



**PHSDSBC**  
PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: **Khehla Khanyile**

Case No: **PSHS739-18/19**

Date of award: **26 May 2019**

In the matter between:

**HOSPERSA obo LEONARD MNCUBE**

**Applicant**

and

**DEPARTMENT OF HEALTH – KWAZULU NATAL**

**Respondent**

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This arbitration was held on 22 January 2019, 01 March 2019 and 09 May 2019 at Nkandla Hospital boardroom. The Applicant was present and was represented by the Union Official, Mr. Mxolisi Nhlabathi from HOSPERSA. The Respondent, Department of Health- KwaZulu Natal was represented by the deputy director labour relations officer, Mr. Sipiwe Sithole. The proceedings were digitally recorded and I also took notes by hand. Both parties submitted their written closing arguments on 13 and 14 May 2019 respectively.

## **ISSUES TO BE DECIDED**

2. I am required to determine whether the suspension of the applicant was fair or not.

## **BACKGROUND TO THE DISPUTE**

3. The Applicant, Leonard Mncube, was employed by the respondent, from 1989 to date as a human resources officer. The respondent preferred two changes against the applicant as follows:
4. During the month of May 2017 at Nkandla Hospital the applicant did not implement a sanction of three months' suspension without pay for Mr G.S. Mpanza which resulted in him receiving the salary while he was on suspension without pay.
5. During the month of May 2017 at Nkandla Hospital, he favoured Mr G.S. Mpanza who is his union member to receive the salary while he was supposed to be on unpaid suspension from duty.

## **SURVEY OF EVIDENCE AND ARGUMENT**

### **Witness 1**

6. Miss Thandeka Chiliza (Labour Relations Practitioner) stated that she is responsible with all labour issues, interlay, capturing of disciplinary data and assisting in labour related investigation. She submitted the respondent suspended Mr Mpanza from duty for three (3) months without pay. On or about 14 July 2017 she discovered that the Mr. Mpanza was still receiving a salary despite being on unpaid suspension. She went to the HRM's office to enquire as to the non-implementation because the employee was supposed to be on unpaid suspension from 01 June 2017 until 31 August 2017. She further submitted that the HRM was not at work and she then proceeded to the HR office to request to see Mr. Mpanza's file. She requested for the file from the interns because the HRO was not at work and they found the file on the Applicant's desk with the sanction letter inside the file. She further submitted that, after using the file, she went to report the matter to the HR Manager, Mr. Nzimande and requested reasons why the sanction was not implemented on the system on 01 June 2017. She further submitted that Mr. Nzimande informed her that he was unaware that the applicant had not implemented the suspension on the system. She further submitted that Mr. Mpanza three (3) months suspension without pay should have implemented on or before 01 June 2019.

7. She further submitted that she conducted a preliminary investigation in respect of the above matter. She further submitted that Mr. Nzimande informed her that he instructed the applicant to implement the sanction as contained in the file as such a file was allocated to the applicant. Under re-examination, she further submitted that instructions are usually given verbally.

### **Witness 2**

8. Ms. Nelisiwe Nkwanyana (HRO Supervisor) stated that she was responsible for work and approving that work for the Applicant. She submitted that the Applicant was responsible for files starting with alphabets A, H, K, M, AND I. She further submitted that instructions are issued verbally within the HR component. She further submitted that as she returning from the toilet on 18 July 2017, she witnessed the HR Manager arguing with the Applicant, the HR Manager asking the Applicant why he did not implement Mr. Mpanza's suspension without pay timeously on per-sal. She further submitted that the Applicant replied by saying that two months had already lapsed and that there was only open month and thereafter required the HR Manager to write down the instruction. She further submitted that the HR Management gives instructions verbally to the HR Officers.
9. Under cross-examination she conceded that she was unaware of the instruction to the Applicant.

### **Witness 3**

10. Mr. Lucas Nzimande (former HR Manager) stated that he was in charge of the Human Resource section. He submitted that he gave in May an instruction verbally to the applicant to instate an unpaid three-month suspension against aforesaid Mr Mpanza. He further submitted that he was approached on 18 July 2018 by aforesaid Ms. Chiliza, who informed him that the sanction had not been implemented by the applicant. After that, he went to the applicant to enquire about the omission. He then instructed the applicant again to implement the sanction, the applicant

seemed reluctant to take the verbal instruction and suggested to the HRM to write the instruction down on the letter of sanction. He further submitted that he did comply with the applicant's request. The applicant then complied and captured the data.

#### **Witness 4**

11. Mrs. Sithembile Masikane (HR Manager) stated that on 24 July 2017, Mr. Nzimande then HR Manager approached her to report that he had instructed the applicant failed to carry on reasonable instruction to implement aforesaid suspension of Mr. Mpanza that was effective from 01 June 2017 to 31 August 2017. She submitted that the HR management gives instructions verbally to the HR Officers. Under cross-examination, she stated a HR Manager could directly instruct an HR Officer to perform duties. Under re-examination, she confirmed that the aforesaid file with alphabet M was allocated to the applicant. Under questions for clarity, she submitted that the investigation report which was conducted by Mr Mtshali from Catherine Booth Hospital suggested that the file was given timeously to the applicant.

#### **Applicant party**

#### **Witness 5**

12. Mr. Lawrence Mncube (Applicant) stated that he was charged for not implementing an unpaid three months suspension of Mr. Mpanza. He submitted that he respondent alleged that he favoured Mr. Mpanza as a HOSPERSA member. On or before 18 July 2017, he further submitted that he first became aware of the matter when the former HR Manager came to him instructing to implement a three-month suspension without pay for Mr. Mpanza. He further submitted that he noticed on the documents that Mr. Mpanza suspension should have been implemented on 01 June 2017. He then asked for this instruction to be reduced to writing. He vehemently denied that then HR Manager had instructed him to suspend the payment of Mr. Mpanza. He conceded that he was responsible for files with alphabets A, I, H, K, M, D. He further denied that he favoured for his member, Mr Mpanza.

13. He further submitted that he was absent at work and had no knowledge how Mr. Mpanza got on this desk. He further submitted that he never favoured aforementioned Mr. Mpanza.
14. Under cross-examination, he further denied that supervisors give instructions verbally. He further submitted that he had a vendetta with Ms. Chiliza, Mr. Nzimande and Phumla.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

15. The applicant referred an unfair suspension dispute to the council. I am required to determine whether the suspension of the applicant was fair or not. In terms of section 186(2)(b) of the LRA states an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving an unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee. The applicant bears onus to prove that his suspension was unfair.
16. It is common cause that a three-month suspension of Mr. Mpanza was not implemented on or before 01 January 2019. It is further common cause that the applicant is a HOSPERSA shop-steward and was recruited Mr. Mpanza. It appeared as common cause that the file was found on the applicant's desk. The applicant was allocated files with alphabets A, D, I, H, K and M.
17. The applicant argued that the HR Manager never gave him in May 2017 an instruction to implement an unpaid three-suspension of aforesaid Mr. Mpanza. I reject the applicant's contention to be improbable than that of the respondent. It is evident that the file contained in a suspension letter which was discovered on the applicant's desk.
18. The applicant's representative never disputed to the respondent's witness, Miss Chiliza that the file in question was found on the applicant's desk. He further never disputed the issue that the applicant was unaware how the file got on his desk.

19. He ought to have checked the file and implemented the sanction accordingly. The applicant further failed to call witnesses to back his argument that the HR Management gives instructions in writing.
20. He denied that he favoured the aforementioned Mr. Mpanza. In my view, the respondent's argument was based on the assumption and could not be substantiated in respect of the second charge.
21. Under cross examination, he also stated that he recruited Mr. Mpanza as a HOSPERSA member. It was put to him that the omission was made deliberately to fulfil his endeavors to protect Mr. Mpanza. It was further put to him that the respondents' witnesses corroborated each other in that instructions are given verbally. I find that the applicant failed to prove that his suspension was unfair.
22. I accept the respondent's argument that the respondent instructed the applicant to implement a three-month suspension of Mr. Mpanza. The respondent's witnesses, Ms. Chiliza, Mrs Nkwanyana and Mrs Masikane were credible witnesses in this matter.
23. The aforesaid Chiliza's evidence was never challenged by the applicant party in that the file was found on the applicant's desk. Mrs Nkwanyana's evidence was also never challenged by the applicant party in that she witnessed the former HR Manager enquiring from the applicant why he had not implemented a three-month suspension without pay. The respondent's aforesaid witnesses confirmed that the HR Management gives instructions verbally. Under clarification questions, the HR Manager's evidence was selective in that he forgot who was present in the office, but he could still remember that he gave the instruction to the applicant on that day.
24. I also wish to point out that then the HR Manager, Mr. Nzimande was partly to be blamed for this delay in that he instructed the applicant to implement an unpaid suspension in May 2017, but failed to follow up that work was done accordingly. Had it not been for Ms. Chiliza, who discovered in July 2018 that Mr. Mpanza would still continue receiving his salary while on unpaid suspension. In my view, the

respondent should have taken same disciplinary measures against both the applicant and then the HR Manager.

25. Notwithstanding, the unchallenged evidence stands that the file was found on the applicant's desk. I find that the applicant's suspension was fair.
26. In light of the above, I find that the applicant's suspension was fair. Therefore, the respondent did not commit an unfair labour practice against the applicant.

## **AWARD**

27. Accordingly, I find that the applicant's suspension was fair. The application is hereby dismissed. No order as to costs.

**Khehla Khanyile**