transcash [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitutes a rehearing *de novo* on the merits. The award must accordingly be based on evidence led at the arbitration.

At the arbitration the parties tendered bundles of documents and the representatives referred to portions in their arguments. As such the material was properly before me and neither party had objected to it. In University of the North v Nobrega & Another (1999) 20 ILJ 2117 (C) it was held that if any party had had any objections to the material being admitted, it should have raised and

dealt with it in the hearing. As there were no objections to the tendered documents, I am entitled to rely on it.

38. The issues in dispute in this matter are fairly straightforward.

The applicant was the medical manager who was found guilty at a disciplinary hearing held in his absence and sanctioned to three months suspension without pay. He challenges the sanction imposed and prays for it to be set aside. The respondent prays for the sanction to be upheld

39. In order not to protract my determination I record that I have taken note of the party' submissions and the documents tendered and taken cognisance of the applicant's reference to case law where such reference is pertinent to this case.

40. This matter relates to the imposition of a suspension as a sanction and not as a precautionary measure pending a contemplated hearing.

41. The applicant was a senior employee and was aware that the employer intended to take disciplinary action against him. This is confirmed by his letter to the employer prior to the first sitting. In this letter he raised certain issues including the pressure of his work situation, the shortage of doctors ect. The presiding officer was privy to these concerns and determined that the applicant's concerns ought to be raised in terms of the grievance procedures and these concerns had to be separated from the allegations that he had to deal with in terms of the allegations against the applicant.

42. The applicant is not a lay person and was aware that the employer was taking action against him. He ought to have placed more emphasis on the hearing against him because hypothetically if he was subpoenaed to court then his non attendance would receive serious sanction. The fact that he believed that he was crucial for the proper functioning of the hospital is misplaced because the institution continued in the period during his suspension and currently.

43. The challenge that faced the presiding officer was to establish whether the non attendance of the applicant at the hearing on the 6 December 2010 could have a plausible reason. In ordinary cases the presiding officer is to determine whether the absent party was aware of the hearing and once proof is furnished then it is with the discretion of the presiding officer to proceed with the matter.

44. The applicant ought to have exercised greater discretion in that given that he was immersed with an emergency situation it was not beyond his control to alert the presiding officer of his predicament. The fact that he chose not to inform the presiding officer of his not attending the proceedings would tantamount to him being the architect of the adverse result being meted out against him. He by his actions denied placing his defence to the allegations against him. The allegations against him have not been addressed and as such I cannot make a finding whether the findings of the presiding officer was competent or not but do believe that the findings from the presiding officers report is unreasonable or unfair and according to the County Fairs Food case

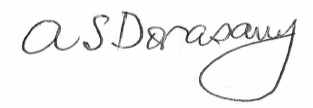
does not shock or alarm. Further I have taken note that case law suggest that arbitrator's should not simply rubber stamp the decision of the employer but should determine whether the decision of employer was one that a reasonable decision maker would make.

45. As a consequence of the above I do not find the Respondent (employer) had perpetrated an act of unfair labour practice against the applicant in respect of his disciplinary sanction.
46. The application is dismissed and the sanction is confirmed.
47. Further I have considered the issue of costs and do not believe that any party should be saddled with a cost order against it.

AWARD

48. The respondent did not perpetrate any act of unfair labour practice against the applicant.
49. The application is dismissed.
50. The sanction is confirmed.
51. There is no order as to costs.

DONE AND SIGNED IN DURBAN ON THIS 21 DAY OF NOVEMBER 2011.



Arbitrator: Anand Dorasamy