PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **Adv Raynold Bracks**
Case No.: **PSHS592 - 11/12**
Date of Award: **21 October 2012**

In the ARBITRATION between:

NEHAWU obo Jantjes, J.M. **Applicant**

and

Department of Health: Western Cape **Respondent**

Applicant/Union: NEHAWU obo Jantjes, J.M.
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DETAILS OF HEARING AND REPRESENTATION

1. The Arbitration was scheduled for hearing at the 1st Floor Boardroom of the Western Cape College of Nursing, Klipfontein Road, Athlone on 17th April and 8th October 2012. The Applicant was represented by Mr. Anwar Meniers, a union official. The Respondent was represented by Ms. Zoliswe Rikwe the Respondent's Labour Relations Officer.

ISSUE TO BE DECIDED

2. Whether or not the Applicant's dismissal was substantively and procedurally unfair.

BACKGROUND TO THE ISSUE

3. The Applicant was employed on the 16th July 1991 as a Security Officer earning R7 500 per month. The Applicant was suspended on the 18th July 2011. A disciplinary hearing was held on the 23rd August 2011 at which the Applicant charged for sexual harassment for incidents on the following dates: 14th March, 4th May, 9th May, 10th May and 29th June 2011. The complainant in all the cases was a Ms. B. Thorne. The Applicant was found guilty on all charges and dismissed on 6th September 2011. The Applicant appealed against the outcome of the hearing on 8th September 2011. The dismissal was upheld on 17th October 2011.

   The matter was referred on the 26th October 2011. It was conciliated on 5th December 2011 when it remained unresolved.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

4 Documents were submitted by both parties.

Employer's Evidence

***** As noted previously the proceedings were digitally recorded therefore what appears hereunder constitutes a summary of the evidence deduced by the parties in so far as is relevant for the purpose of this arbitration; it is by no means a minute of what transpired in the course of the proceedings.***

The Respondent called four witnesses who after being sworn in testified as follows:

Bernadette Thorne testified that:

5 She has been in the employ of the Lenteguer Hospital for the past 7 years as house keeper. She detailed her functions and to whom she reported. She met the Applicant for the first time during the renovations and the only relationship between them was that she was the housekeeper and he was the security.

6 She explained that early in February 2011 there were some changes regarding the wards. She went on leave from 23rd February to 14th March 2011. On return from her leave she was standing in front of the stove in the back kitchen one day when the Applicant came behind her and started stroking her back and sides and pushing her against the wall. She had to struggle to fight him off and told him that what he was doing was wrong and she did not like it. He left her but she was very distressed. This incident was followed by another early in May. She was on the stoep during her lunch break and busy on her phone when the Applicant came up to her and forced himself between her legs pushing his torso into her face. He told her to smell his penis. Marilynn Simpson witnessed this because she was visiting the witness at the time. For Miss Schouw it was a big joke but Simpson was very upset and so was she, so much so that she spent half the day in Ward 11 to avoid him. On her return to the ward she was asked by Frasenberg whether the ward bit. The witness answered in the affirmative and told him to speak to security.

7 On 9th May she was behind Ward 1 in the presence of Schouw. The Applicant came to her opening his pants half way and wanted to show her his g-string underpants. She told him "nee gaan ek het 'n man" to which he responded "ek smaak jou." The following day (10th May) he found her in the kitchen. He started stroking her and said "morning angel, how was your night". She responded that she did not have to explain to him how her night was. She then said to him "ek gaan jou nog verklaar". He told her "jy kan maak wat jy wil daar sal niks daarvan kom nie." This made her feel helpless and she became extremely frustrated. The Applicant then left the kitchen and she stayed out of his way the whole day.

8 The Applicant went on leave and the workplace was very peaceful. She had not done anything yet because she hoped he would come to his senses and realize that what he was doing was wrong. He returned in April and she went to speak to Frasenberg to find out why the Applicant should be in the kitchen. Frasenberg said he could not restrict the Applicant from moving about in the building but if he was harassing her he would suggest that she lay charges. She was so emotional because the Applicant had made her feel cheap and dirty. She still thought that he would come to his senses.

9 In early June she and Mrs. Adams and other housekeepers met. Adams gave her a lift to the ward and during the trip Adams asked the witness whether she was alright in the ward. She told Adams the Applicant was touching her inappropriately. Adams told her the case was serious and she needed to go to the head of security Ms Fisher to have the Applicant disciplined. Despite this advice she continued as normal. On the 29th June while she was on her way to her locker the Applicant grabbed her by the upper arm, pulled her towards him and tried to kiss her. She tried to get away from him but he continued to block her way. She ran from Ward 10 to Ward 11 crying. She was afraid to return to the ward and only returned at about 15h00. She then mustered all her courage and went to Fisher's office in tears. She wanted this to end. Fisher came to the door and saw her crying hysterically and invited her in and calmed her down. She explained to Fisher that the Applicant was touching her inappropriately and told her everything that had happened. She asked Fisher to escort her to the ward which Fisher did.

10 The witness's husband fetched her from work, saw she was upset and asked what was wrong. She disclosed to her husband all that had transpired. She had to stop him from going to assault the Applicant. He then insisted that she give him Fisher's office number. Fisher had told the witness that she would deal with the Applicant and remove him from Ward 10 which she indeed did. The matter then followed the normal process. She was referred to the Employees Assistance Program by Adams.

11 Under cross-examination not much was revealed except that it was put to the witness that the Applicant had not touched her inappropriately but wanted to find out from her why she was working with her hair hanging loose. Also, that he had not shown his g-string to her but that his pants had become unzipped. The witness denied all of this.

Avril Blanche Fisher testified that:

12 She was head of security at Lentegeur Hospital. She detailed her duties and reporting lines. She explained the duties of the security and said that as security they had to stay in the functional area of the patients. They were not supposed to be found anywhere else.

13 The witness said in the first week of 2010 they met to discuss their teambuilding outing which was normally held at a beach resort. At this meeting the staff requested her to ask the Applicant not to attend because of his inappropriate behaviour. This request came as a result of an incident which had occurred on the last occasion when a staff member who could not swim was in the pool and the Applicant pulled officer Cloete's pants down. In addition it was stated that when they reached the place the Applicant undressed down to a red g-string and paraded around the whole day in it with his anatomy protruding. She explained how he bent down and inappropriately exposed himself. She called the Applicant to explain to him that he would not be attending the function at the end of the year.

14 In another incident there were complaints from the students who requested her to speak to the Applicant about his behaviour. His response to her was "if you got it you got it." No one wanted to make a case against the Applicant.

15 The witness explained further that on the 29th June 2011 just after 15h00 Thorne arrived at her door in tears and extremely distraught. Thorne explained to her that she was on her way to the ward to fetch something but the Applicant blocked her way. She pushed him away angrily and swore at him and ran out telling him she was going to report him. She said that Thorne reported it to Frasenberg who told her to report it to the witness. Thorne told her she did not do it earlier because she did not want the Applicant to lose his job. It also became clear that she did not know what sexual harassment was. The witness took Thorne's statement and escalated it to Ms Swarts. The witness called the Applicant and offered him the Employee Assistance Program which he refused. She also offered him the assistance of the union which he also refused. The Applicant was then suspended and escorted off the premises. There were policies in place which the staff was informed of and they were aware of the sexual harassment policy as Mr. Roman constantly gave lectures on it. It was because of his sexual harassment of staff that he was restricted from attending the staff teambuilding gatherings.

16 Under cross-examination the witness stated that this behaviour manifested itself in 2009 and they tried to reprimand the Applicant but the employees would not co-operate so the matter could be addressed and specifically asked her not to raise the issue. In respect of the policies she stated that Lenny Roman had come to the ward in 2011 to explain the policies to staff. She had also spoken to the Applicant and cautioned him that his interfering with the female staff would get him into trouble. This was communicated to him over a period time.

Freda Adams testified that:

17 She was the Assistant Manager Nursing, Forensic Services and Sexual Harassment Contact Officer. She explained her duties and further stated that Mr. Roman was responsible for the sexual harassment training. She had contact with the Applicant when she was working in Ward 1.On the 6th June 2011 she attended a linen meeting where she met Thorne. She asked Thorne how she was doing. Thorne told her what was happening between her and the Applicant. The witness felt that the Applicant's behaviour was unwelcome and she explained to Thorne what sexual harassment was and that she should report the matter immediately to her supervisor. Thorne told her she had tolerated the Applicant and eventually

reported the Applicant on the 26th June. Fisher then called the witness and told her she needed to speak to her regarding an issue of sexual harassment. She then brought the Applicant to the witness on the 30th June and they offered him the Employee Assistance Program. They further told him to bring his representative which he refused to do. She dealt with Thorne and got her the necessary emotional support. Thorne told her what the Applicant had done and that this had made her feel cheap. She also did not want him to be dismissed.

18 The witness said initially she had given the training on sexual harassment but later it was taken over by Roman. Security was one of the sections invited to do the training. She also explained that the training was done particularly in the wards.

19 Under cross-examination the witness stated that she had told Thorne to report the matter and escalate it to the Applicant's supervisor. Thorne had promised her she would first speak to the Applicant to try and dissuade him from his behaviour and get back to the witness once she had done so. Thorne told the Applicant if he did not stop she would report him. According to her all the wards were aware of the policy as it had been handed to all of them and there was training.

Bernadette Wippenaar testified that:

20 She was a general assistant in Ward 10 and had seen the Applicant in Ward 1 performing his functions. She was busy preparing the patients' bread when she saw the Applicant going into the kitchen from the dining room. He walked outside to where Thorne was sitting. He went and stood between her legs and started playing with her hair. Thorne pushed him away and said "Jy wil nie hoor nie nê, ek gaan jou verklaar." She looked very angry. The witness then left to put the bread in the pantry. The Applicant went inside and then saw the witness in the kitchen.

21 The cross-examination of this witness did not add anything new.

Employee's Evidence:

The Applicant, John Michael Jantjes, testified as follows:

22 He stated that he had been in the employ of the Respondent for 22 years as senior security officer. He was referred to p.12 of the bundle which was the charge sheet. He testified as follows in respect of the charges.

23 **Charge 1:** On the morning of 14th March 2011 he went to the kitchen and touched Thorne's hair with his finger and said to her "you can't work like that (meaning that she was supposed to have her hair covered)." She said to him "Jy kannie vir my sê. Jy is nie my supervisor." According to the Applicant there was not a day that passed without the Applicant using abusive language. He then stuck his two fingers into her side. Mrs. Schouw was present.

24 **Charge 2:** On the afternoon of 4th May 2011 he went to where Thorne and the other employees were sitting. Thorne was the closest to the door. As he got to her he realized that his zip had come undone. He turned around to pull the zip up. There were about four people. It was around lunchtime and he normally took his lunch in Ward 10.

25 **Charge 3:** Around lunchtime he went outside and found Schouw, Wippenaar and Simpson standing around talking trivialities. He untied his belt to tuck his shirt in. He then went inside. He denied saying anything to them.

26 **Charge 4:** In the morning he had found Thorne standing around. He then said to her "what about the loose hair. It is nice but it should not be loose."

27 **Charge 5:** On that day Thorne was in a rush and he playfully blocked the door. He ducked and dived and after a while he let her go.

28 He was normally the entertainer for the day walking around in his G-string. No one had ever complained or confronted him. He only heard about it a year later when he was informed that he could not go. He felt very bad because no complaints had ever been raised.

29 According to him he was not aware of the sexual harassment policy. He only became aware of it before the matter as he had never received any training. Touching someone was allowed if that person allowed it. Thorne always spoke to him using abusive and foul language. He only heard about the sexual harassment on the 30th June. He and Thorne saw each other from May to June.

30 He conceded that he was offered the Employee Assistance Program. Further he conceded that he was present at the hearing and said that the evidence presented by Wippenaar was contradictory as she stated that she was standing with her back to them and therefore she could not testify because she could not see what was happening.

31 Under cross-examination the Applicant testified that it was not one of his duties to be concerned with Thorne's hair. He however stated he was concerned that her loose hair was unhygienic and he wanted to make her aware of it and that's why he touched her hair. When asked why he could not tell her without touching he said he had spoken to her on numerous occasions about it.

32 He stated further that he and Thorne had been in a relationship. He used the kitchen as a thoroughfare during his patrols. He was not allowed to call Ms. Schouw at the hearing. He said he had done nothing wrong and he did not know why Thorne had brought charges against him. Fisher had something against him and that is why Thorne went to Fisher; there was a conspiracy against him. The cross-examination was arduous and lengthy but nothing significant was revealed further.

ANALYSIS OF EVIDENCE AND ARGUMENT

33 Section 188 of the Labour Relations Act 66 of 1995 (as amended), provides that an employee's services should not be terminated unless the reason for such termination is fair and relates to conduct, capacity or operational requirements. Item 4 of schedule 8 also stipulates that the termination of services should not be effected without a fair procedure being allowed. The burden of proof, on a balance of probabilities, that the Applicant's dismissal was substantively fair, rests with the employer.

34 A Code of Good Practice on the Handling of Sexual Harassment Cases has been issued by Nedlac. In item 3(1), the Code of Good Practice defines sexual harassment as unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual. This is also found in the authorities that will follow.

35 In **Reddy v University of Natal [1998] 1 BLLR 29 (LAC)** the Labour Appeal Court described sexual harassment as unwanted sexual behaviour or comment which has a negative effect on the recipient. This was confirmed also in **J v M Ltd (1989) 10 ILJ 755 (IC); Payten v Premier Chemical Industries**

[1999] 8 BALR 922 (CCMA); Gerber v Algorax (Pty) Ltd [2000] 1 BALR 41(CCMA) and Mowatt, Sexual Harassment – New Remedy for an Old Wrong (1986) 7 ILJ 637.

36 Section 10 of the Constitution of the Republic of South Africa, Act 108 of 1996 stipulates that "everyone has inherent dignity and the right to have their dignity respected and protected."

37 In "Employment and Labour Law vol. 1" at E.4 26–27 Brassey suggests that sexual harassment is *"an expression that can be used in describing sexual assault, especially of a less serious sort, but it also denotes non-physical sexual overtures and other sexually implicated conduct that the employee reasonably finds degrading or oppressive. Framed in this broad way, the description denotes more than just an act by which the perpetrator seeks some sexual or similar gratification from an unwilling victim; it also denotes conduct which creates a sexually charged environment to which the employee is entitled to take offence – by making sexual jibes, telling salacious jokes or displaying nude pin-ups, for instance."*

38 In PSA **obo Ferreira and Another / Department of Labour [2004] 8 BALR 1001 (GPSSBC)** the arbitrator stated the following: "*It follows that an employer is required to investigate and, if necessary, take action against perpetrators of sexual harassment – see items 5–7 of the Code of Good Practice* and **J v M Ltd (1989) 10 ILJ 755 (IC); Ntsabo v Real Security CC [2004] 1 BLLR 58 (LC).** *I have studied every case on sexual harassment I could lay my hands on. In the vast majority of these cases it was held that an act of sexual harassment warrants dismissal. I agree with this trend because sexual harassment in whatever form constitutes grave disrespect for another human being and as such is a very serious form of misconduct. In addition, an employer is required to eradicate sexual harassment and create a working environment that is conducive to healthy relations where all employees treat one another with respect and recognize another's integrity and dignity*."

39 The undisputed evidence is clearly against the Applicant in that he sexually harassed Thorne. He did not dispute the evidence of Thorne. In his own evidence he stated that he had touched her hair and tried to explain that he did it because he thought it was unhygienic for her to have loose hair. The Applicant was a security guard and had no reason to interfere with the activities of Thorne.

40 Further the Applicant tried to make light of his conduct towards Thorne trying to pass it off as either a joke or innocent action. The difficulty with the Applicant's evidence was that whenever he had to tuck in his shirt or his pants came unzipped it happened in Thorne's presence. I find this evidence very disingenuous and implausible.

41 The actions of the Applicant always involved him exposing himself to the extent it was not denied that the rest of the employees found this conduct of the Applicant distasteful. To this extent I found the failure of Fisher to address this situation sooner a serious neglect of duty since some of these actions could have been avoided and nipped in the bud much earlier.

42 It is trite law that an employer is required to eliminate sexual harassment in the workplace and to create a working environment where employers and their employees respect one another's integrity, dignity, privacy and right to equity in the workplace – item 1(3) of the Code of Good Practice (LC). If the Respondent had failed in this it could have opened itself to legal action and it follows that an employer is required to investigate and, if necessary, take action against perpetrators of sexual harassment.

43 In this regard I wish to state that it was confirmed in Media 24 Ltd and Another v Grobler (301/2004) [2005] ZASCA 64; [2005] 3 All SA 297 (SCA) (1 June 2005) at paragraph 65 where it was stated "It is well settled that an employer owes a common law duty to its employees to take reasonable care for their safety (see, e.g. Van Deventer v Workman's Compensation Commissioner 1962 (4) SA 28 (T) at 31B-C and Vigario v Afrox Ltd 1996 (3) SA 450 (W) at 463F-I). This duty cannot in my view be confined to an

obligation to take reasonable steps to protect them from physical harm caused by what may be reasonable care for their safety called physical hazards."

44 An issue that cannot escape consideration is that of the trust relationship because sexual harassment in whatever form constitutes grave disrespect for another human being and as such is a very serious form of misconduct. (See Gerber v Algorax (Pty) Ltd [2000] 1 BALR 41 (CCMA).

45 In *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 9 BLLR 995 (LAC) paragraph 22, the court, per Conradie JA, held the following regarding risk management: 'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

46 In *Toyota SA Motors (Pty) Ltd v Radebe and others* [2000] 3 BLLR 243 (LAC) para 15 Zondo AJP (as he then was) stated; 'Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty.' In the present case I concur with the words of Zondo that the present case also falls under this category

47 As regards trust our courts have stated for example in Williams v Gilbeys Distillers (Pty) Ltd (1993) LCD 327 (IC) that: "If an employer for instance mistrusts an employee for reasons which he must obviously justify … and he can show that such mistrust, as a result of certain conduct of the employee is counter-productive to his commercial activities … he would be entitled to terminate the relationship. The Respondent had stated that the Applicant was a senior manager. It is therefore logical (even though this was not argued by the Respondent) that the Applicant as the custodian of the Respondent's code had violated the same code he was expected to enforce on his subordinates. The employees had clearly indicated their discomfort to the Applicant but he deliberately ignored their pleas that his behaviour was inappropriate and should stop and he blatantly ignored their outcries.

48 The test which is generally applied is whether the employee's misconduct has rendered the continuation of the employment relationship impossible – see *Hoechst (Pty) Ltd v Chemical Workers CWUI (1993) 14 ILJ 1449 (LAC).* **In this case one can safely conclude that it did.**

49 The Applicant had raised the issue of procedural unfairness based on the fact that he was not given an opportunity to call witnesses and that his version was not considered. Despite this I have considered the evidence presented and wish to state that I am not convinced that the Applicant was denied an opportunity to state his case at a properly constituted disciplinary hearing. I find support for this in that the right to fair procedure preceding a dismissal is spelt out in specific terms in the Code of Good Practice: Dismissal at Schedule 8 of the Act where Item 4 provides that:

*"(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to seek the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decisio*n." This was done.

50 In addition in Averill Elizabeth Home for the Mentally Handicapped vs CCMA and another (unreported decision), LC November 2005, case number 782/05 the court presented a significant and fundamental departure from the "criminal justice model" that had been developed by the Industrial Court under the unfair labour practice jurisdiction that evolved under the 1956 LRA. That model likened a pre-dismissal hearing to a criminal trial with developed rules and procedures including rules relating to bias and apprehension of bias. According to it the rules relating to procedural fairness introduced in the current LRA do not replicate the criminal justice model of fairness. This is because the drafters of the Act recognized that for workers, true justice lies in the right to an expeditious and independent review of an employer's decision to dismiss, with re-instatement being the primary remedy when the substance of an employer's decision to dismiss is found to be unfair. The right to resort to expeditious and independent arbitration is intended to promote rational decision-making in the workplace and is an acknowledgment that the criminal justice model developed under the 1956 Act was inefficient and inappropriate in the workplace. The Judge went on further to say that the current LRA had struck a balance in that there was recognition that managers are not experienced judicial officers and that workplace efficiencies would be unduly impeded by onerous procedural requirements."

51 The process of deciding on the appropriate disciplinary sanction is complex. Dismissal should only be considered as a last resort and is normally reserved for extremely serious transgressions like theft, gross dishonesty, physical assault of the employer, and willfully endangering the safety of others. In deciding whether or not the Applicant should be dismissed, the following factors need to be taken into account: the Applicant's length of service, his/ her disciplinary record and most importantly, the circumstances under which the conduct was committed.

52 I am therefore faced with the question of whether or not dismissal was fair. In the Sidumo case our courts have rejected the reasonable employer test as a means of determining whether to interfere with a sanction imposed by the employer. Clear guidelines have been given regarding what factors need to be considered in determining the sanction. The following quotation that appears at page 1131 at paragraphs 78 and 79 of *Sidumo* suffices:

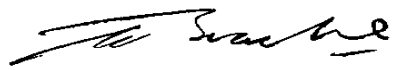
> *"In approaching the dismissal dispute impartially, a commissioner will take into account the totality of the circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list. To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."*

53 In this case the Applicant had no regard for the complainant's inherent dignity and the right to have her dignity respected and protected. He clearly brought the Respondent's name into disrepute exposing it to possible legal action resulting from his behaviour. In addition he clearly showed no remorse towards Thorne and saw nothing wrong with his actions and for this reason it is my view that dismissal was the appropriate sanction.

54 For this reason I find the Applicant's dismissal to have been both substantively and procedurally fair and that dismissal is an appropriate sanction.

AWARD

The case against the Respondent is accordingly dismissed.



Adv. RONNIE BRACKS

PHSDSBC Commissioner