ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS574-18/19**
Commissioner: **Gerald Jacobs**
Date of award: **13 May 2019**

In the matter between:

Alister Louis (Union/ Applicant)

and

Department of Health-Western Cape (Respondent)

Details of hearing and representation

[1]. This is the award in the arbitration between the applicant, Mr Alister Louis and Department of Health-Western Cape, the respondent.

[2]. The arbitration was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council ("the Bargaining Council") in terms of section 191(5) (a) of the Labour Relations Act, 1996 as amended (the "Act") and issued in terms of section 138(7) of the Act.

[3]. The arbitration hearing took place on 7,9 February 2019 and 2,3 April 2019 at the Department of Health office in George.

[4]. Advocate Daniel Mandla Nyathi briefed by Nico Smit Inc attorneys represented the applicant. Advocate Jerome Van Der Schyff briefed by the state attorney represented the respondent.

The issue to be decided

[5]. The issue to be decided is whether the dismissal of the applicant was substantively and procedurally unfair.

[6]. In respect to the substantive fairness of the dismissal, the issues are whether the applicant engaged in sexual intercourse with Ms Jodene Fernol the complainant on the 21 December 2016, as well as, whether the sanction of dismissal was unfair.

[7]. The procedural issue is whether the applicant was afforded representation.

[8]. The applicant is seeking to be reinstatement with back pay from the date of dismissal.

Background

[9]. The applicant had been in the employ of the respondent for the past 16 years since his dismissal. He joined the respondent in 1999, as a volunteer. In August 2002, he was appointed in the position of Basic Life Support medic and later appointed as an Emergency Care Officer.

[10]. The respondent offered a programme which gave an opportunity for students interested in emergency care to get a chance to see emergency care officer doing their job at their actual place of work. In June 2016, Ms Jodene Fernol a high school student began this programme with her mother's official permission. She was assigned two shifts on the ambulance.

[11]. On 21 December 2016, Ms Fernol was assigned to the applicant as a 'second person' working the night shift. It was on this day during the night shift that she alleged that the applicant engaged in a sexual act that was against her will. The incident was eventually reported to the respondent. On 24 January 2018, the applicant appeared before a disciplinary enquiry pertaining to two counts of misconduct namely;

"*Charge 1*

You allegedly made yourself guilty of an act of misconduct as contained in the Disciplinary Code and Procedures for the Public Service, Annexure A: Conduct of an improper, disgraceful and unacceptable manner, read with the Sexual Harassment Policy: PGWC in it that you while on duty on or about the night of 21 December 2016 did not respect and protect the dignity of Ms Chanel Fernol, a Volunteer when you forced yourself upon her; undressed her; and had sex with her without her permission.

Charge 2

You allegedly made yourself guilty of an act of misconduct as contained in the Disciplinary Code and Procedure for the Public Service, Annexure A: Commits a common law or statutory offence while on state property in that you while on duty on

or about the night of 21 December 2016 had sex with Ms Chanel Fernol in the ambulance of which you were the driver of".

[12]. The applicant's pleaded not guilty to the charges. He was found guilty and dismissed at the conclusion of the disciplinary enquiry. It may be stated that the chairperson's reasoning for imposing the sanction of dismissal was as follows;

"taking into consideration the necessary facts and factors I, as the Presiding Officer, decided on the following sanction. In accordance with clause 7.4 (a) of the disciplinary code and procedures of the Public Service. Due to the seriousness and nature of the offence and that ***sexual harassment*** *in the workplace will not be permitted or condoned under the circumstances*

[13]. At the time of the dismissal, he earned a monthly salary of R 18 147.25. The dismissal was upheld, following the outcome of an appeal on 19 July 2018. The applicant had upon the outcome of his appeal, referred an unfair dismissal to the Bargaining Council. After conciliation failed, the dispute was referred for arbitration and was first enrolled for arbitration on 7 and 8 February 2019. Proceedings were postponed with costs at the request of the respondent, on the basis that it wanted to explore possibilities of settling the dispute. The matter was re-scheduled to take place on 2 and 3 April at 09h00 am. The parties requested to submit written arguments which were granted. The parties were given until 12 April 2019 to submit their written arguments. However, the arguments were received on 15 April 2019 and the 14 days' time period was calculated from this date.

Survey of the evidence and arguments

Documentary evidence

[14]. The parties submitted in evidence bundle of documents marked a Bundle A containing 68 pages and Bundle B, 98 pages and agreed that the content was what it purports to be. The respondent further in evidence the 'Emergency Medical Services– Ambulance Operations- Standard Operations Procedures dated 2010 as well as the Disciplinary Code and Procedure for the Public Service marked as Annexure A.

[15]. I have considered all the evidence and arguments, but because the LRA (s138 (7)) requires an award to be issued with brief reasons for the finding, I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings and the determination of the dispute.

The respondent's evidence

Ms Jodene Fernol

[16]. The complainant, Ms Fernol was aged 16 years when this alleged incident occurred. She testified (duly sworn) that the applicant suddenly pulled the ambulance to the side of the road and said that they going to do it. She said no and that she was not going to have sex with him. Whatever his intention was she was not going to do it. The applicant repeatedly said that they going to do it as he brought the ambulance to a halt.

[17]. The applicant climbed from the driver seat to the passenger seat where she was seated. He then got on top of her, stripped off her clothes and panty. At that stage, she resisted and tried to push him off. The applicant was on top of her with her hands trapped on her chest which made it impossible to push him off. Her attempts at freeing herself were thwarted by the applicant's weight. Although they stopped near the deceased patient's house she could not shout for help or open the passenger door. While laying on top of her the applicant undress himself and had full sexual intercourse with her. She had no idea why he stopped but all she kept on thinking was what she going to say to her family. After he had satisfied himself, the applicant got off her and dressed up. They drove off and attended to the call. The applicant did not say a word to her on the way. After they dropped off the patient at the hospital, they went to the base. On their arrival, they went straight to the crew room where the applicant wanted to continue having sex with her. This time she managed to push him away.

[18]. Having described what was done to her by the applicant she said that she felt worthless and at that stage, she was traumatised. She reported this incident to nobody. She explained that it was in fear of being judged and what the applicant had done would not have been believed. She also did not report this incident to her parents.

[19]. She testified that the applicant's wife confronted her and enquired if she was in an affair with her husband. At that time, she did not know who the husband was and replied that she was not. She, in fact, added that she was not in an affair with any man.

[20]. Following that interaction with the applicant's wife, thoughts of the incident came rushing to her mind after writing her examination paper. She could not remember the date but said it was sometime in April 2017. Her teacher notice that she was not well as her head was on top of the desk. The teacher approached her. She told the teacher what the applicant had done. The teacher then sent her to the school psychiatrist who told her to inform her parents. She later reported the matter to her parents, who in turn contacted the offices of the respondent and the police. The applicant was later charged.

[21]. She said she did not know whether the applicant knew that she was a high school student in response to the question by the respondent representative. She was also asked whether the applicant asked her why she was volunteering she said she was sure.

Cross-examination

[22]. She was asked what the applicant meant when he said that they are going to do it. She replied that the first thought that came to mind was that the applicant meant that he wanted sex. She added, even though the applicant did not say it outright it would be clear to any person that it was sex that he was after.

[23]. She testified that the applicant came over to her side. She asked him what he is doing. She tried to resist but the gear lever was between her legs at the time and the applicant overcame her. He pushed her down on the seat and then forcefully had sexual intercourse with her. She, however, cannot remember whether he held her hands. She also cannot remember whether she said that he held her hands during the disciplinary enquiry. She was then referred to Bundle B page 35 paragraph 5 which reads; *"VOORSITTENDE BEAMPTE: Oukel – Hy het vir my gese wat hy nou gaan doen en hy het vir my gese ek hoef nie te worry nie, want hy gaan my nie seermaak nie. En hy het my nie seergemaak nie, alhoewel hy saam met my seks gehad het. Hy het nie my arms lelik seergemaak of my styf vasgehou of so nie, maar hy het wel my hande. Ek het hom prober wegstoot, maar hy het my hande vasgehou"* She said that she cannot remember that she said this during the disciplinary enquiry.

[24]. It was put to her that the applicant will testify that the wheeled stretcher started to rattle (made a knocking sound). He pulled the ambulance to the side of the road and got out of the ambulance to tighten it. She denied that this was the reason the applicant pulled over to the side of the road. She, however, agreed that the wheeled stretcher was rattling while driving on the gravel road, but it was when they received the first call.

[25]. She said that she might have worn the paramedic uniform on the day of the incident but cannot remember whether there was a belt around her waist. It was then put to her that she said in her statement she only became aware it was rape after the incident. Her response was that she was aware it was rape but did not report the rape to her parents because she wanted to forget about it. She was not going to allow the incident to influence her life. She was then asked why she did not provide the same explanation at the disciplinary enquiry. She said that she was not asked, and it did not come to her mind at that time. She later said that she gave a different reason at the disciplinary

enquiry because she developed a feeling of insecurity, and her parents were grieving the death of a family member.

[26]. The evidence that she was immediately after the alleged rape took place in constant communication with the applicant through WhatsApp and Facebook was not disputed. She confirmed that she did. She also conceded that she might have initiated the conversations. She also confirmed that she texts the applicant to pick her up for work the following day. She testified that she was traumatised and overcome by the incident. Despite this, she decided that she will not allow the incident to affect her life and contacted the applicant. For the same reason, she did not report the rape to her parents.

[27]. It was also put to her that the main reason she reported the alleged incident was that the applicant's wife threatened to inform her parents about the messages. She confirmed that this was so. She said that she told her parents immediately after the applicant wife started to threaten her. However, the fact that the applicant's wife threatened her was not the main reason she reported the rape to her parents. She said there were also other reasons why she told her mother.

[28]. She told her mother and then contacted the station manager and reported to the police what the applicant had done.

The applicant's evidence

Mr Alister Louis

[29]. The applicant testified that on the day of the incident he was at the base and dispatched to a priority one call (P1) of a patient on a farm. The farm was only accessible by a gravel road. When they got to the farm, they found the back-up paramedic already on the scene. The patient already passed on and the family was on their way. While they wait for the police and funeral service to arrive, he was dispatched to another incident in George. The backup paramedic said they will wait for the police and stayed behind. He attended to the call and whilst driving for four to five minutes on the gravel road the wheeled stretcher came loose and started to rattle. He pulled the ambulance over to the side of the road. He said that he climbed out of the ambulance leaving the complainant sitting on the passage side inside the ambulance. He opened the rear doors. He climbed into the rear of the ambulance and fastened the wheel stretcher. After fastening the wheel stretcher, he climbed out and light a cigarette outside the ambulance. He smoked for five minutes and drove off without speaking to each other. He said further that he cannot remember whether the call was cancelled but can remember that they went to the base.

[30]. He vehemently denied he said he wanted to do it to the complainant. He denied that he undressed her and had sexual intercourse. He said that he would have been stupid because the police and funeral services were on their way and had to use the same road to get to the farm.

[31]. He texted her on WhatsApp on three or four occasions. It was cordial and work-related. They did not communicate through Facebook Messenger because his phone could not show the messages. He said his wife used his account and signed in on Facebook. He wife stubble on a message sent by the complainant wherein the complainant said threatened him to say that he will see what was going to happen. His wife confronted him with the message. His wife wanted to know if he was in a relationship with the complainant. He denied that there was a relationship.

Cross-examination

[32]. The applicant reiterated that he was first dispatched to the patient on the farm which was a priority one call. The second call was a priority two which was not so serious. He testified that his intention was first to attend to the wheeled stretcher and then the priority two (2) call. But the priority two(2)call was cancelled before he stopped to fasten the wheel stretcher. There was no longer urgent to attend to the call.

[33]. He confirmed that the existence of the rule that prohibits sex on the company premises and during working hours. He further agreed that it was a serious offence. The applicant testified that any person having sex with such a young girl, a volunteer should be dismissed.

[34]. It was put to the applicant that nowhere in the minutes of the hearing did he dispute that he had sex with the complainant. It was also put to him that he did not dispute the investigating report compiled by Ms DC Hayward wherein she indicates he said that he had sex with the complainant during the interview. The applicant said that he did not ask the complainant question because he waited for his chance to give his version of the events. He also agreed that he did not challenge the complainant's allegation that he had sexual intercourse with her. As to the investigating report compiled by Ms Hayward, he said that what was contained therein was not the truth. Ms Hayward insisted that he had sex with the complainant, but he denied it.

[35]. He was referred to page 30 Bundle A, and it was put to him that nowhere in his appeal document did he deny he had sex with the complainant. He said the document was compiled by his union representative. He was surprised by the omission made by his union representative and when he was asked why his union representative never

dispute that he had sexual intercourse with the complainant, well he said his union representative knew better than him. In fact, he told his union representative that he had no sexual intercourse with the complainant.

[36]. It was put to the applicant that it was never the respondent's case that he raped the complainant. The case of the respondent was that he had sexual intercourse with a minor, whether it was consensual or not. He vehemently confirmed that he did not rape the complainant, and neither had sexual intercourse.

[37]. It was then put to the applicant that the complainant confirmed to his wife that they had sexual intercourse. The applicant said that he was sitting next to his wife when she phoned the complainant. She first denied that they had intercourse but later said to his wife that they had sex.

[38]. The applicant said that it was his first disciplinary hearing that he attended since he was employed. He did not know the procedure or what to expect. He did not know what questions to ask the complainant. He said, after the complainant gave her version of the events, he asked the presiding chairperson whether they going to ask him any questions. The chairperson said no, and he left it there. He also did not understand when the respondent representative said that it was closing its case what it meant. He had no witnesses, and that was the reason he said no more questions.

[39]. He was referred to the charge sheet and asked if he was aware of his right to be represented by a fellow employee from the same institution or office or an official of a recognised union. He said he understood that he had the right to representation and was aware that it should be a union representative or a fellow employee. He testified further that after he received the charge sheet, he approached his union. However, the disciplinary enquiry was scheduled for 8 December 2017 but postponed to reconvened on 24 January 2018 because his union representative was not available. The disciplinary enquiry was postponed because the complainant was writing exams on that day. He was notified a week before the sitting that the enquiry would not proceed. But on the day of the last hearing, his representative was in Cape Town and requested a postponement of the hearing. He elected to proceed with the hearing without his union representative. He represented himself during and the rest of the disciplinary hearing because he wanted to get it finished and bring the whole saga to an end. According to him, the procedural unfair was not that he was not afforded representation. The unfairness stem from the fact that he was not afforded the opportunity to state his case in response to the allegations.

[40]. It was put to the applicant that the wheel stretcher rattled was a fabrication. He said that the complainant confirmed that it did. That evening he took the complainant home with his vehicle and could have had sex in his vehicle whilst driving her home.

Dominique Louis

[41]. The only witness called to testify on the applicant's behalf was his wife. She testified that the applicant asked her to update his phone. She testified that the day following the alleged incident the complainant sent a Facebook text message to the applicant at the time she was in possession of the phone. The complainant was under the impression she was chatting with the applicant. The complaining asked the applicant to pick her up for work. She texted back and asked why she cannot work with the other paramedics. The complainant said that she learned nothing from the other paramedic and do not want to work with Brenda. She wanted to work with him. She texted back saying that she must work with the others. The complainant responded *'Jy vat my vir a gat. Jy weet ek will saam met jou werk'*- roughly translated *'you take me for an asshole, you know I want to work with you.'* On the same day, she sent a WhatsApp message to the complainant and asked what the relationship was with her husband. The complainant responded nothing and wanted to know who she was texting with. Immediately thereafter, the complainant sent a WhatsApp message wherein she said that she was not aware that the applicant was married because he was not wearing a ring. She replied and said that she had a photo of the two of them being intimate. The complainant replied that there cannot be a photo because nothing happened between the two of them.

[42]. She gave the complainant a call and told the complainant to leave her husband alone. If the complainant does not, she will report it to her parents. The complainant said that her parents would give her a betting if they find out and begged her not come to their house. The complainant then sent a Facebook message wherein she said 'Jy gaan sien wat ek met jou gaan maak. Wie gaan vir jou glo en wie gaan vir my glo"- translated 'You're going to see what I'm going to do with you. Who is going to believe you and who will believe me'?

[43]. She confronted the complainant sometime in April 2017 and asked the complainant whether she was in a sexual relationship with her husband. The complainant confirmed that they had sex. She asked the complainant in detail about the sexual relationship but nothing the complainant said made any sense.

[44]. The last Facebook message the complainant sent to the applicant phone was *'Jy gaan sien wat ek nou gaan doen'* roughly translated *'You're going to see what I'm going to do now'.*

Cross-examination

[45]. She testified that the complainant said that she had sex with her husband during a telephonic conversation. The complainant said she will disclose the truth to her, but her mother said no. She still does not know the truth.

Closing arguments

Respondent's written arguments

[46]. In regard to the procedural fairness of the applicant was criticised for his decision to continue with the disciplinary enquiry without his union representative. That being the case, the respondent cannot be held responsible for the applicant's decision to represent himself. Furthermore, the applicant testified under cross-examination that he understood his rights as set out in his disciplinary notice and yet at the internal enquiry he stated that "ek het niks getuies of niks om te roep nie." It was suggested in the light of this the applicant was afforded a fair hearing which included prior knowledge of the charges, the right to representation (which he abandoned), the right to cross-examine the complaint and the right to state his case, which he declined. In so doing, so it was argued, the respondent complied with the requirements for a fair procedure as set out in Schedule 8(2) of the LRA.

[47]. The respondent representative submitted that the applicant was charged with two counts of misconduct. The first charge alluded to both forcing himself on the complainant to have sexual intercourse with her and sexual harassment and that the two comprise different charges. The representative of the respondent submitted that the exact description of the charge was irrelevant since charges set at disciplinary hearings are drawn by laypersons. The requirement was that the employee understood the nature of the misconduct of which he was accused citing the Labour Appeal Court case in *Woolworths (Pty) Ltd v CCMA (2011)* 32 ILJ 2455 (LAC) [32] in support of its argument. It was submitted that the applicant conceded under cross-examination that the Standing Operating Procedures regulates the relationship between himself and the respondent and that he was aware that sexual intercourse was not permitted during working hours as set out in the SOP. The applicant and his representative did not dispute that Charge 1 accused him making himself guilty of conduct that was "improper, disgraceful and unacceptable manner…" when he had sex with her (the complainant) without her

permission “as read together with Annexure “A” as amplified by the aforementioned SOP at A1.8. Since the applicant understood the charge to be a “serious one” and that he consequently understood the charge as required and alluded to in the Woolworths case.

[48]. Regarding the substantive fairness, it was argued on behalf of the respondent that in proving its case on the probabilities it was significant that the applicant’s appeal he did not include a denial that he had sexual intercourse with the complainant. This was despite his acknowledgement that the allegation was serious. Moreover, at no stage at the internal disciplinary enquiry did the applicant denied having had sexual intercourse with the complainant. Not even during the cross-examination of the complainant. Linked to the cross-examination. and of equal importance the applicant’s question to the complainant which clearly implied sexual intercourse:

“*And after the incident (emphasis added) of 21st you continued to travel with me and I did not ….”* Bundle B pg. 58.

[49]. The complainant gave detailed evidence of her sexual encounter with the applicant none of which was disputed by him. It is trite law that that which is not disputed is deemed to be admitted. Consequently, the complainant’s version that the applicant had sexual intercourse with her should stand. Once the complainant’s evidence stands uncontested the applicant ipso facto guilty of “improper, disgraceful and unacceptable” conduct as contemplated in the charge read with Annexure “A” and the A1 8 of the SOP. (Bundle A p64 – 67)

[50]. Numerous aspects of the applicant’s evidence were referred to on behalf of the respondent. It was argued that the applicant accepted under cross-examination at the disciplinary enquiry that the second call-out from the initial DOA scene was a “P1” call out. However, under cross-examination at the arbitration hearing, he testified that the second call out was a “P2” which, according to him, was not as serious as a “P1”. In light of this contradiction the only reason for the applicant changing his version in this regard was in order to explain why, despite receiving an urgent “P1” call, he was able to stop to attend to something as trivial as a loose stretcher and still have a smoke. This reason was given purely in an attempt to explain the common cause 5 minutes interruption in his journey en route to Scene 2.

[51]. In conclusion it was submitted that the only inference which can be drawn based on the evidence led, was that the applicant stopped the vehicle, despite the P1 call out, to have sexual intercourse with the complainant but subsequently altered his version to

state that it was a P2 call out, to justify why he had stopped for something as trivial as a loose stretcher and a smoke.

The applicant's written arguments

[52]. It was argued on behalf of the applicant that there were patent and consistent evidence to the effect that the applicant only consented to represent himself during the hearing due to that those who were supposed represent him were not available and the matter was previously postponed on a number of occasions. He stated that it was instructive to note that the applicant never declined or intended to represent himself during the hearing but due to circumstances of 'many postponements' and the unavailability of union representatives he represented himself 'to get on with it', to his detriment, after a clearly qualified affirmation when asked in that regard. It was submitted that the presiding officer failed in her duty to give effect to the applicant's substantive right to representation. The applicant's qualified consent to represent himself should be considered within the context.

[53]. Under cross-examination, the applicant stated that he decided to represent himself only due to that the matter was postponed numerous times for reasons, not of his making and that on the date of the hearing it was due to that he was advised that the person/s to represent him could not make it. It should, therefore, have been clear to the presiding officer that the applicant's consent to represent himself was due to circumstances beyond his control and not intended, therefore ill-informed. All that was elicited in cross-examination on this aspect (of representation) was that the applicant should have known that he had an option to ask for another postponement in order for him to secure proper representation. The presiding officer had a duty to give effect to this and failed to do so.

[54]. It was submitted that given the qualified nature of the consent to represent himself, the presiding officer had a duty to at least postpone the hearing to another date, despite the applicant's patently misguided consent to represent himself, so that applicant could be properly assisted and thereby give effect to substantive rather than formal representation.

[55]. On the substantive side it was argued on behalf of the applicant that the version of the complainant was that applicant allegedly forcefully undressed a fully dressed complainant (in pants and reasonably with a fastened belt) who was physically resisting such unwanted advances and had forced sex with her in a public road with the potential for police and undertakers using the same route to the emergency situation. In response, the applicant's version was that he stopped the ambulance to fasten the progressively loosened and rattling stretcher, and thereafter took a smoke, all of which lasted the five

minutes reflected in the vehicle tracking record. It was submitted that the applicant's version was the more reasonably probable version in the circumstances. Further, it is trite that in the absence of direct evidence and in civil disputes, inference on the available circumstantial evidence may be made. As per authoritative authors in *Hoffmann & Zeffertt, South African Law of Evidence 4th Edition at 590* on the law of evidence, an inference made would be sufficient if it is the more natural or plausible conclusion from amongst several conceivable ones. The fact of the matter was that the circumstances of the manner in which the hearing was conducted, the fact that the complainant's evidence in the hearing was at variance with that led during the arbitration as well as the probabilities of a rape ('forced sexual conduct') having occurred within the five minutes that respondent relied on inter alia all point to that the applicant was unfairly dismissed.

[56]. In the circumstances, it was submitted that the respondent failed to prove that the dismissal was procedurally and or substantively fair. In light of this, the decision in favour of his reinstatement with retrospective effect was justified.

Analysis of evidence and arguments

[57]. The applicant challenged the procedural and substantive fairness of his dismissal. In this case, the applicant was charged with contravening the Disciplinary Code and Procedure for the Public Service, Annexure A, read together with the Sexual Harassment Policy on two counts of misconduct. First was that he did not respect and protect the dignity of the complainant when he forced himself upon her, undress her, and had sex with her without permission. The second was that he had sex with the complainant in the ambulance.

[58]. The evidence showed that the chairperson found the applicant guilty of sexual harassment. The motivation for finding the applicant guilty of sexual harassment was stated by the chairperson as follows;

> *"For similar offences, similar sanctions were given. Sexual harassment and unprofessional conduct or both serious offences and similar sanctions have been given. Case law quoted Campbell scientific Africa (Pty) Ltd and Adrian Simmers No: CA 14/2014".*

[59]. The case quoted by the chairperson's (the correct citation is *Campbell Scientific Africa (Pty) Ltd & Others [2016] 1 BLLR (LAC)*, the Labour Appeals Court had to decide whether the advances of a sexual nature made by Mr Simmers to an employee in the employ of another company during a business trip in Botswana constituted sexual harassment. The Court found that it indeed constituted sexual harassment.

[60]. At the arbitration hearing, the respondent distanced itself from the finding of the chairperson and the appeal authority finding that the applicant sexual harassed the complainant. The respondent representative stated that the issue that I need to be determined was whether the applicant had sex with the complainant. Whether it was consensual was not an issue.

[61]. I requested the parties to address it in writing on whether the respondent can change the reason for dismissal at arbitration. What follows was their submissions on the issue.

[62]. The respondent representative submitted that the exact description of the charge was irrelevant since the charges set at disciplinary hearings are drawn by laypersons. The requirement was that the employee understood the nature of the misconduct and conceded that he was aware that sexual intercourse was not permitted during working hours as set out in the Standing Operating Procedure. He referred me to the judgement of the Labour Appeals Court in *Woolworths (Pty) Ltd v CCMA (2011)* 32 ILJ 2455 (LAC) in support of his argument.

[63]. The applicant representative submitted that the inconsistency of the charges professed against the applicant as well as the complainant's testimony that she was raped in the disciplinary and during the arbitration hearing was inconsistent with the basis of the finding of the presiding officer.

[64]. He submitted further that the applicant was dismissed for an offence in terms of the sexual harassment policy. Sexual harassment has been described as 'persistent, unsolicited and unwanted sexual advances or suggestions by one to another, Mowatt 'Sexual Harassment, New Remedy for an Old Wrong' (1986) 7 ILJ 637. There was a clear disconnect between the charges, the evidence, and the basis of the sanction that the applicant was found guilty of. This approach was inconsistent with Item 8 Code of Good Conduct: Dismissal, in that it was not clear whether the applicant contravened a rule or standard with regard to the alleged rape, mere sexual intercourse in the workplace or plain sexual harassment as described by the chairperson. The respondent representative conceded that the manner in which the charges were formulated and professed against the applicant was unfortunate and 'not well done' as the charges (charge 2 specifically) effectively amounted to a 'splitting of the charges'. The applicant representative in motivating its argument reposed its faith on the authority of Ntshangase v Speciality Metals CC 12 (1998) 19 ILJ 584 LC where the court held that a splitting of the charges 'took the issue beyond the realms of fairness'. He went further to elaborate on the gist of the authority and indicated that effectively it amounts to inter

alia an express concession that the respondent acted irrationally and or unreasonably, thereby rendering the dismissal unfair.

[65]. A perusal of the charges reveals that the first charge relates to the applicant forcing the complainant to engage in a sexual act against her will. The second charge was that the applicant had sex with the complainant in the ambulance. In the case of *Xstrata South Africa (Proprietary) Limited - Thorncliffe Mine v NUM obo Mphofelo and Others* (JR1091/2011) [2018] ZALCJHB 148 (11 April 2018) this court had the occasion to deal with the issue of a commissioner determining the fairness of the dismissal on the charges proffered by the employer. In deciding that case the court referred to the passage in the case of *Woolworths (Pty) Ltd v CCMA* [2011] 10 BLLR 963 (LAC) paragraph [5] in the following terms:

"Unlike in criminal proceedings where it is said that "the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient", the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that the misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained".

[66]. The main thrust of the charges against the applicant was that he had sexual intercourse with the complainant. The applicant conceded that he was aware that he was charged for having sex which was not permitted during working hours as set out in the SOP. The applicant understood that the charges arose out of the allegation that he had sexual intercourse with the complainant. The records of the disciplinary enquiry also revealed that he was able to defend himself against this allegation. In light of the above judgement, I, therefore, agree with the respondent representative and find that it was not a splitting of the charges as argued by the applicant's representative.

[67]. Turning to the law that governs dismissal disputes. The onus in dismissal disputes is governed by section 192 (1) and (2) of the Labour Relations Act, 1995. The onus is on the applicant/employee to prove the existence of dismissal. In this case, it was common cause that the applicant was dismissed. Section 192 states further that after the employee proves that he or she was dismissed, the onus shifts to the employer to establish that the dismissal was effected for a fair reason, after following a fair

procedure. Section 188 of the Act provides further that if a dismissal is not automatically unfair, it is unfair if the employer fails to prove that the dismissal is for a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements and that the dismissal was effected in accordance with a fair procedure. Thus, the burden placed on the respondent by section 192(2) entails proving, that the applicant was guilty of the offence for which he was dismissed. The Code of Good Practice: Unfair Dismissal, Item 7 ("the Code") notes that whether a reason for dismissal is a fair reason is determined by the facts of each case and the appropriateness of dismissal as a penalty. In order to establish whether the employee is guilty of misconduct justifying dismissal, the employer must prove the following:

(i) The rule was a valid or reasonable rule or standard;

(ii) The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) The employer has consistently applied the rule or standard, and

(iv) The dismissal was an appropriate sanction for the contravention of the rule or standard

[68]. In doing this function I will have regard to all the facts presented and assess whether in the light thereof the respondent can be said to have dismissed the applicant fairly. As stated earlier the respondent representative stated that the case of the respondent was not that the sexual act was against the complainant's will or that the sexual act was consensual. The respondent's case was that the applicant engaged in sexual intercourse with the complainant which was against the company Standing Operating Procedure. The applicant did not dispute the existence of the rule. He was aware of the rule and also the consequences of breaching the rule. The validity and the consistent application of the rule were not placed in dispute. The applicant pleaded not guilty at the disciplinary enquiry and at the arbitration hearing. He denied that he engaged in sexual intercourse with the complainant. In light of the plea, the onus was on the respondent to prove that the applicant was guilty.

[69]. It was common cause that on the evening of 21 December 2016, the applicant accompanied by the complainant was dispatched to a patient in a serious condition on a farm outside George that was only accessible by a gravel road. Upon their arrival, the patient was clinically deceased. While there they waited for the police and other paramedics to arrive. During that time, the applicant received another call not long after the paramedics arrived to attend to another patient. While on their way there the applicant pulled the ambulance over to the side and brought it to a halt. It was further

common cause that the ambulance was temporary stationery for five minutes where the complainant alleged the incident took place. It was from this point that I heard the word of the complainant against that of the applicant on what transpired after he pulled the ambulance over to the side of the road. I was confronted with two mutually destructive versions of what occurred during the five minutes that the ambulance was stationary. I must decide on a balance of probabilities, whether the complainant's version, was more probable than the applicant's version.

[70]. The complainant version was that the applicant forced her to engage in sexual intercourse without her consent and as such raped her. She testified that the applicant climbed from the driver seat and moved towards the passenger seat, got on top of her, stripped off her clothes and panty. She resisted and tried to push him off, but her hands were trapped on her chest and attempts at freeing herself were restricted by the applicant's weight. She could not shout for help or open the passenger door. While laying on top of her the applicant undress himself and had full sexual intercourse with her.

[71]. Her version during the disciplinary enquiry was that at first, she resisted and tried to push him away, but the applicant held her hands. However, the applicant did not force himself. He said it was going to be quick and that he was not going to hurt her, and he did not. The applicant loosened her belt and had sexual intercourse with her. She said no because he was not wearing a condom. She did not know that it was rape at the time and only became aware that it was rape after the psychiatrists told her.

[72]. There was a clear contradiction in her version. However, her version cannot simply be rejected altogether just because of the contradiction. Therefore, I have to determine which version was probable or plausible and whether her evidence was credible and satisfactory in all material respects.

[73]. Her version that the applicant was able to loosen her belt while holding her hands, despite this according to her, the applicant had succeeded to loosen her belt and I assume pull down her trousers and panty without having any hand free throughout the process of the execution of the sexual act was questionable. It was most unlikely that the applicant could have held her hands and loosen her belt. Face with this unlikelihood and that this evidence was inconsistent with her version before me, she said that she could not remember testifying that he held her hands at the disciplinary enquiry. This was from the cross-examination by the applicant representative who referred her to the minutes of the disciplinary enquiry and asked the question, whether the applicant held her hands. Although there was a lengthy period between the date of the incident and

the date of the hearing which could cause the lapses in memory, this does not remedy the obvious improbability of her version.

[74]. Furthermore, the summary of her testimony at the disciplinary enquiry did not show any evidence that she struggled or resisted when the applicant had sexual intercourse. Her resistance was only to the extent that the applicant did not wear a condom. She testified before me that she was rape which was not consistent with her testimony at the disciplinary enquiry. She, however, conceded that her testimony at the disciplinary enquiry that she resisted only because the applicant did not wear a condom was not correct. She was, therefore, being untruthful at the disciplinary enquiry. In light of this, I find her version at the disciplinary enquiry, the applicant had sexual intercourse with her in the manner she described not credible and stands rejected.

[75]. In her attempt to convince me that she was raped she testified that she could not push the applicant away because he was on top of her together with his weight. Even at this stage, no suggestion that there was a pause for whatever reason during the process of the act was ever made in her testimony. The applicant representative asked her whether she was wearing the paramedic uniform on that day. This question was of the greatest importance because it addressed the credibility of her claim that she was rape. Even more important that the applicant had sexual intercourse with her. She said that she might have worn the paramedic uniform on that day but cannot remember. How was it possible for her to remember that the applicant undressed her but cannot remember whether she was in uniform on that day. Her evidence was silent on this issue. The only inference that can be drawn for this lapse of memory was that if she wore the paramedic uniform on that day her version of how the rape took place would not have been plausible. It is a one-piece uniform which was confirmed by the applicant during cross-examination. It would not have been possible that the applicant managed to take off her uniform while being on top of her and at the same time undress. All in one go. It could only have been possible if she had been of some assistance, and had intercourse by consent which was not in the manner, she described the rape took place. However, the applicant stated that he neither rape nor did he have sexual intercourse with her on 21 December 2016.

[76]. Insofar as the demeanour of the applicant was concerned, he gave evidence clearly and confidently. His recollection of events was clear, and his evidence was not subject to the serious challenge during the course of cross-examination. The applicant's story was quite simple. It was that the wheeled stretcher rattled, and he pulled the ambulance to the side of the road. After he had fastened the wheeled stretcher, he smoked a

cigarette. After smoking he climbed back into the ambulance and drove off. The complainant agreed that the wheeled stretcher rattled but denied that it was the reason that the applicant pulled the ambulance to the side of the road. She said that the wheeled stretcher rattled when they arrived at the deceased house. However, nowhere in her evidence does she allege the applicant fastened the stretcher at the deceased house. It was just a bare denial without any substance. It does not mean the fact that she denied it made the applicant's version less probable and her version should be accepted. It was therefore probable that the applicant pulled over to the side of the road to fasten the wheeled stretcher and had a smoke thereafter before he climbed back into the ambulance and drove off.

[77]. It was argued that the explanation by the applicant for the time that the ambulance was stationary was a fabrication. It was argued that the applicant testified that the second call out was a "P2" and during the disciplinary enquiry he said it was a "P1". It was argued further that the only inference that can be drawn from the contradiction was to provide a reason to stop for five minutes to attend to something as trivial as a loose stretcher and have a smoke. The real reason, so went the argument, was to have sexual intercourse with the complainant. The applicant version was that the call-out (P2) was cancelled before he stopped to fasten the wheel stretcher. The respondent could not challenge his evidence, to the extent that it was not true.

[78]. In the totality of the evidence, I find the applicant version more probable than that of the complainant. I conclude that the applicant account for the five minutes that the ambulance was stationary at the place the complainant said the rape took place was probable. Having said that, it follows that the applicant did not engage in sexual intercourse with the complainant on the 21 December 2016. Nothing in the evidence presented suggests otherwise. I find him not guilty of contravening the SOP in the workplace that prohibit sexual intercourse during working hours.

[79]. The respondent did not prove on a balance of probabilities that it had a valid reason to dismiss the applicant. In the circumstances, the dismissal of the applicant by the respondent was not an appropriate sanction.

Procedural fairness

[80]. Turning now to the procedural fairness of the dismissal, it was argued that the applicant was not given the opportunity to be represented. From the version of the applicant, this was not the case. The applicant was entitled to representation but elected to continue with the hearing without his union representative.

[81]. The statutory requirements for a fair procedure are clearly spelt out in the Code of Good Practice: Dismissal and are elaborated on in *Avril Elizabeth Homes for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC). The existence or otherwise of procedural fairness is determined by whether the employer complies with the relevant statutory requirements. In this instance, the applicant was notified of the allegations in a language that he understood. The applicant was given an opportunity to state his case, but he elected to stay silent and wait for his turn to be cross-examined. He was given enough time to prepare a response to the charges and to be assisted by a trade union official. After the disciplinary enquiry, the chairperson communicated the decision taken in writing and he was afforded the opportunity to appeal the sanction.

[82]. I, therefore, find that the procedure followed by the respondent was fair in terms of Item 4(1) of the Code of Good Practice: Dismissal.

Relief

[83]. Section 193(1) of the Act provides remedies for the unfair dismissal of an employee. It provides that:

> *"If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator 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."*

Undoubtedly, the Legislature intended reinstatement to be the primary remedy if a dismissal has been found to be unfair. The Legislature was however prudent enough to acknowledge that there are situations where reinstatement may not be possible or fair. To this end, Section 192(2) of the Act further provides that;

> *The Labour Court or the arbitrator must require the employer to reinstate or 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 employment relationship would be intolerable;*

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

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

[84]. That said, I found that the applicant did not have sexual intercourse with the complainant and dismissal was not an appropriate sanction. Thus, the dismissal was substantively unfair. The applicant seeks an order that reinstates him into the position he held immediately prior to the dismissal. The respondent did not lead any evidence that the employment relationship was rendered intolerable. The respondent had not established any grounds as to why the position of the applicant ought not to be returned to him or why it would be unreasonable to do so. The representative stated that there was no need to lead evidence regarding the relief sought by the applicant. Weighing up the circumstances of the case, I find that it will not impracticable for the respondent to reinstate the applicant back into its employ. Reinstatement in my view would be suitable in the circumstances.

[85]. I hereby make an award in the following terms:

Award

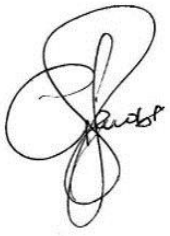
[86]. The dismissal of the applicant, Mr Alister Louis by the respondent, Department of Health- Western Cape was substantively unfair but procedurally fair.

[87]. The respondent is ordered to reinstate the applicant into its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to the dismissal. The applicant is also entitled to normal increases afforded to other employees during the intervening period since his dismissal and date of reinstatement.

[88]. The reinstatement is to operate with effect from 19 July 2018. The respondent is therefore ordered to pay the applicant as back pay, from the 19 July 2018 until the date of the award.

[89]. The respondent is ordered to pay the amount to the applicant no later than 24 May 2019. The amount must be paid into the applicant's bank account which particulars are known to the respondent.

[90]. The applicant is to tender his service to the respondent on Monday 27 May 2019.

Signature: 

Commissioner: ***Gerald Jacobs***