



ARBITRATION AWARD

Commissioner: **KM Moodley**
Case No: **PSHS303-22/23**
Date of award: **26 December 2022**

In the matter between:

Jonathan Naicker

Applicant

and

Department of Health- KwaZulu-Natal

Respondent

Details of the hearing and representation:

1. The arbitration was held at the boardroom of the Respondent, at Clairwood hospital in Durban over several days and was concluded on 13 December 2022.
2. As the proceedings were mechanically recorded, I will only make reference to those aspects of the evidence that are relevant to my findings. All the witnesses testified under oath. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter.
3. The parties tabled bundles of documents, i.e., Bundle A was tabled by the Applicant and Bundles B and C were tabled by the Respondent. The contents of the bundle were accepted by both parties as being what they purported to be. No Points In Limine were raised by either of the parties.
4. No objection was raised to me as the Commissioner presiding over the Arbitration.

Issue to be decided

5. The issue to be decided is whether or not the Respondent committed an Unfair Labour Practice when the Respondent suspended the Applicant for 3 months without pay and if so, what the remedy should be.

Common cause issues:

6. It was not in dispute that the Applicant was the author of a letter of complaint dated 29 September 2021 addressed to the hospital CEO Dr Francis, and copied to Premier of Kwa Zulu Natal, MEC for Health-KwaZulu Natal, and to PSA Provincial Manager-KwaZulu Natal

Issue in dispute

7. The issue in dispute was whether or not the Applicant penned the letter of complaint dated 29 September 2021 in his capacity as an employee, or in his capacity as a shop steward of trade union PSA.

Background to the dispute:

8. The Applicant was employed by the Respondent as a General Orderly since 1 February 2006. In June 2021 he was elected by staff of Clairwood Hospital, to represent them as a shop steward of trade union PSA.
9. On 29 September 2021 he addressed a letter of complaint to the hospital CEO Dr Francis, and copied it to the Premier of Kwa Zulu Natal, MEC for Health-KwaZulu Natal, and PSA Provincial Manager-KwaZulu Natal
10. He was subsequently placed under precautionary suspension, and later charged for misconduct. He was found guilty of misconduct and a sanction of 3 months suspension without pay, together with a final written warning, was imposed upon him.
11. He appealed against the sanction but was unsuccessful.
12. Applicant then lodged a dispute with the Council for adjudication.

Survey of evidence and arguments**Applicant: Witness 1: Jonathan Naicker**

13. The Applicant testified that he was employed by the Respondent, as a General Orderly since 1 February 2006. In June 2021 he was elected by staff of Clairwood Hospital, to represent them as a shop steward of trade union PSA.
14. On 29 September 2021 on behalf of staff of the Pharmacy Department he addressed a letter of complaint to the hospital CEO Dr Francis, and copied it to the Premier of Kwa Zulu Natal, MEC for Health-KwaZulu Natal, and to the PSA Provincial Manager-KwaZulu Natal.
15. On 5 October 2021 he was called to a meeting with the management of Clairwood hospital and then informed of his precautionary suspension. He was placed under precautionary suspension from 5 October 2021 to 08 February 2022.
16. He testified that his intention in writing the letter of complaint was to assist the pharmacy staff to resolve their grievances. Therefore, he was acting in his capacity as a shop steward and not as an employee.

17. He testified that organised labour at the hospital met with the hospital management previously but were not successful in their representations. He pointed out that it was only after the letter was sent off did the CEO visit the Pharmacy Department concerning their complaints. He believed this was a direct response to his letter of complaint.
18. He further pointed out that his remarks about the Pharmacy Manager and The Pharmacy Supervisor were not intimidatory but were purely to remind them about what happened to the previous Pharmacy manager.
19. He was subsequently charged for misconduct He was found guilty and a sanction of 3 months suspension without pay, together with a final written warning, was imposed upon him. He appealed against the sanction but was unsuccessful.
20. He also testified that this precautionary suspension imposed upon him by the Respondent exceeded the 60-day limit for suspension of employees.
21. The Applicant felt aggrieved and then declared a dispute.

Applicant: Witness 2: Krish Govender

22. Govender was the previous shop steward of PSA at Clairwood hospital. He was employed for about 45 years at the hospital and was now retired.
23. He testified that it was common practice for him in his capacity as a shop steward, to take up staff issues with management, and the various other structures available to him. He made representations on several occasions to the Premier, and the MEC for Health, KwaZulu Natal, on staffing and other health related issues. He found that his representations were successful as various interventions then took place at the hospital.
24. On all these occasions that he communicated with the Premiers office and the MEC's office he was acting in his capacity as a shop steward, and not as an employee, and so no disciplinary action was taken against him.

Respondent: Witness1: Buselathi Mthethwa-Pharmacy Supervisor

25. Mthethwa was the Pharmacy supervisor and she testified that she heard about the letter of complaint dated 29 September 2021 from the Applicant, by Pharmacy Manager Gita Desai, and she subsequently gave her a copy of it to read.
26. The letter intimated inter alia, that the same thing that happened to one "Mrs Linda "will happen to her. She was also referred to as "...this woman..." and her behaviour was referred to in the letter as being in an "untoward manner", amongst other comments.
27. When she saw other members of staff reading the letter, she felt intimidated, and insulted, as the Applicant made adverse reference to her in the letter.

28. She then wanted to look for a job elsewhere. She did not feel safe after reading the letter. She does not feel safe even to this day.
29. She testified that the atmosphere at the Pharmacy was good and so was her relationship with the staff, although she had good reason to discipline a staff member once.

Respondent: Witness 2: Gita Desai

30. Desai was the Pharmacy Manager and she testified that when she saw staff reading the letter of complaint from the Applicant, she obtained a copy from the Labour Relations department and gave a copy to Mthethwa.
31. When she read the letter, she felt humiliated, degraded and insulted as she did not have any major issues with the pharmacy staff, only “minor ones” which she managed to sort out. When she read about the previous Pharmacy Manager being “booted” out of the pharmacy she felt intimidated as she believed that the same could happen to her, i.e., *“Anything can happen”*
32. She also felt that her dignity was infringed upon, and that she was degraded by the contents of the letter.
33. She was also surprised by the contents of the letter as she believed that the grievances of the pharmacy staff had been satisfactorily resolved at the staff meeting held in May 2021.
34. She testified that subsequent to the letter, the CEO, Dr Francis, visited the pharmacy but that he previously visited the pharmacy on a regular basis. She stated that he did not discuss the letter with her on this occasion.

Analysis of evidence and argument

35. It was not in dispute that on 29 September 2021 the Applicant addressed a letter of complaint to the hospital CEO, Dr Francis, and copied it to the Premier of Kwa Zulu Natal, MEC for Health-KwaZulu Natal, and to PSA Provincial Manager-KwaZulu Natal.
36. The letter was a strongly worded account of issues pertaining to the conditions at the hospital, including staffing conditions at the pharmacy department, and is clearly intended to draw the attention of the CEO to resolve. To reinforce the impact of the letter, the Applicant copied the letter to the Premier of Kwa Zulu Natal, and the MEC for Health KwaZulu Natal, and the PSA KwaZulu Natal provincial manager.
37. Unfortunately, the Applicant’s poor choice of words left much to be desired, and included but are not limited to the following:
 - *Mrs Linda ... was ‘...kicked’ out of the hospital.*
 - *“Shenanigans in the Pharmacy Department”*
 - *‘...work daily in a toxic environment’*

- *'...dictatorship mentality'*
- *'...culture of baaskap mentality on the part of the Pharmacy manager and the Pharmacy Supervisor'*
- *'...these two women want to be big bosses'*
- *'At Clairwood hospital these 2 women will never be bosses'*
- *'Mrs. Linda was also arrogant and also displayed the same baaskap mentality'*
- *'Mrs. Linda hid in her office, closed the door ...feared for her well-being and safety, and fearing for her life, as the workers were banging on her door.'*
- *The Policemen from Montclair Police Station escorted Mrs. Linda out of the Facility, in tears.'*
- *'...the workers were throwing things at her and singing vulgar and derogatory songs against her.'*
- *Mrs. Linda'...never came back to the Institution. It was a permanent goodbye under ugly circumstances.'*
- *'What happened to Mrs. Nelisiwe Linda ...is a lesson for all Managers and Supervisors at Clairwood Hospital...'*
- *'Mrs. Mthethwa shouts at the Pharmacy staff...and believes she can behave in this untoward manner because she is a Supervisor.'*

38. His poor choice of words left no doubt in my mind that although he claimed that he was highlighting staffing issues at the Pharmacy, instead he succeeded in intimidating and threatening Mthethwa and Desai to such an extent that Mthethwa felt unsafe at work and was even contemplating looking for a job elsewhere.

39. Desai and Mthethwa also felt intimidated, threatened, and insulted, by the Applicant's direct reference to Mrs. Linda, the previous Pharmacy Manager, who the Applicant claimed was *'...kicked out of Clairwood Hospital...'*

40. Mthethwa and Desai also testified that, as women, they felt degraded by the Applicant's reference to them as *'...these 2 women...'*

41. As the Applicant did not dispute that he wrote these words in the letter dated 29 September 2021, I therefore find that the Applicant intimidated, threatened, insulted, and degraded Mthethwa and Desai in no uncertain terms.

Shop Seward:

42. The Applicant on the other hand testified that when he wrote the letter of complaint he did so in his capacity as a shop steward and not as an employee. Therefore, he enjoyed protection from being

charged for misconduct as he was performing his duties as a shop steward, and was not performing his duties as an employee.

Legal Principles:

43. Clause 4.2 of Code of Good Practice: Dismissal, of Schedule 8 of the Labour Relations Act, provides as follows:

Clause 4.2: Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

44. The intention behind this protection was to safeguard against employers taking disciplinary action against shop stewards who were simply performing their duties as shop stewards.

45. In the case of *AMCU obo Masango v Andru Mining (Pty) Ltd* [2018] 9 BALR 952 (CCMA), a shop steward was dismissed for sending a WhatsApp message to the workforce alleging that the employer planned to dismiss employees. This action resulted in a work stoppage. When she was charged for misconduct and dismissed, she claimed that this was done in her capacity as a shop steward. Her dismissal was found to be justified.

46. In *National Union of Metal Workers of South Africa (NUMSA) obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others* [2017] 5 BLLR 483 (LAC), the Employee was dismissed for amongst others, physical assault, verbal assault, disrespect, and threatening and or intimidating behaviour towards a fellow employee. The Labour Appeal Court held that although a shop steward is expected to carry out his duties fearlessly and that he should be protected when doing so, but that he should not resort to open defiance and needless confrontation when doing so, as he still remains an employee. His employer is entitled to expect an appropriate level of conduct during that relationship, and being a shop steward does not give the employee the right to behave in any manner that he/she likes.

47. The court further held that assaults and threats thereof were not conducive to harmony or to productive negotiation and it was therefore unacceptable to hold that when one acts in a representative capacity "anything goes".

48. In *Adcock Ingram Critical Care v CCMA & Others* (2001) 22 ILJ 1799 (LAC), the court recognizes that there must be a balance between the right of shop stewards to exercise their functions as representatives of a union and the right of employers to discipline shop stewards even when exercising their duties as shop stewards, for acts of misconduct.

49. It also recognized that employees who abuse their position as shop stewards may be subjected to disciplinary action by their employers.

50. The court further pointed out that the “*anything goes*”-approach can therefore not be accepted at face value and that employers must have the right to take disciplinary action against employees who “...brandish weapons, threaten management or make false allegations of racism...” to exert their will during negotiations.
51. In all of the above cases it can be seen that shop stewards who are performing their functions as shop stewards cannot be victimised for performing their duties. However, they do have a clear obligation to their employers to conduct themselves in a responsible manner.
52. Should they engage in disorderly or disrespectful conduct they can be disciplined.
53. In *National Union of Metal Workers of South Africa, NUMSA, and Others vs Black Mountain Mining (Pty)Ltd 2008*, LC/CT the court pointed out that:
- “the test would seem to be whether a shop steward’s conduct can be said to fall within the realms of fair and acceptable bargaining conduct and whether it can be said to be reasonably related to the performance by the shop stewards of their functions as such. I am further in agreement that if a shop steward’s behaviour does not satisfy this test, and the employer takes disciplinary action, they cannot rely on the privileges that otherwise attached to their position.”*
54. As I have already found elsewhere, that the Applicant intimidated, threatened, insulted, and degraded Mthethwa and Desai in no uncertain terms, I find that the Applicant’s behaviour towards Mthethwa and Desai, satisfies this test, as it does not fall “...within the realms of fair and acceptable bargaining conduct...”
55. I therefore find that the Applicant, although a shop steward, can be disciplined by the Respondent for misconduct.

Consistency

56. Witness Govender, the previous shop steward of PSA at Clairwood hospital, testified that he had penned letters of complaints on a regular basis to the Premier and MEC of KwaZulu Natal and that this was standard practice for shop stewards at Clairwood hospital, e.g., a letter of complaint dated 22 September 2014 addressed to Premier Senzo Mchunu. At all times he was not charged for misconduct by the Respondent.
57. The Applicant therefore argued that the Respondent had not acted consistently in matters of this nature.
58. I found this to be untrue.
59. The charge sheet of the Applicant comprised 4 charges of which 3 charges were of a serious nature, and pertained to the Applicant allegedly insulting, degrading and intimidating 2 staff members, namely Mthethwa and Desai.

60. The 3 charges were, in my view, of such a serious nature that they required that disciplinary action be taken against the Applicant.
61. I therefore find that the Respondent did not act inconsistently in this instance.

Procedure

62. The Applicant further pointed out that the Respondent put him on precautionary suspension beyond the 60-day limit for suspension of employees, and also failed to inform the union timeously before instituting disciplinary action against a shop steward, the Respondents action was procedurally unfair.
63. Other than stating that the Respondent was unaware that the Applicant was a shop steward of PSA, no valid reason was put forward by the Respondent to the unduly long period of precautionary suspension, with pay.
64. I accept the Applicant's version that the Respondent acted in a procedurally unfair manner, but find that as he was on precautionary suspension with full pay and benefits, he was not unduly prejudiced.

Conclusion

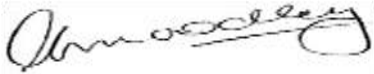
65. I find that the Applicant executed his duties as a shop steward in an unacceptable manner.
66. The onus is on the Applicant to prove that the Respondent committed an unfair labour practice. I find that the Applicant has not discharged this onus successfully.
67. I find that the Respondent did not commit an unfair labour practice in this matter.
68. I rule accordingly.

Award

69. The Respondent did not commit an unfair labour practice.

70. This matter is dismissed.

71. I make no order as to costs.



COMMISSIONER: KM MOODLEY