



ARBITRATION AWARD

Commissioner: Mbuso Mbuli

Case No: PSHS605-21/22

Date of award: 14 September 2022

In the matter between:

PSA OBO NADAR THILOSHNIE

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This matter was placed on the roll before me for arbitration on 13 December 2021 at RK Khan Hospital when it remained part heard. The matter was thereafter heard over several occasions and finalized on 30 August 2022. The Applicant was represented by Mr. M.N. Mbambo, a trade union official from the Public Servants Association (PSA), and the Respondent was represented by Mrs. T.S. Zulu who is the Assistant Director: Labour Relations. The parties were given seven (7) days within which to file written closing arguments. The proceedings were digitally recorded.

JURISDICTION AND ISSUES TO BE DECIDED

2. No other preliminary or jurisdictional issues were raised and the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC/Council) has the required jurisdiction to hear the matter. I have to decide whether or not the Respondent committed an “unfair act or omission... involving unfair conduct... relating to the suspension of the applicant”, as contemplated in section 186 (2) (b) of the Labour Relations Act 66 of 1995, (“the Act”), as amended. In the event that I find that the respondent indeed committed the alleged unfair labour practice, I have to determine the appropriate relief.

BACKGROUND TO THE DISPUTE

3. All the following issues are common cause and were agreed upon before the commencement of the arbitration process:
 - The Applicant is currently employed as a Pharmacist, grade three
 - On 04 August 2021 she was given a Final Written Warning valid for six months. I quote from the annexure handed to the Applicant: *“1 You have demonstrated gross insolence and insubordinate conduct towards the employer and showed a complete disregard of authority in that you deliberately spoiled scratched off or annulled the official documents, when security access control documents were handed to you by security personnel at RK Khan Hospital. 2. You willfully blocked the hospital entrance and deliberately abandoned your vehicle on the entrance of the hospital, while you insistently refused to obey security instruction issued to unblock access into the hospital as a health care facility by removing your car off the entrance for movement of emergency ambulance services and general public’s access to AVR, Primary Health services.3 You have made verbal threats against your component Manager in that, in your words you said that, you will deal with him and he will regret pocking his nose into your business. 4. You have grossly abandoned your duties as a Pharmacist since 02 July 2021 and refused to be optimally utilized in rendering health care to the public at ARV services for approximately three weeks, while on full remuneration with benefits, without just or reasonable cause.5. You have refused to cooperate with your supervisor in a reasonable manner of a supervisor-employee communication, in that you no*

longer recognize your fiduciary duty to subject your loyalty and respect to your supervisor and Managers, in dishonor of the employment relationship.”

4. The applicant referred the dispute to the Council for conciliation in terms of section 186(2) (b) of the Act. The dispute was not resolved at conciliation and a certificate was issued indicating that the dispute remained unresolved after the conciliation process on 27 October 2021. The applicant thereafter submitted a request for the matter to be resolved through arbitration and the dispute was scheduled for arbitration as indicated above.
5. Both parties handed in bundles of documents which were marked “A,” “B1,” “B2” and “B3” and I was enjoined by both parties to accept the documents for what they purport to be and consider them to the extent that it may be required for the purpose of this award.

THE APPLICANT’S CASE

6. The Applicant testified under oath and stated that she has been employed by the Respondent as a Pharmacist for more than twelve years. On 04 August 2021, she received Final Written Warning valid for six months via email (page 1 of bundle A). She said that she is not guilty of any offence that she is charge for.
7. While she working at McCord Provincial Hospital, she receive an instruction to report at RK Khan Hospital and she did as she was instructed and reported at RK Khan Hospital on 02 July 2022. When she reported at RK Khan Hospital, she discovered that no proper arrangements were made to accommodate her. She was instructed to report at ARV clinic, and found that there was no computer and desk that was allocated to her. She also was not given a parking disc and the parking that was allocated to her was far from her work station.
8. At the ARV clinic, where she was instructed to report discovered she did not have any access to the computer to enable her to do her work. There were also no standard operating procedures in place so that she would be able update herself. She has to use her personal computer to get information about ARVs. She has never refused any instructions from any supervisor and she tried by all means to work with all limited resources in her possession. It was very difficult for her to do her work as a

pharmacist. She raised these issues with the Pharmacy Manager who promised to address them but failed to do so.

9. The only reason she scratched some conditions off on the parking application form (page 23 of bundle B1) was that she did not agree with them. (3. *That parking on hospital grounds is entirely at the owner's risk and that no liability is accepted by the KZNPA. 11. The renter/user indemnifies the department/hospital against all proceedings, claims injuries, loss or damage that he/she or any third party may encounter direly or otherwise as a result legal issues that may arise from any such action*), as the conditions indicated the Respondent will not be liable for damage of her car while in the Respondent's parking lot. In the past her vehicle has been scratched while in the Respondent's parking lot. She wanted the Respondent to guarantee her safety at work and also of her vehicle as they have forcefully removed her from McCord Provincial Hospital.
10. On 07 July 2022, she did not forcefully block the hospital, but the security officials at the gate had refused her entry. When she reported for duty in the morning, she had used the same entrance and there was no problem. She went to buy some food outside, there was no problem, when she came back, and she was shocked when security officials did not let her in. When she asked why she was denied the entrance, the security officials at the gate informed her that, they were informed by Mr. M Kunene not to let her in. She tried to explain herself to the security officials but they were not willing to listen to her.
11. As she had no place to park her vehicle, she was compelled to leave her vehicle at the gate. Before leaving the vehicle, she informed the security officials at the gate that she will be at the ARV clinic in case they need. The entrance where her car was parked is not a main entrance to the hospital and she also left some space for other vehicles to pass. When she was instructed to move her vehicle from the entrance by the police, she did that. At no time did she ever threaten anybody at the hospital.
12. She further testified that she was surprised that she was given a Final Written Warning valid for six months on 4 August 2021, via email, for offences she never committed. She appealed against the Final Written Warning, but did not get any response from the Respondent (page 4 of bundle A). She

only received the response that her appeal was unsuccessful after declaring a dispute with the council (page 1 of bundle B3).

13. Under cross-examination, she denied that she had blocked the gate and insisted the only reason she left the car at the gate is that she was denied entrance by security officials. She also denied that she was disrespectful when she canceled some of the clauses on the parking form and insisted that the only reason she cancelled those clauses was that she did not agree with them and she could not sign something she did not agree with it.
14. She insisted she never refused to work during the month of July 2021, but that it was the Respondent who had failed to provide her with all the necessary tools that would have enabled her to perform her duties effectively.

THE RESPONDENT'S CASE

15. The Respondent's first witness, Mr. Mandlenkosi Kunene, testified under oath that he is currently acting as Chief Security Officer at RK Khan Hospital and is responsible for supervising security officials.
16. He does not remember the exact date but the Applicant came to him to apply for a parking disc so that she could park inside and he gave her a form to fill in (page 23 of bundle of bundle B1). He did not issue the disc to the Applicant, because she had cancelled some of the terms and conditions that were specified in the form and indicated she was not happy with them before signing it. He viewed the actions of the Applicant as being disrespectful and decided to report her actions to the Labour Relations Department.
17. He further testified that he was informed that when the Applicant was refused entrance at the gate, because she did not have a parking disc that she had blocked the entrance. She only removed her vehicle from the gate when the police were called.
18. Under cross-examination, Mr. M Kunene insisted that he does not know the exact date the Applicant came to him to apply for a parking disc. He testified that the rules on the application form are

applicable to all employees of the hospital and if any employee blocks the entrance, he/she must be reported to the police. When it was put to him that the Applicant had use the same entrance before and there was no problem with the disc, he responded by saying that might have happened, because the security officials were negligent but they were not supposed to allow the Applicant to enter the gate without a disc in first place.

19. The Respondent's second witness, Mrs. Rian Goundan, testified under oath that she is employed as an Assistant Pharmacy Manager, but is currently acting as Pharmacy Manager. When the Applicant reported for duty she requested a medical examination before resuming her duties.
20. She accompanied the Applicant to the sick bay to undergo medicals and left her at the reception. She was later informed that the medicals were never completed because the Applicant never returned the file after being sent for X-rays.
21. For the whole month of July 2021 the Applicant never worked, because she had raised many grievances (page 2 & 3 of bundle 3). The first grievance concerned her job description, which she wanted changed, and later it concerned requests for specific protective gear to be issued to her.
22. She further testified that there is another pharmacist at the pharmacy to which the Applicant was allocated, but she had never complained about the furniture.
23. Under cross-examination, Mrs. R. Goundan testified there was another pharmacist at ARV clinic where the Applicant was allocated and the Applicant was supposed to work with that pharmacist. When she was asked how the Applicant was supposed to work when she was not provided with a desk and a computer, she responded that not all the work of the pharmacist requires a computer and the Applicant should have performed other duties.
24. When she was asked how was the Applicant to perform her duties without a job description, she responded that the Applicant knows her duties a Pharmacist; she was not supposed to wait for a job description before performing her duties. When it was put to her that the reason why the Applicant was not able to perform her duties was that they had frustrated her by failing to provide her with all the necessary tools to preform her duties, she denied that.

25. The Respondent's third witness, Mrs. Aziza Hadum, testified under oath that she is employed an Occupational Health Practitioner. The Applicant was booked to for medical surveillance on 05 July 2021, after all the procedures were followed the Applicant was advised to take her file to go and do an X-ray. The Applicant never returned and the file was never returned.
26. She tried to follow up the issue with the Pharmacy Manager, but did not get any response and even today the file is still missing. As a result of the Applicant not returning the file, they were not able compile her surveillance report.
27. Under cross-examination, Mrs. A. Hadum insisted she tried to follow-up the issue, but there was no response from the pharmacy department.
28. The Respondent's fourth witness, Ms. Anitha Palhad, testified under oath that she is employed a Security Official and has been employed by the Respondent for more than twelve years. On 07 July 2021, she was requested by Mr. T. Zulu from the Labour Relations Department to accompany him to ARV clinic to speak to the Applicant as she had park her car at the gate, blocking other vehicles. She confirmed (page 31 of bundle B1) is the Applicant's which was parked at the gate and blocking the entrance
29. When they arrive there they informed the Applicant that she must move her vehicle from the gate, but she was no willing to listen to them. She tried to calm the Applicant down, but the Applicant kept on shouting and demanded that she be given a parking disc as she had paid for it. She informed the Applicant that as soon as the Chief of Security is back from the meeting, she will issued her disc, but the Applicant did not want to listen and they decided to leave her.
30. After sometime Mr. T. Zulu came back and asked her to serve the Applicant with a written notice from the Chief Executive Officer of the hospital indicating that if she failed to move her vehicle from the gate that the Metro police will be called to tow away the vehicle. The Applicant refused to sign the notice and they left it on her table. A few minutes later the Applicant went to her vehicle and sat inside, but refused to remove it. She then called the Metro police so that they could remove the Applicant's car.

31. While they were waiting for the Metro police to come, the Systems Manager Mr. M. Kunene came in and requested the Applicant to move her car from the gate, but the Applicant refused. When Metro police arrived to tow the Applicant's car, she requested to fetch her staff from the ARV clinic. When she came back, she drove her vehicle and left.
32. Under cross-examination, Ms. A. Palhad confirmed that page 31 of bundle B is the picture of the Applicant's car at the gate. When she was that in the picture there is no vehicle that she is alleging that were blocked by the Applicant's car. She responded by saying the vehicles were diverted to the other gate. She insisted that the Applicant was requested several times to move her vehicle but she refused

ANALYSIS OF THE EVIDENCE AND ARGUMENTS

33. I am required to decide, on the balance of probabilities, whether the respondent had committed an unfair labour practice in terms of section 186(2)(b) of the LRA by instituting disciplinary action against the applicant, and for issuing a Final Written Warning valid for six months on 04 August 2021, as well as the appropriate relief if an unfair labour practice is found.
34. It is common cause that the Applicant was issued with a Final Written Warning valid for six months on 04 August 2021. It is also common cause that the Applicant's appeal was turned down by the Respondent. The Applicant denies all the charges against her.
35. On charge 3 "*you have made verbal threats against your component Manager in that, in your words you said that, you will deal with him and he will regret pocking his nose into your business.*" There was no evidence that was led through the whole arbitration that the Applicant had made verbal threats against the Component Manager. Based on the above I find the Applicant not guilty on charge 3.
36. On Charge 4 "*You have grossly abandoned your duties as a Pharmacist since 02 July 2021 and refused to be optimally utilized in rendering health care to the public at ARV services for approximately three weeks, while on full remuneration with benefits, without just or reasonable cause*" and .5." *You have refused to cooperate with your supervisor in a reasonable manner of a supervisor-employee communication, in that you no longer recognize your fiduciary duty to subject*

your loyalty and respect to your supervisor and Managers, in dishonor of the employment relationship”.

37. The Applicant submitted that the reason she was not able to perform her duties is that when she reported at RK Khan Hospital, she discovered that no proper arrangements were made to accommodate her. When she was allocated to an ARV clinic at RK Khan Hospital there was no computer and desk that was allocated to her so that she can perform her duties.
38. When she was instructed that she will be working at the ARV clinic, she did as she was told. When she reported at ARV clinic, she discovered she was not allocated any desk to work from and she did not have any access to the computer to enable her to do her work. There were also no standard operating procedures in place so that she would be able update herself. She has to use her personal computer to get information about ARVs. She has never refused any instructions from any supervisor and she tried by all means to work with all limited resources available to her.
39. This was confirmed by management’s witness, Mrs. R. Goundan under cross-examination that there was no desk allocated to the Applicant at the ARV clinic and there was only one computer which was used by the other pharmacist who was already there. She also confirmed that the Applicant had requested a job description. Based on the above I find the Applicant not guilty on both charge 4 and charge 5 as well.
40. Charge 1: The Applicant does not deny that she scratched some conditions on of the parking application form (page 23 of bundle B1) as she did not agree with them (*3. That parking on hospital grounds is entirely at the owner’s risk and that no liability is accepted by the KZNPA. 11. The renter/user indemnifies the department/hospital against all proceedings, claims injuries, loss or damage that he/she or any third party may encounter direly or otherwise as a result legal issues that may arise from any such action*), because the conditions indicated the Respondent will not be liable for damage to her car while in the Respondent’s parking lot.
41. The Actions of the clearly indicate that she was in defiance of the Respondent’s rules. If she was not happy with some the parking conditions on the application form, she was supposed to raise it with the management of the hospital not to scratch the form that was given to her. This clearly is display a sign of disrespect from her side.

42. Charge 2: The Applicant does not deny that she left her vehicle at the entrance of the hospital and the reason for doing so was that the security officials at the gate refuse her entry into the hospital. When she was asked why she was denied the entrance, the security officials at the gate informed her that they were informed by Mr. M Kunene not to let her in. She tried to explain herself to the security officials, but they were not willing to listen to her. When she left her car at the entrance, she informed the Security Officials where to find her and there was also enough space for other vehicles to use the entrance.
43. On other hand the Respondent's fourth witness, Ms. Anitha Palhad, insisted that the Applicant had parked her car at the gate, blocking other vehicles. When they visited the Applicant at ARV clinic to request her to move her vehicle from the gate, she was not willing to listen to them. She tried to calm the Applicant down but the Applicant kept on shouting and demanded that she be given a parking disc as she had paid for it. She only removed her car when the Metro police came in and her evidence was not challenge. This was clearly displayed in the picture (page 31 of bundle B1) which shows the Applicant's car park at the gate.
44. Page 31 of bundle B1 clearly shows the Applicant's vehicle park at the gate. From the evidence it is clear that the Applicant had deliberately abandoned the car at entrance of the hospital blocking the entrance. If the Applicant was not deliberately blocking the entrance of the hospital, she was supposed to move it when requested by Ms. Anitha Palhad and Mr. M Zulu the first time. The fact that the Chief Executive Officer of the hospital had to be involved and Metro police be called before the Applicant would move her vehicle clearly shows that her actions were deliberate. Based on the above I find the Applicant guilty on both charge one and charge two.
45. The Applicant was issued with a final written warning valid for the period of six months. As indicated above although, I have not found the Applicant guilty on charges three, four and five and I find her guilty on charges one and two due to the severity of the offence committed by the Applicant.
46. It is my finding therefore that the sanction imposed on the Applicant was an appropriate sanction. I am therefore not convinced that the Applicant succeeded in showing that the Respondent committed an unfair suspension or disciplinary action against her.

47. Hence I make the following award:

AWARD

48. The Applicant failed to show the existence of unfair conduct committed by the Respondent.

49. The referral made in terms of section 186 (2) (b) is accordingly dismissed.



Mbuso Mbuli