PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: **PSHS527-17/18**

Commissioner: **T ERASMUS**

Date of Award: **5 October 2017**

In the matter between:

PSA obo DR ELRICH JOHANNES (Union/ Applicant)

and

DEPARTMENT OF HEALTH- WESTERN CAPE (Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 186(2)(5) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard at the offices of the Boardroom, Paarl Hospital, Paarl on 27 September 2017. The Applicant was represented by B Jacobs from PSA, whilst the Respondent was represented by Mr M Ngqame, Labour Relations Officer at Respondent.

ISSUE TO BE DECIDED

2. I must decide whether Applicant was subjected to an unfair labour practice.

APPLICANT'S OPENING STATEMENT

3. Applicant was subjected to an unfair suspension or disciplinary action short of dismissal. Applicant received a final written warning on 13 June 2017 and the sanction was upheld on appeal. Applicant was charged with insubordination for failure or refusal to comply with an instruction. He complied with the duty towards the patient, he was not insubordinate. Applicant admits that he received instructions by way of e-mail, but the e-mails were only brought to his attention afterwards. According to Applicant the service providers disconnected his computer from the network, as there were not enough points in his office. Applicant called the IT specialist to fix the network problem. Applicant experienced victimization from his manager. Disciplinary action should be corrective and not punitive. The supervisor did not follow the procedure of correcting his behaviour. The final written warning served on Applicant on 13 June 2017, was issued for alleged insubordinate behaviour, before counselling the Applicant. It stems from Dr Louw wanting Applicant to work overtime without pay on 10 May 2017. Bringing in a locum means there is a budget and the workload is high at the time. Applicant would have performed the work of two people at the time. Applicant seeks the final written warning to be removed from his record.

RESPONDENT'S OPENING STATEMENT

4. Applicant was issued with a final written warning. Applicant was informally disciplined for failure to carry out an instruction to communicate with his supervisor for work related matters. Applicant refused to follow instructions. Applicant was previously disciplined for similar transgressions although those warnings have already lapsed. The Respondent issued a final written warning as Applicant failed to improve his behaviour, in spite of previous progressive disciplinary action taken against him. The Respondent's service delivery will suffer and will have a negative impact on other staff members, Applicant continued with his insubordinate behaviour. There is a Code of Good Conduct to which all staff members have to adhere. It is a serious offence therefore the final written warning is an appropriate

sanction under the circumstances. Applicant admits that the instructions were given to him by e-mail, although he avers he received the instructions after the fact.

APPLICANT'S CASE

5. **ELRICH JOHANNES testified in support of his own case (hereinafter referred to as "Applicant")**

6. Applicant received a final written warning from his supervisor for failure to communicate with him properly. The transgression for which Applicant was disciplined took place on 10 May 2017. Reference was made to page 11 in bundle A, being a Final Written Warning. Applicant acknowledged receipt of the final written warning, although he did not agree with the contents thereof. Applicant stated that there is too much work for one radiologist and he is the only radiologist employed by the Respondent at present. Applicant was asked to work overtime on many occasions in the past and/or his academic afternoons were cancelled unilaterally. Applicant believes that he was harassed by cancellation of his academic afternoons. Applicant has no problem with communicating. Applicant stated that the hospital is over budget and Respondent will not easily appoint a locum. Applicant was convinced that Dr Louw was going to ask him to work overtime again without pay. Therefore, he wanted a PSA representative present. According to Applicant, he is not easily contactable and he was not afforded time for academic administration, in spite of his various requests thereto. Applicant is not the only person who works in his office and he does not have an assistant that can assist him with administration. Applicant stated that he cannot fiddle with IT workstations, as they are worth millions.

7. Applicant does not deny that the e-mails were sent. Applicant knew that the meeting with Dr Louw on 10 May 2017 would revolve around Dr Louw asking him to work overtime again, therefore he insisted on having his PSA representative present.

8. Reference was made to page 18 of bundle A, being the e-mail communication between Dr Louw and both Laurette Esterhuizen and Applicant, where Dr Louw stated the following:

"*Hi Laurette*
Please see if you can get a locum radiologist to assist as discussed; and/or rebook patients.

Elrich – you are obliged to communicate with me in matters pertaining to the daily running of the hospital. If you do not do so via e-mail or message, then I have no alternative but to do so in person. Please do not be obstructive in this regard. I expect of you to answer your emails promptly if you choose not to speak with me in person."

9. According to Applicant, the hospital does not want to appoint a locum, because it is too expensive. Applicant stated that on arrival at work, he looks at the workload and assesses the work. A backlog is often created on his return from leave. Applicant stated that he does not have administrative time or access to his e-mails at all times. Applicant deducted that Dr Louw wanted to speak to him about working overtime again when he received the e-mail dated 10 May 2017. Applicant reported his unhappiness with the standard of the imaging in the Radiology Department previously. Applicant responded to Dr Louw's e-mail on page 19 by stating:

"*I've been feeling sick and may possibly not be able to work tomorrow*."

10. The final written warning is dated 12 June 2017 although it was received by Applicant on 13 June 2017. Applicant confirmed that he was subjected to both a written warning on 20 May 2016 and a final written warning on 5 September 2016, both of which has lapsed. There were no interventions or consultations since the final written warning he received in September 2016. The allegations about insubordination are hearsay. There was no actual instruction given, therefore he cannot be guilty of disobeying an instruction. According to Applicant Dr Louw said

things without ever investigating anything. According to Applicant he worked extremely hard and therefore never disobeyed an instruction. Applicant believes that he was taken advantage of and/or victimized. Respondent requires Applicant to work without pay whenever there are too many patients.

11. Reference was made to page 9 and 10 of bundle R, being the previous final written warning. Applicant stated that his working conditions during this time all related to issues he had with the hospital and not with people as such. There were no strategic meetings in this time to smooth out his working conditions. The meetings were not recorded although he asked for the meetings to be recorded on many occasions. He complained about technical problems in the department and the potential medical negligence. The whole meeting would end up in a conversation whereby Applicant would be accused of being insubordinate. Applicant on the other side felt ethically obliged to protect patient care. Applicant never received any feedback on his complaints. Applicant was not included in the day to day management of the department. According to Applicant he always had an excellent communication with Respondent, except when he wanted to address problems from his side. Applicant seeks the final written warning to be removed from his record.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

12. Applicant conceded that he received instructions in the form of an e-mail. According to Applicant he was never instructed to following a specific instruction. According to Applicant he complied with the instruction from Dr Louw on page 18 of bundle A as best as he could by his response on page 19 by informing Dr Louw that he was not feeling well and the he could possibly not work the following day. According to Applicant he responds to the e-mails whenever he is able to do so.

13. Reference was made to pages 31 and 32, being an e-mail from Applicant to Juanita Andrews, Eben Afrika, André Strydom, Hanneke Wolfaardt and Angelo Fisher, where he queried the referral to ICAS. On page 20 it is clear that Dr Louw asked for assistance out of desperation. Applicant conceded that Dr Louw was asking

for assistance. It was put to Applicant that it means that he did not respond to Dr Louw. Applicant responded that they met with Eben Afrika and Dr Louw. It was put to Applicant that Dr Louw is pleading for help and that it sounds very dramatic, but what really happened is that he stayed and did all the work and spoke to Eben Afrika about the matter. He certainly communicated in this respect.

14. Reference was made to page 21 where Eben Afrika stated:

"*Ek het nounet bevestiging ontvang van Dr Johannes dat hy vanmiddag sal werk. Ons sal egter saam moet gaan sit en kyk na Dr Johannes se eise, wat hy dan sal voorlê*."

15. Applicant responded that as his previous representative, André, was not available, he had to make use of Eben Afrika to assist him. It was put to Applicant that Dr Louw says that he refused to communicate with him and that Dr Louw is his manager and that he cannot manage Applicant through his union representative. It was put to Applicant that every time that Dr Louw wanted to communicate with him about work related matters, he insisted on union representation. Applicant responded that he only wanted his union representative present in the specific incident where Dr Louw wanted him to work overtime without pay or when Dr Louw wanted to change his conditions of employment unilaterally. Applicant was challenged whether he did not comply with the instruction, because he thought that Dr Louw wanted to talk to him about him wanting to work overtime without pay. Applicant responded that there was an e-mail from Eben Afrika on the 10th of May 2017, where he stated that the issue has been sorted out and that Applicant would work overtime. Applicant conceded that he did not speak to Dr Louw at that time, but that Eben Afrika spoke to Dr Louw instead.

16. It was put to Applicant that the issue at stake is the fact that he did not follow an instruction. According to Applicant he spoke to Dr Louw in the office.

17. Reference was made to page 29 of bundle A, the 4th bullet, where Applicant addressed an e-mail to Anne-Marie Basson, Angelo Fisher, André Strydom, Eben Afrika and Hanneke Wolfaardt. He had the following to say about Dr Louw:

"*Dr Jacobus Louw demonstrated very poor managerial skills and unethical behaviour but he was appointed as my manager. Despite the multiple specific concerns there was no managerial intervention that I'm aware of, other than to write a nonspecific letter which casts the unsubstantiated aspersion that I "find it a challenge to adapt to the workplace*."

18. He went on further to state:

"*Dr Louw clearly needs assistance and further training. He repeatedly displayed a lack of managerial ability, in that:*

- *the root cause if the issues is mismanagement and not interpersonal dynamics.*
- *he never performed any fact-finding exercises.*
- *he takes inappropriate disciplinary action without knowing the relevant specific facts.*
- *he takes inappropriate disciplinary action because of his personal frustrations.*
- *he is less than truthful and breaks his promises.*
- *he has difficulty communicating in a nonthreatening manner.*
- *he forgets what was discussed at meetings yet, despite my repeated requests, he refuses to record meetings (which would afford everyone protection and would serve as a reference for him, when he forgets important information)*."

19. It was put to Applicant that he disrespected Dr Louw as his manager and that he spoke badly about him. According to Applicant he had an issue which could potentially kill patients and he felt obliged to report it. Applicant stated that he had problems about the quality of the standard of care at the hospital. It was put to Applicant that he is a consultant and highly intelligent and should have escalated his concerns, which he failed to do. Applicant was challenged on his statement that he was given no assistance as a radiologist, yet he was referred to ICAS. Applicant responded that he does not know what ICAS is, therefore he called for

clarification as per pages 31 and 32 of bundle A. It was put to Applicant that his e-mail was full of offensive wording against his manager. Applicant responded that it is accurate and he has evidence to substantiate same. Applicant responded that there is no reason for him to have daily interaction with his supervisor. According to Applicant he has never been allowed to attend a single academic meeting at Tygerberg Hospital and although there is support staff, he is the only radiologist employed at Paarl Hospital. Applicant conceded that although the written warnings on pages 9 and 10 of bundle A have already expired, that disciplinary action has indeed been taken against him in the past.

THE FOLLOWING ENSUED FROM RE-EXAMINATION:

20. The purpose of the e-mail on page 29 was to provide some positive feedback on a lot of ugly stuff that had happened. Reference was made to pages 28 to 30 of bundle A. Applicant stated that there was never a response from Anne-Marie Basson to the effect that he lashed out in his e-mail. Applicant responded that he exhausted all the internal channels available. Applicant stated that he had no disciplinary issues with Respondent before. The Respondent referred him to ICAS, but the Respondent never queried him afterwards to find out why he did not go to ICAS. Applicant could not attend academic sessions due to workload, although he sometimes attended academic sessions in his private time. He does most of his reading work and preparing talks after hours.

RESPONDENT'S CASE

21. **DR COENRAAD STEFANUS JACOBUS LOUW testified on behalf of Respondent (hereinafter referred to as "Dr Louw")**

22. Dr Louw testified that he is the manager of medical services and acting CEO of the Paarl Hospital since the 1st of February 2017. Dr Louw is Applicant's supervisor. He served the final written warning evidenced on page 1 of bundle R on Applicant after an incident of insubordination. There were previous incidents of insubordination in the past. Dr Louw had to go to Applicant's office to give him an

instruction not to take his academic afternoon, which is a privilege. Dr Louw tried to make contact with Applicant via e-mail the previous day, therefore he went to Applicant's office. Applicant bluntly refused to communicate with Dr Louw without his union representative, André Strydom, present. This amounted to insubordination. Dr Louw referred to the e-mail he sent to both Laurette Esterhuizen and Applicant on page 18 on 10 May 2017. He requested Applicant to communicate, but Applicant refused to communicate with him. Dr Louw then asked the senior surgeon, Dr Wayne Johnson, to try and speak to Applicant. Dr Johnson returned with a message that Applicant was too busy to speak to him. Dr Louw then asked Eben Afrika, the PSA union representative to speak to Applicant. Dr Louw then went to Applicant's office and tried to communicate with him. Applicant refused to communicate with him without his union representative present and closed the door. The manner in which Applicant refused to communicate with Dr Louw was insubordinate. Dr Louw then wrote an e-mail to Laurette Esterhuizen to appoint a locum as he believed that Applicant would not be at work the following day.

23. It was put to Dr Louw that Applicant made the following allegations against him:

- he didn't have time to do his administrative work;
- somebody disconnected his computer;
- he suffered continuous abuse from Dr Louw;
- he didn't get support;
- he couldn't attend his academic sessions.

24. Dr Louw responded that there were previously two radiologists at the Paarl Hospital. Dr Ramaia at first worked on her own, whereafter Applicant was appointed and when Dr Ramaia resigned, Applicant then worked alone.

25. Dr Louw testified that there was a misunderstanding between himself and Applicant in the past, as Dr Louw was under the impression that Applicant should be allowed academic time outside of the hospital. Dr Kruger then informed Dr Louw that the sessions are related to academic sessions inside the hospital only. It is difficult if

a specialist is alone in one hospital. Dr Louw then sorted out the misunderstanding with Applicant some time ago. Applicant is currently allowed to attend academic sessions every second Wednesday, work permitting. Attending academic sessions is a privilege and not a right.

26. Dr Louw asked the IT specialist to sort out the problem with Applicant's e-mails. Dr Louw denied that he abused Applicant at any stage. Dr Louw conceded that Applicant reported alleged medico legal discrepancies. When Dr Ramaia was still here, Dr Louw was asked to intervene. Allegations were made between Dr Ramaia and Applicant at which time Dr Kruger intervened. Dr Ramaia resigned in the meantime. Since Dr Ramaia's resignation, Dr Louw has not been made aware of any serious concerns, although he has had some conversations with Applicant. Applicant was not prepared to sit around a table with other surgeons which makes it difficult to sort out problems.

27. Overtime without payment: Dr Louw denies that he asked Applicant to work overtime. Although it is his right to ask Applicant to work overtime, he can either pay him or give him time off in lieu of payment. It was put to Dr Louw that Applicant suspected that Dr Louw wanted to ask him to work overtime on the 10th of May 2017. Dr Louw conceded that it is quite difficult to make an appointment in the second Radiologist post, due to financial constraints. He had spent almost R125 000.00 on locums during 2017. He also has an agreement with Schnettler and Corbett Radiologists and Tygerberg Hospital for radiologist assistance.

28. Dr Louw conceded that Applicant is the only Radiologist at Paarl Hospital and he thanked him for his efforts in the past. The situation is being monitored and locums are appointed from time to time, such as during the Arbitration hearing. Dr Louw conceded that the situation is not optimal. Dr Louw confirmed that he is aware that the previous CEO gave Applicant a warning. Dr Louw also gave Applicant a written warning for insubordination in the past. Dr Louw confirmed that there was a whole process of probation and code of conduct. Reference was made to pages 9 and 10 of bundle A, being Applicant's referral and appeal outcome.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

29. The written warning and final written warning on pages 9 and 10 lapsed as it is older than six months. The current final written warning can be viewed on page 1 of bundle R and is dated 12 June 2017. Approximately nine months lapsed between the last written warning in September 2016 and the current final written warning. Dr Louw was challenged as to what was put in place to ensure that the insubordination does not occur again.

30. Dr Louw responded that June and September 2016 fell at the end of Applicant's probation period and in November and December 2016 there was a recommendation by Dr Louw and the CEO to terminate the probation and not to extend Applicant's employment. Dr Louw informed Applicant that his recommendation to terminate his employment was rejected and that they have to start on a clean slate. There were ample examples in his final written warning of him trying to communicate with Applicant and going the extra mile to communicate with him in an informal manner, bearing in mind the previously strained relationship. Dr Louw referred Applicant to ICAS. It culminated in the blunt refusal to communicate with Dr Louw. It was put to Dr Louw in order for the final written warning in June 2017 to find substance, it would have been appropriate to include the e-mails dealing with the probation in Respondent's bundle. Dr Louw responded that he was not involved in the compiling of the bundle. Dr Louw confirmed that he met with Applicant and his union representative during March 2017, but it turned out to be a futile meeting.

31. Dr Louw stated that after his e-mail on page 18, dated 10 May 2017 to Applicant, he went down to Applicant's office after Applicant refused to respond to his e-mail. Dr Louw is unsure whether it was before or after the e-mail evidenced on page 18. He reminded Applicant to communicate with him for the umpteenth time. The final written warning was not due to Applicant's refusal to do the work, but because he bluntly refused to communicate with Dr Louw without his union representative present. Dr Louw conceded that Applicant then sent an e-mail to Laurette Esterhuizen, which was part of the communication problem, as he would

communicate with Laurette and she would then share the information with Dr Louw, instead of communicating with Dr Louw directly as his supervisor. Laurette Esterhuizen is the Assistant Director of Radiography. She has to obtain Dr Louw's permission to appoint a locum. If Laurette Esterhuizen did not inform him of the communication with Applicant he would not know about it. The line of communication should be directly with Dr Louw. Dr Louw stated that he subjected Applicant to an audi alteram partem. There is no proof of the audi in Respondent's bundle. Dr Louw stated that he asked Applicant not to attend an academic session, which is a lawful instruction. Applicant has given academic lectures on two or three occasions in the past on Wednesday mornings. It was put to Dr Louw that as Applicant is the only Radiologist at Paarl Hospital, it is his prerogative to do his academic sessions outside the hospital. The purpose of academic sessions is to keep up to date and for peer review. Dr Louw was challenged as to whether it is not to the benefit of both the individual and the hospital for the Applicant to attend the academic sessions outside the hospital. Dr Louw responded that is it true to a certain extent, but that the Paarl Hospital is not an academic hospital, but a service delivery hospital. There was nothing in writing preventing a person from attending academic sessions, but there is an unspoken rule, that operational requirements will prevent one from attending academic sessions. Dr Louw responded that he was actually trying to build a new relationship and Applicant continuously reminded him to communicate with Dr Louw. This became repetitive and culminated in Applicant's blunt refusal to communicate. The disciplinary meeting was called on advice of a labour colleague. Applicant refused to communicate with Dr Louw in person as per the incident on 10 May 2017 and this was the cause of the final written warning. Applicant stated that he needs representation. He refused to communicate with Dr Louw without labour representation. It was made very clear to Applicant previously that he does not have the right to have a representative present every single time Dr Louw spoke to him. There are various aspects that impacts on the communication. It was put to Dr Louw that Applicant is not the only person who uses the office, because there are minimal network points, they would plug the computer. Dr Louw responded that he is not an IT specialist and he was not aware of a specific network problem, as there are continuous problems in the hospital as a whole, this is not unique.

THE FOLLOWING ENSUED FROM RE-EXAMINATION

32. Reference was made to page 21. Dr Louw responded that no meeting took place on 10 May 2017. Dr Louw conceded that as per e-mail to his colleagues on page 20 of bundle A, he pleaded for assistance with Applicant's refusal to communicate with him.

APPLICANT'S CLOSING ARGUMENT

33. The incident that happened on 10 May 2017 was testified to by both Applicant and Dr Louw. Applicant did not refuse to communicate. Dr Louw understood where Applicant was coming from. Applicant said he wanted a union representative present during the communication. Applicant knew that the conversation will lead to Dr Louw asking him to work overtime without pay, therefore he excused himself. There was a meeting with Eben Afrika on the same day and it was agreed that he would continue working for the day. There were several incidences where Applicant's academic time was declined and that is the reason why he wanted his union representative present. Respondent failed to subject Applicant to an audi, therefore the process was incorrect and the final written warning was out of context. Applicant seeks an order whereby the final written warning is removed from his record.

RESPONDENT'S CLOSING ARGUMENT

34. It is clear that Applicant failed to comply with an instruction given to him on 10 May 2017. He blatantly refused to follow an instruction given to him by his supervisor, Dr Louw. Applicant undermines Dr Louw and does not see him as his supervisor. That can be seen by the choice of words in the e-mails on pages 29, 30 and 31 of bundle A. Applicant used strong language against his supervisor. The transgression is viewed in a very serious light. Although Applicant is entitled to union representation, he is not entitled to representation in every communication he has with his supervisor. Applicant refused ICAS intervention, which would have assisted all parties. Dr Louw pleaded for help as he was a man in need. Applicant was previously disciplined for the same transgression, but it did not assist Applicant. Respondent seeks an order whereby the Applicant's application is dismissed.

REPLICATION BY APPLICANT

35. Applicant denies that he closed his office door to Dr Louw on 10 May 2017. There was no testimony to this effect. Applicant did not refuse ICAS, he just sought clarity.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

36. In order to discharge the onus that Applicant was subjected to an unfair labour practice dispute, the Respondent must prove that Dr Louw had the authority to instruct the Applicant to communicate with him about work related matters, as he had done on numerous occasions.

37. Instructions was not only given during meetings held between the Applicant, together with his union representative and Dr Louw, further instructions were given to the Applicant via e-mails addressed to the Applicant by Dr Louw

38. Applicant does not dispute that such instructions were given, however his defense was that he either received the instructions after the fact, as he did not have dedicated administrative time or that he did not have internet access.

39. An employer has the right to prescribe rules regulating conduct in the workplace. These rules are normally incorporated in a disciplinary code, a personnel manual or company policy, etc. All forms of misconduct, that is, unacceptable conduct that may lead to discipline and dismissal, must be contained in the code or policy, which must be consistently applied.

40. It is essential that employees are aware of the existence of a rule, in other words they must know that certain conduct will lead to discipline and possibly a dismissal. The code, therefore, needs to be detailed and include all forms of conduct that will invite disciplinary sanction. It is, however, not unfair to discipline an employee for conduct which is understood and accepted by any person to be misconduct without it specifically having been mentioned in the code, such as theft. Before an employer can impose a disciplinary sanction on his/her employee, he/she must prove that a disciplinary rule has been contravened (See *Verwey v Volkswagen of SA* (*Pty*) *Ltd* [1996] 9 BLLR 1198 (IC)). An employer may discipline for misconduct not expressly covered by the disciplinary code when there is some nexus between the misconduct and efficiency, profitability and continuity of employer's business and where misconduct renders the employment relationship intolerable (See *Nyembezi v NEHAWU* [1997] 1 BLLR 94 (IC)).

41. The sanction or disciplinary penalty has to be in relation to the seriousness of the offence. Dismissal is to be considered as a last resort, and only when continued employment is not possible.

42. The question as to the extent a commissioner can interfere with and overturn the disciplinary sanction imposed by the employer has received much attention. The numerous decisions on this issue hold the view that the commissioner must show some measure of deference to the managerial decision. It has been said that the sanction imposed by the employer can only be overturned by the commissioner if

it is so inappropriate that “it makes one whistle”. 1 *Empangeni Transport* (*Pty*) *Ltd v Zulu* (1992

43. The employer is required to prove, on a balance of probabilities, that a disciplinary rule has been contravened according to the facts known to him/her (See *Olkers v Monviso Knitwear* (*Pty*) *Ltd* (1988) 9 ILJ 875 (IC)).

44. To determine whether the requirement of substantive fairness has been complied with, the following checklist may be adopted:

- is a disciplinary rule in existence. There was certainly a rule to follow instructions given to you by your supervisor.
- was the employee aware of the rule or ought he reasonably to have been aware of it, and did he realise the possible consequences of the breach thereof. Applicant was aware of this rule in the light of his years’ experience and qualifications as a specialist.
- was a disciplinary rule contravened. From the evidence before me, I am convinced on the balance of probabilities that the rule was contravened.
- is the rule reasonable. The rule is reasonable given that patients’ lives could be endangered on non-adherence of the rule.
- has the disciplinary code been consistently enforced. There was no evidence of inconsistency before me.
- was a final written warning the appropriate sanction for the contravention of the rule? I can find no reason for me to interfere with the managerial decision.

45. In terms of the LRA a fair procedure is required to ensure a fair dismissal. This provision is the culmination of many decisions handed down by the Industrial Court since its inception and religiously followed by adjudicators and arbitrators to this day. The requirement of a fair procedure prior to a dismissal is derived from the principles of administrative law in terms of which the rules of natural justice apply. The insistence of adopting the rules of natural justice not only ensures justice and

transparency, but also labour peace and a contribution to democracy within the workplace.

46. The first rule of natural justice to be observed, is the *audi alteram partem* rule. Applicant was indeed subjected to a audi alteram partem according to Dr Louw. He was given an opportunity to respond to the charges against him. He was dissatisfied with the finding of guilt against him, as well as the sanction of a "verbal warning", as a result of which he exercised his right to appeal. I therefore find that Applicant was treated procedurally fair.

47. Disciplinary sanctions can range from verbal warnings to final warnings and dismissal. Demotion can be included as a sanction in a company's disciplinary code misconduct.

48. Employers should take care that the sanction is appropriate. When imposing a disciplinary sanction, the employer must act consistently and follow a fair procedure. If an employer acts unfairly, he is potentially guilty of an unfair labour practice.

49. The question as to whether a commissioner can interfere with and overturn the disciplinary sanction imposed by the employer has received much attention. The numerous decisions on this issue hold the view that the commissioner must show some measure of deference to the managerial decision. It has been said that the sanction imposed by the employer can only be overturned by the commissioner if it is so inappropriate that "it makes one whistle".

50. I find that there was a rule in the workplace that Applicant has to comply with Dr Louw, his supervisor's instructions, according to Respondent's Code of Conduct and Managerial Prerogative is noted. I find that the final written warning imposed on Applicant is reasonable in relation to the level of seriousness of the offence, in the light of Applicant's previous disciplinary record, albeit lapsed warnings, especially since the Applicant is clearly and intelligent and highly qualified individual. The kind of behaviour displayed by Applicant, is most certainly not the

kind of behaviour that one would expect from an employee in Applicants position. On the contrary, the Applicant should set an example to his subordinates and colleagues. I can find no reason why I should interfere and overturn the disciplinary sanction of a final written warning imposed by the Respondent, especially since the sanction is not so inappropriate that "*it makes one whistle.*"

51. I am thus satisfied that the Respondent proved on the balance of probabilities that a disciplinary rule has been contravened according to the facts shown by Respondent, as the Applicant did not place Dr Louw's evidence, that Dr Louw is entitled to give instructions to Applicant, which instructions Applicant is obliged to carry out. Grogan in his book, employment law, states that it is one of the duties of an employee *to be respectful and obedient*, and he clarifies that respect and obedience are regarded as an implied duty of every employee, however he continues to indicate that if respect and obedience is absent. It will render the interpersonal relationship between employer and employee intolerable. He also defines respect as a requirement imposed upon an employee, a duty to behave in a manner compatible with the subordinate position in which the employee by definition stands vis-avis the employer.

52. Grogan continues to illustrate that the Labour Courts have made a distinction between insolence (failure of an employee to show respect, and insubordination (refusal to obey an employer's instructions). further stating that both forms of misconduct are probably embraced by the term insubordination. In the case of *Palluci Home depot Pty (Ltd) v Herskowitz & Another* (2015) 5 BLLR 484 (LAC) at para 19 it was held that if the employee willfully repeatedly and defiantly refused to carry out a lawful and reasonable instruction dismissal would be regarded as fair.

53. The Applicant repeatedly and defiantly refused to obey a reasonable and lawful instruction. His defiance and disrespect towards Dr Louw was captured in the email he sent to Anne-Marie Basson, Angelo Fisher, André Strydom, Eben Afrika and Hanneke Wolfaardt, evidenced on pages 28 to 30 of Applicant's bundle was captured in his response to an email wherein he carbon copied in an email

54. In a judgement delivered on 28 February 2016 in the Johannesburg Labour Court in the case of *City of Johannesburg v Dumisani Job Sithole* at para 51, the court held

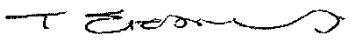
"Insubordination is possibly a more serious offence because it presupposes an intentional breach by the employee of the duty to obey the employer's instructions. The Code requires this defiance must be "gross" to justify dismissal. This means that the insubordination must be serious, persistent and deliberate, and that the employer should adduce proof that the employee was guilty of defying an instruction".

55. Through the testimony of Dr Louw and the documentary proof presented clearly shows that the instruction given on numerous occasions was reasonable, and that that the Applicant repeatedly and defiantly refused to obey such instructions. His defiance was willful

56. I find that the disciplinary sanction was fair and reasonable under the circumstances.

AWARD

57. Applicant was not subjected to an unfair labour practice. Applicant is therefore not entitled to any relief.



COMMISSIONER: T ERASMUS