



ARBITRATION AWARD

Commissioner: **Lindiwe Makhanya**

Case No: **PSHS344-21/22**

Date of award: **29 June 2022**

In the matter between:

PSA obo VERNOM OGLE

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This matter was scheduled for arbitration before me on 20 October 2021 and various occasions until it was concluded on 21 June 2022 at the Respondent's premises in Kokstad. It was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council ("the council") PHSDSBC in terms of section 191(5) (a) of the Labour Relations Act No.66 of 1995, as amended ("the Act").
2. The Applicant, Mr. Ogle Vernom was represented by Mr. Z. Dladla, Union Official from PSA, and the Respondent, Department of Health, was represented by Mr. L. Tshobeni from Labour Relations. The proceedings were digitally recorded.

PRELIMINARY ISSUES, JURISDICTION, and ISSUES TO BE DECIDED

3. No preliminary or jurisdictional issues were raised, and Public Health and Social Development Sectoral Bargaining Council has jurisdiction to hear the matter.
4. The dispute is whether the dismissal of the Applicant was procedurally and substantively unfair.

BACKGROUND TO THE DISPUTE

5. The Applicant commenced his employment with the Respondent on 16 April 2012 and was employed as Laundry Manager. He was dismissed on 28 June 2021. At the time of his dismissal, he was earning a monthly salary of R20,463.44. The matter was referred to as an unfair dismissal dispute related to misconduct to PHSDSBC.
6. The Applicant sought compensation in the event that the award is made in his favour.

SURVEY OF EVIDENCE AND ARGUMENT

7. Both parties presented a bundle of documents, the Applicant's bundle was marked "A" and the Respondent's bundle was marked "B". Both parties submitted written closing arguments on 27 June 2022.
8. The Applicant was found guilty and dismissed based on three charges as per "Bundle B", page 1);
The charges are as follows; it is alleged that on 23 June 2020 around 10h00;
 - 8.1 You verbally assaulted Ms. Thembeke Nomvungu by insulting her in front of her colleagues. On this basis, you breached the code of conduct of the Public Service 4.2.8 (An employee respects and protects every person's dignity and his or her rights as contained in the Constitution).
 - 8.2 You physically assaulted Ms. Thembeke Nomvungu by pushing her against the opened drier and thereby breaching the code of conduct of the Public Service 4.2.8 You discarded health and rules in the workplace.
 - 8.3 You deliberately poured boiling water from the flask onto Ms. Thembeke Nomvungu's lap and thereby disregarding her safety and breaching the code of conduct of the Public Service 4.2.8.

THE RESPONDENT'S CASE

9. Ms. Thembeke Nomvungu testified that she works at the Laundry as a Linen Orderly and that the Applicant was her manager. On 23 June 2020, after she had finished drying the laundry and was busy taking out the washing, the Applicant came and asked her why she had washed the pillows, she informed him that the staff had been instructed to wash all pillows before disposing them due to

Covid19 infections but the Applicant shouted at her and started coming closer to her. The Applicant aggressively grabbed her by her clothes, and pushed her by the dryer machine, she almost fell and was assisted by the machine to balance. The Applicant shouted and called “bloody bitch, I am the manager here”. Everyone was shocked by the Applicant’s actions and this hurt her a lot.

10. Subsequence to this, Mr. Mjaja, the Security Manager came looking for the Applicant and they both walked away. After some time, the Applicant came back carrying a flask and poured boiling water on it. The Applicant then went to where she was seated and started pouring boiling water on her, the water dripped from her breast and fell on her right thigh.
11. According to her, it was not the first time the Applicant had abused her, previously the Applicant was dismissed for strangling her but was later reinstated. The Applicant was an abusive person, especially to female employees, and used vulgar language.
12. Under cross-examination, she said the Applicant pushed her as he was angry that the pillows had been washed and that the Applicant had poured boiling water on her right-hand side above her breast and it dripped to her thigh. Although the water was boiling, she did not get any burns because she had covered her upper and lower body with the blanket since it was cold. The Applicant poured water on her bit by bit. She did not seek medical attention but had used aqueous cream. She however believed that the Applicant intended to hurt her.
13. Mjaja was not at the laundry when the Applicant poured boiling water on her, but he had seen the Applicant pushing her towards the dryer machine.
14. When asked how she knew that the water was boiling, she said she had poured the same water to make tea. She denied that she had any vendetta against the Applicant but had to report him as he had abused her and bullied everyone at work.
15. During re-examination, she maintained the reason she did not seek medical assistance after the Applicant poured water on her was that she had wrapped herself with a blanket but if she had worn a light dress, she would have had blisters.
16. Ms. Nompandolo Ndaba testified that she is working at the Laundry as a Sewing Orderly since 2011 and that the Applicant was her former manager. On 23 June 2020 in the morning Thembeke and the Applicant had an argument at the laundry regarding the linen. After a while, the Applicant went to his office, but during break time he returned to the laundry where there was boiling water in the kettle

which the Applicant poured into his flask and went to where Thembeke was seated and started pouring water on her. She shouted as she was shocked by the actions of the Applicant.

17. She pointed to page 7 of "Bundle A" where her statement is found, it is stated that Thembeke was standing next to the dryer machine removing linen when the Applicant closed the door of the machine which pressed Thembeke.
18. According to her, the Applicant was unable to work with other people because if a person disagreed with him, he would get upset and start shouting, using vulgar language like "bloody bitch".
19. On 23 June 2022, she did not hear any vulgar language used by the Applicant when he was arguing with Thembeke.
20. Under cross-examination, she reiterated that the Applicant poured boiling water on Thembeke's upper body. She did not dispute the charge which states that the boiling water was poured on Thembeke's lap but said that water may have dripped on her lap as well. Thembeke stood up immediately when the Applicant poured boiling water on her.
21. She insisted that the Applicant closed the door of the machine by pressing it whilst Thembeke was standing between the door of the machine and the machine resulting in Thembeke being stuck when the Applicant pushed her. She explained that pushing and pressing in her view were almost similar words especially because she had written her statement in isiXhosa.
22. She emphasized that the water was boiling because the distance from where the kettle was plugged to where Thembeke was seated was short, she made an example of a boardroom table to where she was seated and an end of the table.
23. During re-examination, she maintained that Thembeke was poured with boiling water and that she was pressed or pushed towards the machine by the Applicant.
24. Ms. Otilia Mbangatha testified that she works as an HR Assistant Director since 2019. She referred to page 6, "Bundle B" where there is a correspondence dated 3 November 2020 that was sent to PSA regarding the alleged misconduct committed by the Applicant but PSA did not respond to the letter. She denied that the dismissal was procedurally unfair because the Respondent had notified the union of its intention to discipline the Applicant.

25. Under cross-examination, she conceded that before disciplining the shop steward, the union must be notified and that in this case the union was notified after the Applicant was served with a notice to attend the disciplinary enquiry.
26. She admitted that the Applicant was informed to attend the disciplinary enquiry on 2 November 2020 but the union was notified on 3 November 2020 about the disciplinary enquiry. She however disputed non-compliance with the LRA in terms of disciplining the shop steward because the disciplinary process had not yet taken place when the union was notified.
27. During re-examination, she maintained that disciplinary enquiry had not taken place when the union was notified of the Respondent's intention to discipline the Applicant.

THE APPLICANT'S CASE

28. Mr. Vernon Owen Ogle, the Applicant in the matter testified that at the time of his dismissal he was a Shop steward for PSA but the Respondent did not inform his union prior to instituting charges against him. He referred to page 2, "Bundle B" where he received notice to attend a disciplinary enquiry on 02 November 2020 whereas the letter sent to PSA is dated 03 November 2020. According to him, the Respondent failed to comply with the code of good practice in terms of informing the union before instituting disciplinary enquiry for the shop steward. Also, during an investigation, he was not requested to provide a statement despite availing himself to the Investigation Officer.
29. He disputed that he verbally assaulted Thembeke but stated that on the day in question he informed Thembeke not to wash pillows in the machine as it was not the procedure.
30. He also denied that he pushed Thembeke towards the dryer machine because when the disagreement between them ensued, Thembeke was standing next to the folding tables.
31. He denied that he poured boiling water on Thembeke. He said when he filled his flask with boiling water, he had put too much water in that when he closed it, water was pushed out of the flask by the lid. So, as he was holding the flask, he had opened his arms wide to give Thembeke a "conciliatory hug" after their argument while she was seated on a bench. He demonstrated with a flask full of water how the drips of water may have fallen to Thembeke's lap as he was in a hurry to attend to Mjaja who wanted to speak to him.
32. He denied all the charges levelled against him and stated that previously Thembeke had lodged a dispute against him alleging that he had strangled him, he was dismissed but later reinstated after

the matter was referred to the council. The Applicant said he wished to be paid for the salary he had lost as he was unfairly dismissed.

33. Under cross-examination, he admitted that water from the flask overflowed and dripped which was the reason it landed on Thembeke but said that water was already cool by then and that Thembeke had covered her body with a blanket. When asked if he had the intention to have body contact with Thembeke, he disputed this and said he could not have given Thembeke a hug when he had a flask in his hand, it was a reconciliatory gesture to say he saw that she was in pain.
34. When asked why Yali and Nompandolo shouted when water dripped on Thembeke, he did not provide a specific answer. He denied that Thembeke was standing next to the dryer machine when they had an argument regarding the linen.
35. He was adamant that the Respondent did not comply with the LRA because the union was notified of his discipline after he had been issued with a notice to attend a disciplinary enquiry which was held on 12 and 13 November 2020.
36. When he was asked why the staff would come to the arbitration and lie, he said they had done it before.
37. During the re-examination, he was adamant that Thembeke was not burnt because she had covered herself with the blanket.
38. Mr. Skhumbuzo Mjaja testified that he is working as a Principal Security Officer for the Respondent and that he was at the laundry when the alleged incident of pushing Thembeke to the dryer machine occurred. He saw the Applicant coming closer to Thembeke whilst Thembeke was standing next to the dryer machine. He did not witness the incident of pouring boiling water as he had already left to attend the meeting.
39. Under cross-examination, he admitted that when he arrived at the laundry, he found both the Applicant and Thembeke standing by the dryer machine shouting at each other but Thembeke was standing very close to the washing machine, so when the Applicant came closer to her, he touched Thembeke's body. According to him, the conduct of the Applicant was unprofessional, as a manager, he was supposed to call Thembeke in his office instead of shouting at her in the presence of other staff members.

40. He disputed that the dryer machine was opened otherwise Thembeke would have fallen inside when she was pushed by the Applicant.
41. During re-examination, he maintained that he did not hear the Applicant insulting Thembeke but said in his observation anyone would view the action of the Applicant as sexual harassment as he came too close to her.

ANALYSIS OF EVIDENCE AND ARGUMENT

42. I have taken note of section 185 of the LRA which states that “every employee has the right not to be unfairly dismissed.” I read this section together with section 192(2) of the Act in terms of which the employer bears the onus to prove on a balance of probabilities that the employee’s dismissal was fair.
43. The Applicant challenged his dismissal as procedurally and substantively unfair.
44. It was common cause that the Applicant had had an argument with Thembeke on 23 June 2020 at the Laundry. It was also common cause that water had dripped on Thembeke’s body when the Applicant attempted to give her a conciliatory hug.
45. It was disputed by the Applicant that the water that dripped on Thembeke’s body was boiling, on the other hand, the Respondent argued that the water was boiling. The Applicant disputed that he verbally and physically assaulted Thembeke.
46. At the outset, it is necessary to make some comments about the credibility of the witnesses. I found that the three witnesses who were called gave testimony that was impressive and credible and remained consistent under cross-examination. The same cannot be said for the Applicant who contradicted himself when he was testifying. At first, he testified that he was giving Thembeke a conciliatory hug but under cross-examination, he changed his version and said he could not have given Thembeke a hug when he held a flask with boiling water in his hand.
47. Also, the Applicant denied that Thembeke was standing next to the dryer machine when the argument ensued, but all three witnesses who testified in this arbitration including Mjaja, the Applicant’s witness revealed that Thembeke was standing by the dryer machine when the argument between her and the Applicant ensued.

48. I will first deal with the issue of procedure. In terms of LRA schedule 08, Code of Good Practice: Dismissal, item 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. The Applicant argued that the Respondent did not comply with the LRA because his union was not consulted prior to receiving notice to attend a disciplinary enquiry. The Respondent claimed that when it notified the union of its intention to discipline the Applicant, the disciplinary enquiry had not taken place. The Applicant was notified to attend a disciplinary enquiry on 2 November 2020 but the union was informed of the Respondent's intentions to initiate disciplinary action against the Applicant on 3 November 2020, the union did not respond to this letter. There was also no evidence presented in this arbitration which suggests that the union did not receive the letter from the Respondent. I accept the Respondent's argument that although the union was notified after the Applicant was notified of the date to attend the hearing, no disciplinary action had been taken against the Applicant, and also if the union wished to engage the Respondent before the disciplinary enquiry took place on 12 and 13 November 2020 it would have done so. The failure by the Respondent to consult with the union prior to 3 November 2020 does not in my view render the process procedurally unfair.
49. I will now deal with the substantive fairness of the Applicant's dismissal. In charge one, Nompendulo stated that she did not hear any insults being uttered when the Applicant and Thembeke had an argument but Thembeke testified that the Applicant aggressively grabbed her by her clothes and shouted, "bloody bitch, I am the manager here". The Applicant only stated that he did not insult her, but this evidence of Thembeke was not challenged by the Applicant. I, therefore, accept that the Applicant verbally assaulted Thembeke, more so because the evidence of Thembeke and Nompendulo that the Applicant used vulgar language was also not challenged, so when the argument ensued the Applicant in my view verbally insulted Thembeke.
50. In charge two, the Applicant denied that he pushed Thembeke against the opened dryer machine but all three witnesses' testimony corroborated as they said the Applicant pushed Thembeke towards the machine. Mjaja's testimony revealed that the Applicant pushed Thembeke in that he viewed such conduct as sexual harassment. The Applicant did not challenge this evidence in all three witnesses except that Nompendulo was asked if the Applicant had pressed or pushed Thembeke towards the machine which Nompendulo indicated that it was a choice of words used because she had written her statement in isiXhosa but explained that the Applicant closed the door whilst Thembeke was

standing between the door of the machine and the machine. Since the evidence was not challenged, I accept that the Applicant pushed Thembeke against the open dryer machine.

51. In charge three, the Applicant did not challenge that water may have dripped on Thembeke's body but had said that the water had cooled down when it dripped on her and that it did not fall on her lap. The Applicant argued that Thembeke did not have any blisters to show that the water was boiling, however, Thembeke argued that she had wrapped her body with a blanket but if she was wearing a light dress she would have burnt. Also, Nompendulo testified that the water was boiling when the Applicant poured it into his flask and that the distance to where the kettle was situated and where Thembeke was; was short meaning the water was still boiling when it dripped on her. Thembeke's testimony is that the water was boiling which was not challenged as she stated that she had just poured the water to make tea. I accept the Respondent's version that the water was boiling and the Applicant had poured it onto Thembeke.
52. The Applicant did not challenge the evidence of the Respondent's witnesses hence I find him guilty of all the three charges.
53. Now turning to the issue of sanction. Thembeke claimed that she was hurt by the action of the Applicant when he insulted and pushed her. Mjaja said that the Applicant as a manager ought to have called Thembeke to his office and discuss the issue but not to shout at her in the presence of her colleagues. The Applicant's conduct was unprofessional and unacceptable. I do not understand why a manager would push a subordinate when there is a disagreement. It is clear that the Applicant's behaviour shocked Thembeke, as Mjaja said that anyone could have viewed this conduct as sexual harassment. I accept that this kind of behaviour is a physical assault which is a dismissible offence.
54. Thembeke's evidence that she was verbally assaulted by the Applicant was not challenged. Verbal assault is not acceptable in the workplace especially if it comes from a manager who is expected to be exemplary to his subordinates, in my view dismissal was an appropriate sanction.
55. The Applicant demonstrated that he opened his arms wide to give Thembeke a "conciliatory hug" whilst he held a flask with boiling water in his hands. I find this bizarre because the flask was dripping with boiling water therefore inevitably the water was bound to spill onto Thembeke. The Applicant deliberately poured boiling water into Thembeke; his actions illustrate a purposeful act of harm towards Thembeke. In my view, the dismissal was fair because the Applicant held a senior position, as a manager who had a responsibility to promote harmony in the workplace but he did the opposite.

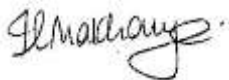
56. Zondo JP held in *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340 it was held that a commissioner must only interfere with the sanction imposed by the employer if it shocks and alarms. In the circumstances, I am unable to interfere with the sanction imposed by the Respondent as it is not shocking nor alarming. The Applicant ought to have known better not to behave in an unacceptable manner that violated Thembeke's dignity as she felt hurt and threatened at work when she was insulted, pushed, and even poured with boiling water. The Applicant's dismissal was warranted.

57. It is my view that the Respondent has succeeded in carrying out the onus that rested upon it. I, therefore, find that the dismissal of the Applicant was an appropriate sanction. I am satisfied, having regard to the evidence and the arguments presented, that the dismissal was both procedurally and substantively fair.

AWARD

58. The dismissal of the Applicant, Mr. Ogle. Vernom was substantively and procedurally fair.

59. The Application is dismissed.



LINDIWE MAKHANYA