



# ARBITRATION AWARD

Commissioner: **Khehla Khanyile**

Case No: **PSHS595-20/21**

Date of award: **29 March 2021**

In the matter between:

**PSA OBO PORTIA SHAZI AND 18 OTHERS**

Applicants

and

**DEPARTMENT OF HEALTH- KWAZULU NATAL**

Respondent

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## DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was scheduled for 02 February 2021, 09 and 10 March 2021 at Gamalakhe CHC in Port Shepstone. The applicants, Portia Shazi, Thandazile Duma, Nokwanda Khuzwayo, Zandile Mbali, Fikile Mthlane, Zethu Msiya, Caroline Khuzwayo, Noma Khuzwayo, Zinhle Cele, Winnie Mthembu, Nontuthuko Dlamini, Thabile Mpangase, Mbuso Mseleku, Nokukhanya Jaca, Thandeka Mhlanvu, Blessing Ndovela, Linah Tjale, Zilungile Khumalo, and Zodwa Mkhize, appeared in person and were represented by the Union Official, Ms. Gillian Hassan from PSA. The respondent was represented by the Labour Relations Officer, Mr. Khulekani Msomi. The proceedings were digitally recorded and I also took down notes. The parties agreed to submit their written closing arguments on 17 March 2021.

## **ISSUE TO BE DECIDED**

2. I am required to decide whether the respondent committed an unfair labour practice against the applicants or not.

## **BACKGROUND TO THE DISPUTE**

3. The applicants, are still employed by the respondent. The respondent alleged that the applicants embarked in an illegal strike on 06 May 2020. The applicants are earning various salaries monthly.
4. The respondent issued the applicants with the final written warnings as follows:  
This is a final written warning in terms of the disciplinary procedure for the misconduct whereby:
  1. You were found guilty of participating in an unlawful strike on 6 May 2020
  2. You did not your normal working station even after the instruction of the Chief Executive Officer.
  3. You could not give valid reasons as to why you did not comply with a lawful and reasonable instruction from the CEO.
  4. You could not provide valid reasons to service it and justify your absence from your workstation on the day upon return.
5. The applicants argued that the respondent committed an unfair labour practice by issuing them the final written warnings and deducting their salaries. It is the respondent's argument that the respondent did not commit an unfair labour practice.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

6. The parties herein relied on the oral testimonies of witnesses as well as documentary evidence.

### **Applicants' case**

#### **Witness 1**

7. Mr. Mbuso Mseleku (Sterilizing Surgical Instrument) stated that on 04 May 2020, he was called to the assembly area by his supervisor, and the CEO, Dr. Shongwe addressed them that someone tested positive for COVID-19. He submitted that the aforesaid CEO instructed them to go home and return to work after two days, to allow the respondent to disinfect the institution. He further submitted that on 06 May 2021, he reported for duty and was advised by his supervisor, Mr. Cele that his workstation

was not fumigated. He further stated that he reported to Mrs. Ntuli, who advised him to go to Ms. Kunene who then referred him to go to the supervisor, Sister Nkosiyaphansi. He testified that he received a call to come to the assembly area and the colleagues informed him that certain stations of the institution were not fumigated. He testified that they were firstly addressed by the organized labour, secondly by both organized labour and management, thirdly by organized labour at around about 17h00. He further testified that management the CEO, in his address said, "they must get out of the gate". He submitted that the CEO informed that they were going to be tested and refused to take any questions. He further submitted that the respondent made deductions from his salary without his concern. He stated that the respondent issued him with the final written warning.

## **Witness 2**

8. Ms. Zilungile Khumalo stated that she works at the casualty department. She submitted that on 03 May 2020, they were summoned to the assembly area and advised one of the colleagues tested positive for COVID-19. She testified that management informed them that they would go home as the institution would be fumigated and come back after two days. She further testified that on 06 May 2020, at around 7.00 am, they asked their supervisors how they would be tested and informed them management was going to test the employees who were in close contact. She stated that the casualty department was fumigated on 06 May 2020 as the floor still wet and unable to work there. She further stated that the organized labour had a meeting with the management and called to meet at the assembly area, and informed them that the management was coming to address. She testified that the CEO addressed them (accompanied by the police) in that, they had to go to the workstation or go outside the gate. She further testified that the Shop Stewards called the Union Organizer, Mr. Mthalane to come, and while they were waiting for him, they went to the workstations, but the casualty was still being cleaned. She stated that upon arrival, Mr. Mthalane informed them that he was going to speak with the management and advised them that the management refused to speak to them. She further stated that the district manager arrived at around 03h00pm, and they had a meeting with the management. She further stated that at around 5h00pm, the organized labour addressed them that the management agreed to test them gradually, and were not going to be charged for what

happened. She submitted that the respondent never issued them with the ultimatum nor the disciplinary hearing was held. She testified that the management issued them with final written warnings and deducted from her salary R769.00 without her consent. She further testified that the respondent was not consistent, as other employees were not charged like Ms. Nontuthuko Dlamini who attended the meeting.

9. Under cross-examination, she conceded that she had no permission from her supervisor to attend the meeting. She denied that the respondent gave them an ultimatum.

## **Respondent's case**

### **Witness 1**

10. Mrs. Thokozile Ntuli (Deputy Manager Nursing) stated that on the 03 May 2020, she was telephoned by District Communicable Disease Coordinator informing her about the positive results of the COVID-19 infection which had infected one of their staff members in Gamalakhe Community Health Center together with IPC. She testified that the person infected confirmed that she had been going on all over the place and they realized that area was not safe for the employees to work. She further testified that on 04 May 2020, the CEO decided to inform the staff. She stated that the OPD staff was first to get tested as the infected employee was working there. She further stated that at around 8.00 am, the organized labour and the management had a meeting, and the organized labour informed the management that their members were concerned about their safety. She testified that the management informed organized labour that the institution had been fumigated. She further testified that the organized labour came back and informed them their members wanted to be addressed by management. She submitted that they phoned the head office labour relations department which advised that they could address the employees. She further submitted that the CEO, Dr. Shongwe, accompanied by the police, addressed the employees who attended the meeting, and gave the instruction that they had to go back to their working station with immediate effect. She stated that after that the instruction, there was a lot of noise, shouting at him, and she tried to address them and they also shouted at her. She further stated that during that time there were a lot of patients who were waiting and no one came back to the unit.

### **Witness 2**

11. Dr. Phiwankosi Shongwe (CEO) stated that on 03 May 2020, the management was informed that the employee tested positive for COVID-19. He submitted that he suspended the operation on the day, and on 04 May 2020, the management addressed the workers that the operation would be suspended. He further submitted that the employees were informed to return on duty after two days. He testified that the fumigation was done on 05 May 2020, and the Environmental Health Care Practitioner, Mrs. Jwacu came to oversee the process. He further testified that the management and the organized labour including DENOSA, HOSPERSA, and NEHAWU agreed in the meeting to test all staff and was finished at around 8.30. He stated that the employees congregated at the assembly area. He further submitted that the organized labour came to his office and informed him that the employees were aggressive to address. He testified that he called the head office at the labour relations department seeking advice, and the police in the presence when addressing the staff fourthly about their plan. He further testified that the management team went to address the employees and Mrs. Ntuli was booed. He stated that he also addressed the employees and gave them the ultimatum. He further stated that in less than an hour, the electricity and water were cut off. He submitted that the respondent called the NEHAWU office. He further submitted that the Regional Organizer, Mr. Prince Mthlane, and the District Director came in at around 14h00 pm and held the meeting. He testified that the Regional Organizer and Shop stewards agreed to address the staff, and the dispute was then resolved. He further testified that the applicants committed the less serious offense as they endangered the people's lives. He further testified that he never agreed that he would not charge the applicants for their act of misconduct. He submitted that the respondent issued the applicants with the final written warnings and leave without pay.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

12. The applicants referred an unfair labour practice dispute to the council in terms of Section 186(2) (b) of the Labour Relations Act. I am required to decide whether the respondent committed an unfair labour practice or not.
13. In terms of Section 192, the applicants bear the onus to prove that the respondent committed an unfair labour practice. In terms of section 213, a strike means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by

- persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.
14. Section 65(1) (d) (i) provides that no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lockout if that person is engaged in an essential service. Section 213 of the Labour Relations Act defines essential service as including a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population.
  15. I want to bring to the attention of the parties that I did not receive the applicants' written closing arguments. The Council also has no jurisdiction to deal with the deductions made by the respondent.
  16. It appeared as common cause that the applicants were members of the organized labour. It appeared as common cause that the organized labour engaged with the management to resolve the dispute.
  17. The applicants argued that the respondent committed an unfair labour practice in issuing them with the final written warnings. I reject the applicants' argument to be less probable than that of the respondent. The evidence led by the applicants' witnesses, Mr. Mseleku and Ms. Khumalo confirmed that the applicants abandoned their work with no permission from management and met at the assembly area. Mr. Mseleku led evidence that the CEO addressed that they were going to be tested, and he instructed them to return to their workstations but refused to comply. Mr. Mseleku led hearsay evidence that Mr. Cele informed him that his workstation was not fumigated and that argument stands to fail. The applicants failed to prove why they continued with the illegal strike after the management agreed to test them. In this case, most of the applicants who were engaged in an essential service were not allowed to embark on an illegal strike. The question that begs answers as to why the applicants did not raise their concern through the organized labour to address it with management. In my respectfully view, the applicants compromised the service delivery. The applicants' conduct was serious and warranted final written warnings. It also is worth mentioning that the respondent issued final written warnings in August 2020, valid for six months and they had lapsed.

18. I accept the respondent's argument that the applicants committed a serious offence in that the applicants engaged in the unprotected strike, and endangered lives. The respondent witnesses' evidence was credible and reliable. Mrs. Ntuli corroborated with Dr. Shongwe that management agreed to the organized labour to test all employees for the Covid-19 and the CEO also addressed employees at the assembly area. The applicants had no valid reason to abandon their work as the organized labour was capable to address their concerns. The CEO submitted that he instructed the applicants to return to the workstations, but they refused to adhere. The respondent proved the applicants participated in an unlawful strike while they were regarded as essential workers.

19. In light of the above, the applicants on the balance of probabilities failed to prove that the respondent committed an unfair labour practice.

#### **AWARD**

20. I make the following award:

21. I find that respondent did not commit an unfair labour practice against the applicants.

22. The applicants' claim is hereby dismissed.

23. There is no order as to costs.



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Khehla Khanyile