

ARBITRATION AWARD

Case Number: GPBC1831/2024

Commissioner: Nowethu Sangqu Ndiki

Date of Award: 24 April 2025

In the **ARBITRATION** between

PSA obo Mqotyana

(Employee)

and

Department of Home Affairs

(Employer)

DETAILS OF THE CASE AND REPRESENTATION

1. The matter was scheduled and heard on 07 April 2025 at the premises of the Respondent in Mthatha.
2. The applicant Ms Mqotyana appeared represented by Mr Mzuku, a union official of a Registered trade union PSA. Mr Zulu represented the Respondent in his capacity as Employee Relations Officer.

BACKGROUND TO THE ISSUE

1. The Applicant was employed by the Respondent as an office manager in Mthatha. She was responsible for running the office. She had been in the Mthatha office since May 2023. The

Applicant had been working in Limpopo office as well as Lady-Frere before joining the Mthatha office.

2. The Applicant was issued with a final written warning for failure to submit a list of stakeholders that had areas to be attended to by the Respondent as per the project that started in 2022.
3. She will argue that the final written warning was not warranted as she did not commit any form of misconduct. It will be argued during these proceedings that the instruction issued to the Applicant was adhered to. She prayed that the final written warning be removed from her file and she should be compensated as the final written warning has caused her stress and anxiety.
4. The applicant submitted a bundle of documents and testified as the only witness to prove her case.
5. The Respondent will argue that the warning was warranted because the Applicant failed to adhere to the instruction of the manager Mr Mnunu. Two witnesses will be called to testify for the Respondent.

ISSUE TO BE DECIDED

6. The issue to be determined is whether the Respondent committed unfair labour practice by issuing a final written warning to the Applicant for failure to submit the list as requested. If I find that the Respondent committed unfair labour practice, I must order the Respondent to remove the warning and declare it invalid. I must also order compensation for unfair labour practice.

POINT IN LIMINE

7. At the beginning of the proceedings the Respondent raised a jurisdictional issue in that the final written warning referred to was due to expire on 30 April 2025. It was therefore out of the Commissioner's jurisdiction to hear such a matter. A ruling was made in this regard. The matter was properly before the Commissioner, the warning had not expired at the time of the hearing.

SURVEY OF EVIDENCE

8. I have considered all submitted documents as well as verbal submissions of the parties to arrive to my finding. I however, will not repeat the evidence word for word. The closing arguments that were received are also considered and applied in coming to the finding below.

Applicant's Witness

9. The applicant, Nomvuyo Mqotyana took oath and testified that, she was employed by the Respondent in Mthatha office as office manager (Deputy Director). She had been working in Limpopo office as well as Lady Frere before joining the Mthatha office, in total she has worked for the Department for 22 years. She said that she joined the Mthatha office on 01 May 2023.
10. Mqotyana said that she was part of the Stakeholders meeting held on 10 April 2024. One of the Stakeholders Mr Mchunu raised a concern that the Department promised to deal with the queries of the undocumented persons in their wards. The project started in 2022 and lists were submitted in 2022. She said that it was Mchunu's indication that nothing was heard from the Department since.
11. Mqotyana testified that Mnunu asked her to look for the list referred to by Mchunu so that it could be dealt with.
12. When she returned to the office, she looked for the list but could not find it. She asked around the office and particularly asked Ms Bam who did not have any idea. She said that she called Mr Diko who indicated that he could not know where the list was and she should ask in the office. Mnunu called to tell her that she must give him feedback so that he could be able to report to the Stakeholders. Mnunu told him that even if it was not in a form of a report, he just needed some report even if it was not formal.
13. She testified that in a bid to get to the bottom of the task, she called Mr Mchunu who was complaining in the meeting about the project. Mr Mchunu was willing to assist, he came to the office and retrieved the list from one of the boxes. On 17 April 2024 she sent a voice note to Mr Mnunu to update him of what was happening with the list of those who were not documented and some did not have certificates in the communities as complained by Mchunu.
14. Mqotyana said that from then she started working with the mobile to give the services to the people. The report was finally submitted on 03 May 2024 at 3:33pm as it appeared on page 10 - 11 of the applicant's bundle. The email was addressed to Mnunu as well as Khanyile Diko.
15. She testified that she lodged a grievance which was not related to this case in June 2024. The grievance was about Mr Diko. Instead of getting any response she received a letter which was

referred to as *Audi alteram partem*(an opportunity to be heard correspondence) from Mr Diko. She responded to the letter stating her side of the story on 18 June 2024 as attached on page 7 of the bundle of document. On the letter she explained that it was not true that she did not respond to Mr Mnunu. She said that she responded formal and informal as Mnunu indicated.

16. Mqotyana said that she had done what she needed to do even though she did not get any help from the office. She did not get any handover from Diko in order to know what was pending and or what was being worked on.
17. She was given a final written warning which appeared on page 8 -9 for failure to carry out a lawful order or written instruction without just or reasonable cause.
18. It was her testimony that this warning was not warranted as she had responded to Mr Mnunu by phone and in writing.
19. It was further Mqotyana's evidence that the warning affected her badly in that she was even given time off from work. She was attending counseling because of the depression which was caused by the final written warning and other the office issues. She referred to page 17 where a doctor's note was attached. The doctor booked her off for stress and she had to apply for temporal incapacity leave due to the issues of her office, it was her first time in her 22 years with the Department that she had to apply for such leave.
20. She mentioned that there were number of issues, she wanted Diko to apologize for, things that he said. The environment was not peaceful. She would like to be compensated and be removed from the office because it was not healthy for her to be in the office with Diko. She also wished that the warning be taken off her file as it is issued for no reasons.
21. During cross examination she reiterated that she had submitted the report to Mnunu. She also said that she kept contact with Mr Mnunu with regards to the list she had to find.
22. When asked about the size of the offices she worked in, she said Mthatha office was a larger office than the previous offices.
23. When asked about her sick leave and causes she said the warning was one of the major issues that triggered her depression.

24. She was asked why did she take so long to book off sick, she said she did not book herself she was booked by the doctor and she also attended to the employee wellness.
25. Her response to the document on page 31 was that, the page attached was a medical information form. The page was completed by the doctor. Handwritten part indicated stressful work environment which referred to her unhealthy working relationship with Mr Diko. She said maybe she lacked a better word to describe the work environment.
26. It was put to her that the workload due to the volume of clientele in Mthatha caused her stress, to which she said she disagreed because she worked in a big office in Mokopane.
27. When asked if Mnunu gave her timeline for the report, she said there was no specific timeline given for the report back with regards to the list.

Respondent's Witness

28. The witness introduced himself as Khanyile Diko, working for the Department of Home Affairs as District Manager in a Director's rank. His duties included operations, inspectorate, immigration, support services duties and any other duties across the District.
29. He testified that he knew Ms Mqotyana as an office manager in Mthatha, and she reported to him.
30. He referred to page 4 saying that the attached document was the *audi alteram partem* letter directed to Ms Mqotyana signed by himself on 06 June 2024. He sent the letter because there was a complaint received from Mr Mnunu complaining about Mqotyana who failed to submit a report regarding the list of undocumented people. The report was supposed to be sent to Mnunu before the end of the week or 10 April 2024. To be precise the report was supposed to be sent on 12 April 2024.
31. He said that the instruction was given to Mqotyana on 10 April 2024 to submit the report on 12 April 2024.
32. It was his evidence that Mnunu was embarrassed due to the failure to obey a lawful instruction by Ms Mqotyana. Mnunu had to report back to stakeholders and he could not do that without the information from Ms Mqotyana.

33. Diko said that Mqotyana's response was that she had reported back to Mnunu on 17 April which was way after the deadline. He said he was not even aware that she responded on the 17th. Diko said he viewed the conduct as a very serious one hence the final written warning.
34. He said that even though the report was submitted on 02 May 2024, it was already late. Mqotyana failed to report back even a cutesy call to Mnunu who had to report back to the stakeholders.
35. Diko denied that the *Audi* letter was triggered by the grievance lodged by Ms Mqotyana. He said that he was able to separate issues. He sent the letter because there was a complaint.
36. Referring to the doctor's letter attached in page 25, he said the document was applying for incapacity leave. He said that he did not think that the depression was triggered by the final written warning. From where he was sitting, the trigger took too long, the warning was received in June and the trigger was in September.
37. According to Diko, Mqotyana was still not doing her work even after the final written warning. In Diko's view, the final written warning did not motivate her to do better.
38. Diko said that he was supported by the Minister in giving the letter to Mqotyana as he was correcting the behaviour.
39. He acknowledged the email to have been sent by Mqotyana on 03 May 2024. He said that the report was late, it was supposed to be sent on the deadline which was 12 April 2024. He said, that was the discussion between Mnunu and Mqotyana on 10 April 2024. He said that if he was chairing the proceedings he would kick out the report, ignore it and not even consider it because it was submitted a way after the due date. According to Diko, the final written warning was even a lesser sanction for the offence of Mqotyana. He gave the final written warning because it was the first offence.
40. He said that Mqotyana was responsible for the management of the office, in her position the sanction was lesser for her offence.
41. During cross examination, he said that he was not present when the instruction was given to Mqotyana. He was told by Mnunu who gave the instruction and was the complainant.

42. It was put to him that the complaint from the stakeholder emanated from the project of 2022, he said that he disagreed because what was being dealt with was Mqotyana failing to submit the list as requested by Mnunu.
43. When asked if the instruction was given in writing, he said it was a verbal instruction to be submitted on 12 April 2024.
44. He confirmed that Mnunu spoke to Mqotyana and he was not present to hear Mnunu giving the instruction.
45. He did not have the email he was referring to as a complaint, he said that he could look for the email but did not bring it to the proceedings.
46. He said that he was not even aware that there was a list, he was not the office manager, Ms Ntabeni was. He said that he was a District Manager. He said that he was not operationally involved therefore would not have known that the list was not dealt with since 2022.
47. He reiterated that Mqotyana failed to submit the list to Mnunu which was due on 12 April 2024.
48. He agreed that what he testified on was based on what was told to him by Mnunu, he was not there when the instruction was given.
49. He could not confirm the date when he received the complaint from Mnunu. He said that he printed the email and showed to Mqotyana.
50. When asked why did he not forward the email to the Applicant, he said the email was directed to him.

ANALYSIS OF EVIDENCE AND ARGUMENT

51. Section 185 of the Labour Relations Act no 66 of 1995 as amended (the Act) prohibits the employer from subjecting any employee to unfair labour practice. Further to this the Act, entitles employees to institute actions against an employer who is acting unfairly towards employees. Employees may take action by referring unfair labour practice to the Commission or

within 90 days of the unfair action.

52. Section 186 (2) (a-d) of the Labour Relations Act no 66 of 1995 as amended, states that

“Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving—

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.”

53. In this case, the Applicant alleges that the Respondent committed unfair labour practice by issuing the final written warning to her because she had submitted the list as requested by Mr Mnunu. The Applicant explained that she was new in the Mthatha office. According to her there was no handover by the person who was in the position before. When she was given the task of finding the list, she started looking for it. She asked Mr Diko who offered her no support. She took it upon herself to update Mnunu about what was happening. She made phone calls and even sent whats app messages to Mnunu. She finally got assistance from an external person who was one of the stakeholders (Mchunu). Immediately when she got the list she did her analysis and sent it to Mnunu on 3 May 2024.

54. Diko testified for the Respondent that the Applicant refused a reasonable instruction. While trying to put across this failure by the Applicant, Diko kept on referring to what he was told by Mnunu who did not come and testify in these proceedings. Diko did not bring the email complaint he kept on referring to as written to him by Mnunu even though he knew that

he was coming to testify on issues relating to the email. None of his testimony was first hand information.

55. He was evasive and avoided answering questions asked during cross examination. All what he was eager to put across was that the Applicant refused a reasonable instruction.
56. It is common cause that the applicant was new in the Mthatha office. It was not disputed that the Applicant did not get any handover from the person who was in her position before she took over.
57. While Diko was trying to put across that the Applicant might be incompetent because she worked in smaller offices as compared to Mthatha, he did not indicate any support that was given to the Applicant knowing the challenges of the big office. It was further Diko's testimony that he was not in the position before the Applicant took over. This is another indication that there was really no handover by whoever was in that position. If there was a handover, the Applicant would have known who was in the position before she took over. All along the Applicant was under the impression that Diko was in the position before she took over, even in her testimony in these proceedings, she referred to Diko as the person who should have done handover to her
58. I have no reasons not to believe the Applicant as she was consistent in her testimony. She also proved that she was communicating with Mnunu by cell phone. The voice note was played during the proceedings and that was not disputed. I do not believe the Respondent because the witness called did not help at all. He avoided answering questions, in fact he could not have answered because he was not directly involved.
59. Even in cases where he said he got a complaint from Mnunu, he failed to submit such email. No attempt was made even in the closing arguments to attach the email as referred to. As far as the instruction is concerned, Diko did not give the instruction, Mnunu did. According to the Applicant there was no deadline set for the submission of the list. While Diko attached a deadline for the submission of the list, he could not support it. The instruction was between Mnunu and the Applicant in person, Diko was not present when the instruction was given. Nothing was written. Mnunu did not come to testify to support Diko's so called deadline.

60. While Diko is referring to the deadline, which I do not believe, he is mentioning that the deadline was to submit within two days. One should also take into consideration that when the instruction is given it must be valid and reasonable. For a person who was still finding her feet within the office where there was no handover, the Applicant had to find things on her own. Diko did not dispute that the Applicant called him with regards to the list. Diko disclosed to these proceedings that he was not in the applicant's position before the Applicant joined Mthatha office. He said Ntabeni was in the position. I do not think that this is confidential information that the Applicant should not know. If she got the handover opportunity either from Ntabeni or whoever was in her position before, she would have known who to ask for the list. Further to this, Diko did not dispute that the Applicant heard about the 2022 project which gave rise to the list for the 1st time on 10 April 2024 meeting. I am of the view that the Department failed the Applicant and just issued her with the warning instead of offering her the information she deserved. On a balance of probabilities, the Applicant's version is more probable.
60. I can not make anything of the allegations that the Applicant refused a reasonable instruction as it is not supported, or proven. If there was such instruction, I do not believe that it was reasonable to expect the Applicant to find the 2022 list in 2024 without any assistance from the people who received or have an idea of the list. The Applicant was not part of the team when the list was handed to the Department. The instruction was therefore not reasonable in the circumstances. I have nothing to persuade me to believe that the Respondent acted fairly in this case.
61. In the premise, the probabilities favour the Applicant. The Respondent failed to disprove the allegations leveled against it by the Applicant. The actions of the respondent amount to unfair labour practice.
62. Having found that the Respondent subjected the Applicant to unfair labour practice, I must decide on the appropriate remedy. The Applicant prayed for the removal of the warning. She also prayed for compensation as she suffered depression because of the final written warning. While asking for compensation for depression as indicated on the medical notes, I can not be sure if the depression was as a result of the warning. I am saying this because the applicant in her testimony said that the depression was as a result of what she was enduring in the office. She mentioned her relationship with Diko and even said she would like to be removed from the office. It was further her evidence that she has lodged a grievance which has nothing to do with

this warning. I can not single out the final written warning and be convinced that it triggered the depression unless there was tangible evidence that indeed the warning triggered her depression. As it stands, there is a combination of issues that the Applicant is dealing with in the office. For these reasons, I am not able to award compensation. I however, believe that the warning was not warranted and it should be removed from the file as if it never existed.

AWARD

63. The Respondent **Department of Home Affairs** committed unfair labour practice by issuing the final written warning to the Applicant **Nomvuyo Mqotyana** while she had attended to the instruction of the manager.
64. The Respondent **Department of Home Affairs** must remove and destroy the Final written warning from the Applicant's file as if it never existed.
65. I make no cost order.

Signature:



Commissioner:

Nowethu Sangqu Ndiki

Sector:

Public Service