



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS592-18/19**

Commissioner: **Nozibusiso Faith Gumede**

Date of award: **14 February 2019**

In the matter between:

POPCRU obo EMMA LEHUMO MODIKOE

(Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES – NORTH WEST

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration was held under the auspices of the Public Health and Social Development Sectorial Bargaining Council (hereunder referred as “PHSDSBC”) terms of section 191(5) (a) of the Labour Relations Act, 1995 as amended (“hereunder referred as the LRA”) and the award is issued in terms of section 138(7) of the LRA. The hearing took place at Department of Correctional Services, Rustenburg on 20 November 2018, 5 January 2019, 6, January 2019, 7 January 2019 and 5 February 2019.
2. The applicant, Emma Lehumo Modikoe was represented by Johannes Dire, a Union Official from Police and Prisons Civil Rights Union (POPCRU) whilst the respondent, Department of Correctional Services – North West was represented by Daniel Hlatshwayo, the Employee Relations Investigator. The service of the interpreter was not required. The hearing was both digitally and manually recorded.

PRELIMINARY ISSUES

3. On 20 November 2018, the respondent' representatives requested a postponement because he did not get the opportunity to prepare for this case, as he only became aware of his appointment on 19 November 2018. The pre-arbitration was not held, and the key witness (applicant's disciplinary hearing chairperson) was at the intensive care in hospital. The applicant opposed this application, and disputed that they were not notified on 20 November 2018 because the letter of their appointment was dated the 30 October 2018. There was no need for any preparation because they investigated this matter, the pre-arbitration is not compulsory and the chairperson's evidence is not crucial because it is a hearing *de novo*. Further indicated that a delay will prejudice the applicant, as she does not have any source income, and the postponement must be granted with a cost order against the respondent. The respondent indicated that they will abide to any cost order issued in these proceedings, as it was not their intention to delay the proceedings.
4. It was apparent that the matter could not have been brought to finality on this day, as one of the witnesses was in hospital, and there was no proof to show that the respondent had delay these proceedings in the past. Therefore, it was proper grant the postponement, and the parties agreed for the matter to be rescheduled for 8, 9 and 10 January 2019.
5. On 10 January 2019, similar request was made, on the basis that the 4th witness was unavailable due to ill health. This request was not granted, as no medical certificate was produces as evidence. The respondent representative was persistent, and also indicated that he was also not feeling well. The applicant duly opposed this application, on a view that the other representative can proceed in his absence. However, this representative was not present when other witnesses were testifying. Therefore, it was proper to grant it, and furnish PHSDSBC with a medical certificate.

ISSUE (S) TO BE DECIDED

6. I am required to make determination on the following substantive and procedural issues:

- whether the rule was known by the applicant or not,
- whether she breached it or not,
- whether she was discipline twice for the similar misconduct or not;
- Whether to award a remedy or not, and if so, to determine the appropriate remedy?

BACKGROUND TO THE DISPUTE

7. The applicant was employed by the respondent as a Senior Social Worker for approximately 19 years, and she was earning R344 814.00 (three hundred and forty-four thousand, eight hundred and fourteen rands) per annum. She is seeking retrospective reinstatement in this matter.

8. The applicant's disciplinary enquiry was held on 11 July 2018, and the charges were drafted as follows:

a. **Charge 1** – *Disciplinary Code and Procedure Resolution 1 of 2006 Annexure A clause (p) Dereliction of duties. In that whilst on duty an action plan was drawn up on the 23rd August 2016 for the Social Workers of North West Region which you were forming part of, for the assessment of Lifers at Losperfontein Correctional Centre in order to address the issue of backlog for lifers reports, the plan was scheduled from the 12th – 16th September 2016 between 07h00 -16h00 and you failed to carry out the lawful instruction as agreed and that is viewed as gross insubordination from your part by the Department of Correctional Services.*

b. **Charge 2** – *Disciplinary Code and Procedure Resolution 1 of 2006 Annexure A Clause (g) Prejudice the administration, discipline or efficiency of a department, Office or institution of the State. In that your refusal to administer the backlog of lifer's reports led to lifers litigating against the State at Losperfontein Correctional Centre, and these litigations spread to*

different Managements areas in the country, causing a lot of financial implications and damage to the reputation of the Department.

SURVEY OF EVIDENCE AND ARGUMENT

9. I do not intend to deal with every aspect of the evidence as it is recorded and will only record the part of the evidence that I deem necessary for the purpose of this determination. I will deal with the evidence of all the witnesses in the same manner. The parties submitted bundle of documents to support their evidence.

RESPONDENT'S CASE

1ST WITNESS

10. **Mduduzi Buthelezi** ("Buthelezi"), the Area Coordinator (Social Integration), testified as follows:

11. There had a backlog of psychologist and social workers reports of more than 200 prisoners who are sentenced for life imprisonment (Lifers) at Losperfontein Correctional Centre. On 23 August 2016, he was invited into a meeting, as an Acting Area Commissioner to explain the reasons for compiling these reports. The applicant was among the Social Workers who attended this meeting. The Action Plan was then drafted, and these prisoners were grouped into team for each Social Worker.

12. He averred that due to the applicant's failure to obey this instruction, they incurred cost as they had to appoint a Senior Counsel to represent them at the High Court to defend the state against the legal action taken by these prisoners. The applicant was subsequently summoned to attend a disciplinary hearing for this offense.

13. He further testified that the applicant had a written warning for the similar misconduct which was issued on 24 November 2016.

14. At cross examination, he stated that the applicant worked at the Community Correctional Services which fall within the Rustenburg Management Centre. At the meeting of 23 August 2016, the applicant and other Social Workers agreed on the timeframe for compiling these reports. He argued that she was not transferred per se to Losperfontein

Correctional Centre but merely delegated to compile reports. He also indicated that he was not the applicant's direct supervisor and did not have her sick leave records. He has cordial relationship with the applicant and did not make a final decision of her dismissal sanction.

2ND WITNESS

15. **Carina Maria Muller** ("Muller"), the Manager: Social Workers Services testified as follows:

16. On 17 August 2016, she sent a memorandum regarding the plan of action to address the backlog on social reports for lifers at Losperfontein Correctional Centre to the Area Commissioner in Rustenburg. The backlog was for prisoners who were transferred from a private prison in Kutama Correctional Centre to Losperfontein Correctional Centre.

17. On 23 August 2016, the applicant attended a meeting where all Social Workers were tasks to compile these reports. The action plan was then drafted, and agreed to assist from the 12 until the 16 September 2016.

18. On 26 August 2016, the applicant sent an email to Menkie Annida Moeketsi agreeing to partake in it, after she was persuaded her. However, she did not compile these reports and did not tender any explanation. She also did not compile similar reports in 2015, and which led into an investigation which was still pending when a meeting was held on 23 August 2016. She testified as a witness on her disciplinary hearing.

19. There was other Social Workers (Ntebo Sibanda and Dichaba) who were unable to compile these reports from 12 to the 16 September 2016 however they made arrangement to perform this task on different dates. There had consistent communications with emails regarding these reports, and would have known if the applicant had made alternative arrangements.

20. The Reviewed Social Work Service Policy Procedures Directorate Social Work Services make provisions for referral of other social workers to different Correctional Centers. She averred that it would have been risky to bring these prisoners to Rustenburg for compiling

their reports. The applicant also contravened the ethics code, as she refused without sufficient cause to render a professional service.

21. Under cross-examination, she stated that the instruction for the applicant to work at the Losperfontein was issued by the Area Commissioner. She was not aware that the applicant will be facing a disciplinary hearing for 2015 refusal to carry a lawful instruction. She was not informed about the applicant's sick leave. She averred that the action plan was drafted for September, October and November 2016, the applicant was at liberty to elect any date during this period to compile reports of the prisoners which were allocated for her.

3RD WITNESS

22. **Menki Moeketsi** (Moeketsi), the Area Coordinator (Development and Care) testified as follows:

23. She consulted with the applicant after receiving an email that she does not want to partake in compiling the reports of Losperfontein Correctional Centre prisoners. However, she managed to persuade her, and she confirmed her attendance by an email but she still failed to partake to it and did not provide any explanation for it.

24. Under cross-examination, she stated that the applicant does not directly report to her. On 9 November 2016, she wrote a letter to the applicant to enquire about her failure to partake on Losperfontein Correctional Centre project but she did not respond to it. She conceded that the applicant's failure to partake on 14 September 2016 was justifiable because she was summoned to attend her disciplinary hearing on this date.

APPLICANT'S CASE

25. **Emma Lehumo Modikoe**, applicant testified as follows:

26. She worked at Rustenburg Correctional Services, and she was directly reporting to Tom Muller. She was on sick leave from the 12-13 September 2016, and a medical certificate was provided to her direct manager. The Z198 register was completed by her line

manager to confirm her reasons for failure to report for duties. She would assisted at Losperfontein Correctional Centre if it was able to do so.

27. Under cross examination, she stated that she reported to her supervisor as per protocol. She did not call Tom Muller, as witness in these proceedings because she did not deem it fit to do so. The medical certificate was presented at the disciplinary hearing as evidence.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

28. In terms of section 138(7) of the LRA, I am required to issue an award with brief reasons, and what follows is a summary of the evidence and argument that I regard as necessary to substantiate my findings and determination of the dispute. In terms of section 192(2) of the LRA, the respondent bears the onus to prove that the dismissal was fair. The evidence will be dealt for each charge as follows:

CHARGE 1 (paragraph 8.a above)

29. The respondent's witness (Moeketsi) indicated that the applicant had to be persuaded to assist in compiling the Lifers reports at Losperfontein Correctional Centre. However, the email sent to her by the applicant on 26 August 2016 merely stated that "*After the discussion we had with the area co-ordinator development and care due to the humanistic approach and empathy she displayed, I have come to a conclusion to take part in this project that will take place in Losperfontein. Even though I'm still convinced that initial approach was one of a dictatorship to say the least*". This suggest that she was indeed aggrieved by a manner on which this instruction was issued. It is also probable that her dissatisfaction was resolved in this meeting, as she eventually agreed to complete this task.

30. However, the applicant argued that she was unable to compile these reports due to ill health on 12 and 13 September 2016. This evidence would have suffice if the medical certificate was supplied or if the register which she alleges was completed by her line manager was corroborated by his testimony. However, she provided a rational explanation for her failing to compile these reports on 14 September 2016, in that she

was summoned to attend a disciplinary hearing on this date. However, no explanation was given, as why she did not compile them at the later stage.

31. Moreover, there is also no evidence led to show if she had enquired about the reports of prisoners who were assigned to her. Muller indicated that she was not the only social worker who was not able to perform these duties on the week of the 12 September 2016 but they were able to make alternative arrangements to compile these reports. Therefore, she did not fulfil her obligation because she did not commit into an alternative date as her colleagues.

32. In *Westman Group v SAMWU* [2012] 8 BLLR (LAC), the court considered the difference between insubordination per se and insubordination which must give rise to the ultimate dismissal. It was held that the difference between insubordination and gross insubordination is a question of degree. It was held that there is difference between an employee that partially defies an instruction but later completely complies with it and an employee that deliberately refused to obey the instruction, expressly defying an instruction and challenging the authority of the employer, especially in the presence of other employee. In this matter, there was no evidence led which suggest that the defiance was committed in the presence of other employees. However, it is probable that other social workers were aware it because she was assigned to work with them as a team.

CHARGE 2 (paragraph 8. b above)

33. It is evident that the backlog was not at the Correctional Centre where the applicant is located. Therefore, it will be improper to suggest that she was liable for it from the onset. It is probable that it exposed the respondent to potential litigations. However, if there was any cost incurred and/or reputational damage, it is the respondent who should be held liable for not placing appropriate measures to prevent it.

34. The applicant further challenges the procedural defects. In that she was disciplined twice for the similar offense. However, the records shows that she was issued with a written warning for refusal to carry out a lawful instruction in 2015 and dismissed for 2016 contravention of disciplinary code and procedure resolution 1 of 2006. Therefore, the applicant was not discipline twice for similar incident, and the notion of “*double jeopardy*”

is not applicable in this matter, as she was not charged for the same misconduct and the second enquiry did not emanate from the same event.

35. However, she cannot be regarded, as a regular offender because she successfully challenged a written warning issued for 2015 alleged transgression which was held under case number PSHS1163-16/17 at PHSDSBC. There is also no evidence led to show that the arbitration award issued on this matter has been reviewed and set aside by our courts. However, the evidence led in proceedings which led to her dismissal had been determined on its own merits.

36. Moreover, the sanction of dismissal would have not been appropriate if she had shown any remorse and/or had sufficiently substantiated her claim. Therefore, the respondent has discharged a burden of proof on the misconduct (charge 1) of dereliction of duties.

37. On a balance of probabilities, the applicant's dismissal was substantively and procedurally fair. The relief sought will not be granted in this matter. The cost order will also not be appropriate in this matter because the parties were not legally represented, and it was not a frivolous and vexatious matter *per se*.

AWARD

38. I make the following order:

39. The dismissal of the applicant by the respondent was both substantively and procedurally fair.

40. The applicant's dismissal upheld.

41. There is no order of costs.



NOZIBUSISO FAITH GUMEDE