



# ARBITRATION AWARD

Commissioner: **Khehla Khanyile**

Case No: **PSHS209-20/21**

Date of award: **26 May 2022**

In the matter between:

**PSA OBO CYRIL MTAMBO**

Applicant

and

**DEPARTMENT OF HEALTH- KWAZULU NATAL**

Respondent

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This arbitration was scheduled for 03 December 2021, 25 January 2022, 28 February 2022, 07 April 2022, and 06 May 2022. The applicant, Mr Cyril Mtambo, appeared in person and was represented by the Union Official, Ms Gillian Hassan from PSA. The respondent, Department of Health- KwaZulu Natal, was represented by the Assistant Director Labour Relations, Mr Mzovukile Lembede. The proceedings were digitally recorded and I also took down notes.

## **ISSUE TO BE DECIDED**

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

## **BACKGROUND**

3. The applicant, Mr Cyril Mtambo was employed by the respondent as a Supply Chain Clerk on 15 March 2005, stationed at the Provincial Pharmaceutical Supply Depot. The Supervisor, Mrs Nokuzola Mtshali-Mbhele assessed the applicant for the performance period from 1 April 2017 to 31 March 2018. In September 2017, she rated the applicant unsatisfactory (2) on one KRA 5 (filing and archiving of documentation). As such, he was not eligible for the pay progression on 1 July 2018 (performance incentive). On 24 July 2018, the applicant lodged a formal grievance regarding the unsatisfactory assessment for 2017/2018.
4. The applicant argues that the respondent committed an unfair labour practice against him. The respondent argues that the respondent did not commit an unfair labour practice.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

5. The applicant relied on his testimony as well as the documentary evidence. The respondent relied on the testimony of Mrs Nokuzola Mbhele-Mtshali as well as documentary evidence.

### **The applicant's case**

6. The applicant stated that on 24 April 2018, he scored himself satisfactory and the supervisor scored him unsatisfactorily. He submitted that the supervisor did not explain what was expected of him nor improvement plan was done. He testified that the relationship with his supervisor was bad as in January 2017, he borrowed money from her and paid later than the agreed date. He testified that he could not do filing in time due to the heavy working load and other disabling factors. He stated that the respondent did not comply with the PMDS policy clause 9.2. He testified that he had no meeting with his supervisor to discuss what was expected of him or what he was not achieving. He stated that there was no improvement plan in place. He submitted that he used to not file query documents.

### **The respondent's case**

#### **Witness 1**

7. Mrs Nokuzola Mtshali-Mbhele (Supervisor) stated that she was a supervisor of the applicant during 2017/ 2018. She submitted that the applicant signed the performance agreement on 1 June 2017. She testified that the applicant's filing was not up to date. She further testified that the paid files allocated to the applicant would lie on his desk for months. She stated that the applicant was trained

on filing, and had many sessions with him intending to assist the applicant to perform satisfactorily, and counselled him, but cannot change his performance. She testified that on 30 October 2017, she rated the applicant unsatisfactory for not filing and archiving documents. She submitted that on 31 October 2017, she issued the applicant with a written warning valid for six months for not filing work documents on time as scheduled. She stated that on 24 April 2018, the applicant rated himself satisfactory and she rated him unsatisfactory on the KRA 5 (filing and archiving of documents). She testified that she prepared a performance improvement plan to assist him, but the applicant refused to sign it. She stated that on 06 June 2017, the applicant refused to sign a performance plan.

8. Under cross-examination, she stated that the applicant was not fully effective to score himself 100% - 114% or rating himself 3 as his performance did not fully meet the standard expected in all areas of the job. She submitted that in 2012, she borrowed the applicant money and she had no issue with him as he paid it back.

#### **ANALYSIS OF EVIDENCE AND ARGUMENTS**

9. The applicant referred an unfair labour practice dispute to the Council. I am required to decide whether the respondent committed an unfair labour practice or not.
10. In terms of section 186 (2) (a) unfair labour practice means any unfair act or omission that arises between an employer and an employee involving the unfair conduct by the employer relating to the provision of the benefits to an employee. Section 192 the applicant bears the onus to prove that the respondent committed an unfair labour practice.
11. PMDS policy clause 9.2 reads " supervisors are required to first identify and then, in line with a developmental approach, deal with the unacceptable performance of employees under their supervision. This supervisor must comply with the procedural requirements of PSCBC Resolution 1 of 2003 - Incapacity Code". EPMDS provides for the early identification and resolution of unacceptable performance. The employees' performance rating as "not fully effective" or lower during the annual performance assessment should not be the first indication of the employee's shortcomings. Performance monitoring, including the performance reviews, provides opportunities to ensure this does not happen. Interventions by the supervisor to overcome performance shortfalls on the part of the employee can include any or all of the following:

- (i) personal counselling
- (ii) On the job mentoring coach
- (iii) Formal training/ re-training
- (iv) Restating the workplace performance requirements
- (v) Work environment audits to establish other factors affecting the performance

12. Should the employee not respond to reasonable continuous attempts to improve performance and overall performance and an overall performance assessment score of less than 90% is consistently the result of the assessment process, the employee must be formally registered on the incapacity programme and advised of this in writing”.

13. It appeared as common cause that on 01 June 2017, the applicant and his supervisor signed a performance agreement.

14. The applicant argued that the respondent committed an unfair labour practice against him. I reject the applicant’s argument to be less probable than that of the respondent. The applicant conceded that he could not do the filing in time due to a heavy workload and other disenabling factors. The supervisor rated him unsatisfactory on the KRA 5 (the filing and archiving of documents) while he still was on the written warning issued on 31 October 2017 for not filing and archiving of documents. The supervisor denied that her relationship with the applicant was bad regarding money stands to fail. I find that the applicant failed to prove the respondent committed an unfair labour practice.

15. I accept the respondent’s argument that the respondent did not commit an unfair labour practice. The respondent’s witness, Mrs Nokuzola Mtshali-Mbhele’s evidence was reliable and credible. She led evidence that the applicant had a challenge with the filing and archiving of the documents. She stated that she had many sessions with the applicant and counselled him, but never changed his poor performance. He further stated that on 31 October 2017, she issued the applicant with a final written warning valid for six months for not filing and archiving the documents. She submitted that she rated the applicant unsatisfactory whilst the written warning was still existing. Under cross-examination, he stated that the applicant could not score himself 3 fully effective 100% -114% as his performance (filing and archiving of documentation) did not fully meet the standard expected in all areas of the job. I find that the respondent did not commit an unfair labour practice against the applicant.

16. In light of the above, I make the following award:

**AWARD**

17. I find that the respondent did not commit an unfair labour practice.
18. The applicant's claim is hereby dismissed.



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Khehla Khanyile