PHSDSBC

Public Health and Social Development Sectoral Bargaining Council

ARBITRATION AWARD

Commissioner: **Elsabè Skinner**

Case No: **PSHS303-21/22**

Date of award: **30 November 2021**

In the matter between:

PSA obo Mcdonald Lebetsa Applicant

and

Department of Health Free State Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for arbitration at Albert Nzula Hospital in Trompsburg on 17 November 2021. The parties filed written heads of arguments on 22 November 2021.

2. The Applicant was present and was represented by Mr Fandie, an official of the PSA. The Respondent was represented by Mr Ndobo, the Labour Relations Officer of the Respondent.

3. The proceedings were digitally recorded. No interpreter was used.

BACKGROUND TO THE DISPUTE

4. During the narrowing of the issues, the parties agreed as follows:

4.1 The Applicant worked as a Driver at Albert Nzula Hospital. He was employed on 23 April 2011 and earned R16 157.32 per month.

4.2 He was dismissed on 19 April 2021. He appealed his dismissal and received the outcome on 7 June 2021 (page 10 bundle A). He was charged with two charges namely (page 11 bundle A):

Charge 1 – Misuse of state vehicle

"It is alleged that on 30 September 2020 without authorization you picked up a minor girl at the hiking spot using a state vehicle on your way to Bloemfontein on work related matters.

Charge 2 - Bringing the name of the Department into disrepute

It is alleged that on 13 September 2020 you indecently assaulted a minor girl and you were subsequently arrested and as a result your conduct has put the name of Department of Health into disrepute".

4.3 The parties agreed during the narrowing of the issues that the only issue to be determined by me regarding substantive fairness is whether dismissal the appropriate sanction in both charges. The parties had agreed that the Respondent had rules at work as stated in the charges, the Applicant was aware of the rules, it was valid and reasonable, it was consistently applied by the Respondent and the Applicant had breached the rules.

4.4 Regarding procedural fairness, the parties had agreed that procedural fairness is regulated by Resolution 1 of 2003 which is a collective agreement. It was agreed that I must determine whether the chairperson had misdirected him when it was alleged that it was not placed before him that he should dismiss the Applicant. He did not consider the Applicant's remorse. No evidence was led before him that the Applicant had premeditated intention. I must further determine whether the Respondent had complied with clauses 7.3 (m) and (o) of the Resolution.

4.5 Regarding the facts, the parties had agreed as follows:

4.5.1 The Applicant pleaded guilty during the hearing.

4.5.2 No evidence was led during the hearing.

4.5.3 The Respondent sought as relief in the aggravating circumstances which he had presented to the chairperson that the Applicant be given a three-month suspension without pay and a final written warning.

4.5.4 The Applicant's representative recommended 1 month suspension without pay as well a final written warning in the mitigating circumstances which were presented to the chairperson.

4.5.5 Both parties had agreed that this was brought to the attention of chairperson.

ISSUE TO BE DECIDED

5 I am called upon to determine whether the Applicant's dismissal is substantively and procedurally fair in terms of section 188 of the Labour Relations Act 66 of 1995 (hereafter called the Act).

6 The Applicant is seeking retrospective reinstatement.

PRE-LIMINARY ISSUE TO BE DECIDED

7 The Respondent's representative indicated at the commencement of the arbitration that he intended to call one witness and applied that he leads his witness via virtual platform.

8 The Applicant's representative opposed the application and stated that they all had to come and ensure that their witnesses were available. No reason was provided why the Respondent could not have their witness available. It was unequal treatment, unless he stated that the witness was in hospital and had a medical certificate.

9 The Respondent's representative replied that the arbitration had been postponed previously due to the previous commissioner. His witness had attended on those occasions. He stayed in Harrismith and travelled almost 300 kilometers during all those times. The chairperson requested to be connected rather than to travel from Harrismith to Trompsburg only to find that the matter would again be postponed. He confirmed that they had not made any application to the Council regarding this.

10 The Applicant's representative indicated that they would leave it for the commissioner to decide. The postponements did take place. The commissioner had indicated that she was sick and that the matter would not proceed on either the day before or early in the morning. It remains the witness' responsibility

to attend. He said it was a blameworthy thing, the commissioner did not come therefore he would not come.

11 I issued a ruling during the proceedings that I would allow the Respondent to lead the testimony of the chairperson via virtual platform. My reasons are as follows:

11.1 The Council had issued a Directive regarding virtual hearings which stipulates that the party must lodge an application 5 days prior to the arbitration. The parties also had to agree on various issues, namely how documents would be submitted, et cetera.

11.2 In the matter before me, the application is not for a complete virtual hearing, the Respondent requested to lead the testimony of the chairperson via virtual platform. I must agree with the Applicant's representative that the chairperson's reasons for not attending is not acceptable. We all had to travel to attend the arbitration.

11.3 However, what is common cause between the parties is that the arbitration had been postponed on several occasions previously when all the witnesses were present. I am required to give both parties a fair opportunity to present their cases and I must also ensure that the matter is not further delayed since the Applicant remains unemployed in the meantime and it is contrary to the main objective of the Act namely the speedy resolution of disputes. I therefore decided to allow the Respondent to lead the testimony of the chairperson. The quality of the recording had also been tested and it was ensured that the witness was indeed alone in his office prior to him giving testimony.

SURVEY OF EVIDENCE AND ARGUMENTS BY THE PARTIES:

Documentary evidence

12 The parties presented a common bundle marked A. There were no objections to the documents and parties were satisfied that the documents were what it purported to be.

Evidence by the Respondent

13 Mr Fanyana Moloi testified under oath as follows via virtual platform:

14 He was the CEO at Thebe Hospital in Harrismith. He also acted as the chairperson at the disciplinary hearing. He drafted a report regarding the outcome of the hearing.

15 He found the Applicant guilty on the two charges, misuse of state vehicle and bringing the Department's name into disrepute as the Applicant had pleaded guilty during the hearing.

16 The parties had forwarded their aggravating and mitigating circumstances. He decided to dismiss the Applicant after he analysed those circumstances. He was informed by the seriousness of the offences that the Applicant had committed. It was the only appropriate sanction of these offences. The alleged gender-based violence was committed using the Respondent's resources. Indecent assault forms part of gender-based violence. The Applicant was trusted to use the vehicle to give service to the poor people, but he misused it. Both representatives recommended suspension without salary, but he decided to dismiss the Applicant. No agreement was presented to him by either party. It also did not form part of the hearing. They should have requested a meeting to address him on the recommendation.

17 During cross-examination, he testified that the recommendation by both representatives were individual recommendations for the recommended sanction and not a collective recommendation from both parties. It was pointed out to him that he had stated the mitigating and aggravating circumstances in his report but there was no indication that it had been analysed. He answered that there was no specific sentence in the report, but he had done so. It was pointed out to him that he had not considered that he had three children, a wife and 4 sisters to supports with 11 years of service and a clean record. He answered that he had considered it. He agreed that no evidence had been led in the hearing. He was asked how he came to the conclusion that the Applicant had premeditated intentions. He answered that he had studied the audi letter and the bundles of documents which were presented to him by the representatives in the hearing. It was pointed out to him that he went through documents which were not lead as evidence before him. He answered that he had to go through it to come to an informed decision. The Applicant had pleaded guilty before any evidence could have been lead. He did not know where he was supposed to get someone to lead evidence to him. The case was closed right there when the Applicant had pleaded guilty.

18 He had communicated the outcome report and the sanction to the District Director and the Respondent's representative. It was pointed out to him that he had not complied with clause 7.3 (o) of the Resolution as he had failed to communicate it to the employee. He answered that he had acted according to the Circular.

19 It was pointed out to hm that he was supposed to make a finding of guilty after the Applicant had pleaded guilty in terms of clause 7.3 (m). He answered that the Applicant had pleaded guilty. He saw no reason to repeat it.

20 He considered three things when he decided to dismiss the Applicant, the seriousness of the charges and the mitigating and aggravating circumstances.

21 During re-examination, he testified that according to the Circular the District Director has the powers to sign the dismissal letter as he only recommended the sanction.

Evidence by the Applicant:

22 Mcdonald Lebetsa, the Applicant, testified under oath as follows:

23 He was represented by Mr Motlhale during the hearing. Prior to the hearing a meeting was held with his representative and the Respondent's representative, Mr Kula. They concluded that he had to plead guilty and the sanction would only be two- or three-months suspension without pay. His representative said one or two months and the Respondent's representative stated three months with a final written warning. He referred to the mitigating and aggravating circumstances which were presented by both representatives and confirmed that it was in line with the agreement during the meeting (pages36, 39 bundle A). He would not have pleaded guilty without the agreement. It was not fair that the chairperson had not communicated the sanction to him. The chairperson was very harsh with the sanction. He wanted to return to work as he had a lot of dependents to take care of, he lost everything and was struggling. It was his first offence in 11 years. He was asking the commissioner to check on her own and to "please help him if the commissioner finds it in the right way".

24 The court case against the Applicant had been withdrawn during June 2021.

25 During cross-examination, he testified that the agreement was a verbal agreement. Confirmation of the agreement is found in the reports. He did not know the chairperson had the powers to overturn the recommendation of the representatives, but the chairperson should have checked what was brought to him. He did not understand the seriousness of the charges. The criminal case was withdrawn, he did not have proof with him, but he could ask his lawyer for the proof. During clarity seeking questions, he testified that he was very sorry for what he had done. During re-examination, he testified that the purpose of the representatives' discussion was that he should not have been dismissed.

26 Mr Matshidisio Shadrack Motlhale testified under oath as follows:

27 He was the Applicant's representative during the hearing. Prior to the hearing he had a discussion with the Respondent's representative, Mr Kula. It was a norm to meet with the Respondent's representative before a disciplinary hearing. The meetings were always verbal meetings. It was agreed that the Applicant would plead guilty as he had agreed that he had put the Department's name into disrepute as he had to attend court. The Applicant's name had been cleared in the meantime.

28 He referred to his recommendation that he had written and confirmed that he had spoken with the Applicant's supervisor, Mr Skele, prior to the hearing who confirmed that the employer/employee relationship had not broken down (page 34 bundle A). The Respondent indicated that they were ready to give the Applicant a second chance as the Applicant was showing remorse for his actions. It was agreed that he, the representative, would write that the relief sought by the Applicant was one month suspension without pay and a final written warning. The Respondent's representative would write that it was seeking three months' suspension without pay and a final written warning. None of the parties proposed a dismissal sanction.

29 It was the first time since 2015, when he had started to present employees during disciplinary hearings, that he had seen such a thing where the chairperson did not follow the recommendations. Both parties were shocked when the outcome had been received. Mr Ndobo, the Respondent's representative during the arbitration, had also phoned him and expressed his shock. Mr Kula, the representative during the disciplinary hearing, had also phoned him and stated that the chairperson was wrong to do this. This would just create conflict between the parties.

30 During cross-examination, he testified that the Applicant had shown remorse and had indicated that he was prepared for a change. The Respondent had agreed that he should not be dismissed. The Applicant had acknowledged that he was at the wrong side of the Respondent and his supervisor had stated that the relationship had not been broken. The Respondent's representative had also stated that they were not going to dismiss the Applicant as he had admitted his mistake. The Applicant had not assaulted or raped anyone. The criminal case had been withdrawn and he had informed the Respondent's representative, Mr Ndobo, of this prior to the arbitration. He never requested a document to proof this. The sanction of dismissal was communicated to Mr Lebetsa. The parties never drafted minutes of their discussions prior to a hearing. He had similar meetings with Mr Ndobo before disciplinary hearings and they had also never drafted such minutes. During re-examination, it was pointed out to him that the chairperson had testified that he had not communicated the sanction to the Applicant. He answered that the District Manager had given it to the Applicant.

31 The above-mentioned witnesses gave evidence under oath and were cross-examined. Both parties submitted written closing arguments.

32 The Respondent's representative wrote that it remains the chairperson's responsibility to decide on a suitable sanction depending on the misconduct committed. The misconduct was serious and could not be tolerated. He agreed with the chairperson that the misconduct committed was dismissible offences. The representatives had not presented a plea bargain to the chairperson. They submitted their recommendations individually. The chairperson had to go through the bundle to satisfy himself because no evidence was led during the hearing. According to HRM Circular 23 of 2019 the District Director is empowered to dismiss the employee on account of misconduct. The Applicant indicated that he pleaded guilty only to get a lesser sanction than dismissal and it clearly does not show remorse. SA is dealing with epidemic gender-based violence. The Respondent could not promote a person who used the state's resources to indecently assault a minor girl. The Applicant had pre-meditated intention when he reversed the vehicle after passing the passage when coming back from Bloemfontein. He passed the town where the passenger was supposed to be disengaged. The Applicant mentioned that he was busy clearing his name at the court at the time of the disciplinary hearing, but the question arises why he pleaded guilty if he was not guilty of misconduct. The Applicant wrote in his statement (page 25 bundle A) that he was sorry for what had happened on the day of the incident. This is evidence that he was indeed guilty. There was no other sanction suitable than a dismissal. The application should be dismissed. The dismissal was substantively and procedurally fair.

33 The Applicant's representative wrote that it was unfair of the chairperson to dismiss the Applicant when no evidence was led during the disciplinary hearing regarding the breach of the trust relationship. The evidence at the arbitration was led that it was not the parties' intention to have the Applicant dismissed. The intention could be seen in the mitigating and aggravating factors that were submitted by the parties. The Respondent did not raise the breach of the trust relationship as a factor. The Court had held in the case **Edcon v Pillemer NO & others [2008] 5 BLLR 291 (LAC)** that evidence must be led on the trust relationship. The chairperson had not considered the mitigating factors. His evidence was confusing and raised a lot of doubts. It was clear that he had not considered it. The sanction was issued and communicated to the Applicant by the Manager and not the chairperson. He failed to comply with the collective agreement which regulates discipline in the public service. Only the chairperson can communicate the sanction to the employee in terms of the Resolution. His testimony that he only made a recommendation is misleading. He referred to the case **Solidarity obo Parkinson v Damelin (Pty) Ltd and others (JR2792/12[2014] ZALCHJH 480 (4 December 2014)** where the Court held that the employer must have compelling and good reasons for deviating from the disciplinary code and procedures. The employee must be given an opportunity to respond why he believes that there should

not be deviation from the procedures. The Resolution has the force of law and non-compliance with its provisions renders the proceedings null and void. The commissioner should find the dismissal of the Applicant unfair.

34 I have not repeated all the evidence before me but concentrated on those that assisted me on arriving at my final decision as I am required to issue an award with brief reasons.

ANALYSIS OF EVIDENCE AND ARGUMENT

35 In terms of section 192 of the Act the onus rests on the Respondent to prove that the dismissal was substantively and procedurally fair.

Regarding procedural fairness

36 The parties had agreed during the narrowing of the issues that procedural fairness is regulated by the Resolution which is a collective agreement.

37 Non-compliance with clauses 7.3 (m) and (o) were placed in dispute regarding procedural fairness. It was also stated that I must determine whether the chairperson had misdirected himself when it was alleged that he had decided to dismiss the Applicant whilst it had not been placed before him that he should dismiss the Applicant. He did not consider the Applicant's remorse. No evidence was led before him that the Applicant had premeditated intention. The Applicant's representative had confirmed that the issue raised did not relate to whether the chairperson was biased.

38 I am guided by the case **Performing Arts Council of Free State (PACOFS) v CCMA and Others (JR 82/18) [2021] ZALCJHB 70 (27 May 2021)** where the Court had held that "arbitration proceedings constitute a *de novo* hearing of the matter and as such, the commissioner exceeded her powers when she reviewed the findings of the chairperson of the disciplinary enquiry. In *County Fair Foods (Pty) Ltd v CCMA 1*999 20 ILJ 1701 (LAC) at para 11., the LAC stated that the decision of the arbitrator as to the fairness or unfairness of the employer's decisions is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator".

39 It is clear from the above, that I may not review the findings of the chairperson. I may not review what was presented to him and whether he had misdirected himself with regards to what was placed before him or not. I am required to determine what is fair based upon what is placed before me.

40 Clause 7.3 (m) of the Resolution states that if the chair decides the employee has committed misconduct, the chair must inform the employee of the finding and the reasons for it.

41 It is common cause that the Applicant had pleaded guilty during the hearing. The chairperson testified that the Applicant had pleaded guilty. He saw no reason to repeat it.

36 I am guided by the case **Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others [2018] ZACC 3** where an employee waited 5 years for the outcome of her appeal before she was dismissed. In this case procedural fairness was also regulated by a collective agreement. The Court had held that the employer had to show good reasons for not complying with its own set of rules. An employer must justify the non-compliance of its rules. The Court found the Applicant's dismissal to be procedurally unfair as no reasons were provided for the non-compliance of the Respondent's rules.

37 I am further guided by the case **Department of Labour v The General Public Service Sectoral Bargaining Council and others (Case JR 2262/12) (heard 10 July 2014) (Delivered 19 December 2014)** where the Court specifically dealt with Resolution 1 of 2003, the Court had agreed with the arbitrator's award where procedural unfairness was found as the employee were not issued with the sanction letter and report by the chairperson. The Court stated as follows:

[23] **Policies exist for a reason, they are binding to parties, deviation from the policies is to undermine other parties who are expected to observe and adhere to such policies with the attachment that failure to observe and adhere to such has the consequences of disciplinary actions being taken.**

[24] Policies are negotiated and enacted to govern the workplace whereby employer and employee are equally bound by them which means that there should be no superior parties who can arbitrarily or unilaterally decide not to adhere to the policies when the situation suits them. **A negotiated policy like this Resolution, which was negotiated by the employer and labour, cannot be arbitrarily or unilaterally changed by a mere practice, without it being renegotiated to either amend or deviate from it. As much as the employee is expected to adhere to company policies, the employer is equally so and even to act in such a way that it leads by example. It will defeat the purpose of establishing policies (which is to maintain order and governance within the workplace) if employers by virtue of their perceived superiority are permitted to deviate from the rule that they have discretionarily established and adopted.**

[25] **The arbitrator interpreted the Resolution correctly in the absence of any explanation being advanced as to the reason for not following the procedures by the book".** (my emphasis)

38 I must add, in passing, that it is a practice that a chairperson usually informs the offender that he is found guilty as he had pleaded, after the chairperson had satisfied him/herself that the offender was indeed guilty by asking questions to determine whether he pleaded guilty out of his own free will and whether he was not raising some sort of offence. This also assists the chairperson to get information regarding the circumstances of the misconduct.

39 The Applicant is a lay person and was represented by a shop steward of the PSA. One may argue that his representative knew the process and would have explained to the Applicant, but, in my view, the responsibility to ensure that the process is followed and explained to the Applicant remains with the chairperson and not with the Applicant's representative. I am therefore satisfied that the Respondent had not complied with the Resolution by not informing the Applicant that he had been found guilty as he had pleaded and I am not satisfied that the reason provided for not complying was reasonable and acceptable.

40 Clause 7.3 (o) stipulates that the chairperson must communicate the final outcome of the hearing to the employee within five working days after the conclusion of the disciplinary enquiry, and the outcome must be recorded on the employee's personal file. The chairperson had conceded that he had not issued the outcome of the hearing to the Applicant. He had submitted it to the District Director and the Respondent's representative in terms of a Circular.

41 The chairperson testified that he was entitled in terms of the HR Circular to send it to the District Director to furnish the Applicant with his sanction. The Respondent's representative also wrote in the closing arguments that the chairperson was entitled to do so in terms of the Circular. During the narrowing of the issues the parties had agreed that procedural fairness is regulated by Resolution 1 of 2003 which was a collective agreement. It had not been agreed that the Circular also deals with procedural requirements. The onus rests on the Respondent to prove that the dismissal is procedurally unfair. It is their responsibility to lead evidence regarding this during the arbitration. I am therefore satisfied that the Respondent had not complied with clause 7.3 (o) of the Resolution.

42 I am not able to consider the Circular as no evidence was led about it during the arbitration. There is therefore no reason before me why the Respondent had deviated from the procedure in this regard.

43 Considering the above, I am satisfied on a balance of probabilities that the Respondent had not complied with the procedural requirements of the Resolution. I therefore find the Applicant's dismissal procedurally unfair.

Regarding substantive fairness:

44 In terms of Item 7 of Schedule 8 – Code of Good Practice: Dismissal a person should consider the following when determining whether a dismissal for misconduct is fair:

(a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) If a rule or standard was contravened, whether or not
   (i) The rule was a valid or reasonable rule or standard;
   (ii) The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
   (iii) The rule or standard has been consistently applied by the employer;
   (iv) Dismissal was an appropriate sanction for the contravention of the rule or standard.

45 The Applicant was charged with two charges namely that he had misused a company vehicle by giving a minor girl a lift (charge 1) and that he had brought the Respondent's name into disrepute because of the allegation that he had sexually assaulted the girl and was subsequently arrested (charge 2).

46 The parties agreed during the narrowing of the issues that the only issue to be determined by me is whether dismissal is the appropriate sanction.

Whether dismissal is the appropriate sanction for breach of the rules

47 It is trite law that when determining whether dismissal is an appropriate sanction: an enquiry into the gravity of the contravention of the rule; an enquiry into the consistency of application of the rule and sanction; and an enquiry into factors that may have justified a different sanction needs to be undertaken. The issue of consistency had not been placed in dispute by the parties.

48 It is trite law that a commissioner should not defer to the decision of an employer. The commissioner's own sense of fairness must prevail after considering all the circumstances.

49 I am satisfied that the Applicant was found guilty of serious offences. He misused a government vehicle by giving a minor girl a lift and he brought the name of the Department into disrepute when it was alleged that he had indecently assaulted the minor girl and was subsequently arrested. The chairperson testified that the Applicant had committed a premediated offence, he indecently assaulted a minor girl in the state vehicle and the issue of gender-based violence is very serious. I agree with him that gender-based violence is indeed very serious and cannot not be tolerated. However, the Applicant was not charged for this. He was charged that he brought the name into disrepute because of the allegations that were brought in against him. The Respondent led no evidence regarding the circumstances of the misconduct. There is no evidence before me that he had indecently assaulted the minor girl. In fact, he testified that the charges had been withdrawn against him. His evidence was corroborated by Mr Motlhale as well. The Respondent's representative sought proof of this during the arbitration, but the onus rests on the Respondent to prove that it was not merely allegations and not on the Applicant. I am therefore satisfied on a balance of probabilities that the charges against the Applicant had been withdrawn. The Respondent's representative explained in his closing arguments how the Applicant had committee the misconduct, et cetera. I cannot attach any weight to this as no evidence was led regarding this during the arbitration and it is trite law that closing arguments may not be used to introduce new evidence. The evidence before me is that allegations were brought in against the Applicant and nothing more. I cannot infer that he indecently assaulted the minor girl. It is trite law that a person is regarded as innocent until proven guilty.

50 The Respondent led no evidence that the trust relationship had broken down between the parties. In the case Impala **Platinum Ltd v Jansen and others (LAC) (JA100/14)** the Court reaffirmed that the breakdown in the trust relationship may also be implied from the gravity of the misconduct and no evidence need to be led regarding the trust relationship. However, in the matter before me, it is common cause that the trust relationship had not broken down. Both representatives sought sanctions of unfair suspension without pay as well as a final written warning. Mr Motlhale testified that he had spoken to the Applicant's supervisor who had confirmed that the trust relationship had not broken down. This was never disputed during cross-examination. I am therefore satisfied that the trust relationship had not broken down between the parties.

51 It is common cause that the Applicant had pleaded guilty during the hearing. The Applicant testified during cross-examination that he would not have pleaded guilty had it not been for the agreement that he would not be dismissed. I am guided by the case **De Beers Consolidated Mines Ltd v the CCMA & Others (2000) 21 ILJ 1051 (LAC)** at paragraph 25 where the Court held "it would be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrongdoing is the

first step towards rehabilitation". However, during clarity seeking questions the Applicant had stated that he was very sorry for what he had done. I must also add that the Applicant's demeanour during the arbitration was not like someone who did not care. It was clear that he was very stressed. I am satisfied that he had remorse for his actions.

52 The Applicant had 11 years of service and had a clear record and a family to support.

53 Considering the above, when I weigh the seriousness of the charges against the fact that the Applicant had pleaded guilty, he showed remorse, he had 11 years of service and a clean record, the trust relationship had not broken down and his supervisor is prepared to work with him again, then I am not satisfied that dismissal is the appropriate sanction. In my view, the mitigating circumstances far outweigh the aggravating circumstances.

54 I therefore find the dismissal of the Applicant substantively unfair.

Regarding the appropriate remedy

55 I must determine the appropriate remedy. The Applicant was seeking retrospective reinstatement. In terms of section 193 (2) of the Act reinstatement is the primary remedy as it states as follows:

"The Labour Court or the arbitrator ***must*** require the employer to reinstate or re-employ the employee unless:

(a) the employee does not wish to be reinstated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
(d) the dismissal is only procedurally unfair"

56 There is no evidence before me to prove that the factors are applicable to the matter before me. I am therefore satisfied that reinstatement is the appropriate remedy for the Applicant. I must determine the appropriate amount of backpay that should be paid to the Applicant. A period of approximately five months had passed since the time of the dismissal until the date of the arbitration. The Applicant was found guilty of serious offences. Both representatives had recommended during the hearing that the Applicant should be suspended without pay and a final written warning should be issued. The Applicant's representative suggested one month whilst the Respondent's witness suggested three months. In my view, when considering the seriousness of the misconduct, I must agree with the recommendation of the Respondent's representative that three months suspension without pay is fair. I therefore only deem it

appropriate to award backpay for a period of two months. The three months without backpay should be regarded as his suspension without pay.

57 The backpay is calculated as follows: R16 157.32 per month x 2 months = **R32 314.64**

AWARD

58 I make the following award:

58.1 The dismissal of the Applicant is substantively and procedurally unfair.

58.2 The Applicant is issued with a final written warning as well as a sanction of suspension without pay for three months.

58.3 The Respondent, **Department of Health- Free State**, is ordered to reinstate the Applicant, **Mcdonald Lebetsa**, in its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal.

58.4 The reinstatement in paragraph 58.3 is to operate with retrospective effect from 7 June 2021.

58.5 As at the date of the award the remuneration due to the Applicant as a result of the retrospective operation of the reinstatement amounted to **R32 314.64** minus such deductions as the Respondent is in terms of the law entitled or obliged to make.

58.6 The amount referred to in paragraph 58.5 is to be paid to the Applicant on 15 December 2021.

58.7 The Applicant is ordered to report for duty on 7 December 2021.

58.8 I make no order as to costs.

Elsabè Skinner